U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARVIN L. PREE and DEPARTMENT OF THE INTERIOR, NATIONAL CAPITOL PARKS -- EAST, Washington, DC

Docket No. 98-715; Submitted on the Record;
Issued August 18, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON, BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation effective March 18, 1997.

The Board has duly reviewed the case record and finds that the Office did not meet its burden of proof in this case.

In the present case, the Office has accepted that appellant, a maintenance mechanic, sustained a lumbar and dorsal strain on September 15, 1995 while getting out of a hole after repairing a pipe.[1] Following the injury, appellant returned to work on May 29, 1996. On May 28, 1996 appellant sustained a back injury while lifting furniture which the Office accepted for lumbar strain and authorized physical therapy exercises.[2] The Office paid appellant appropriate compensation benefits.[3] The Office terminated appellant's compensation benefits by decision dated March 20, 1997 on the grounds that the weight of the medical evidence established that appellant's disability, resulting from the injuries of September 15, 1995 and May 28, 1996, ceased by and no later than, March 18, 1997. Following a review of the written record by an Office hearing representative, the termination of appellant's compensation was affirmed by decision dated November 6, 1997.

[1] The Office assigned this claim number A25-474205. On January 15, 1995 the Office combined both claims under the master file number of A25-491199.

[2] This was assigned claim number A25-491199. The Office noted that appellant had filed approximately 22 other claims.

[3] The Board notes that appellant was terminated from a work hardening program at the National Rehabilitation Hospital due to his failure to participate in the program.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[4] After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disabling condition has ceased or that it is no longer related to the employment.[5]

The Office terminated appellant's compensation benefits based upon a report received from Dr. Louis E. Levitt, a Board-certified orthopedic surgeon and Office second opinion physician. In his report dated January 23, 1997, Dr. Levitt related appellant's history of injury and medical treatment and noted appellant's physical examination findings. Dr. Levitt stated that a magnetic resonance imaging scan did not evidence any acute discogenic disease and there was no evidence of a compromise of the nerve roots in the lumbar spine or of the spinal cord. Based upon appellant's history and physical examination, Dr. Levitt stated that it was his impression that appellant had had a low pain threshold, that his physical examination was normal and there was no reason why he could not function at full capacity. Dr. Levitt opined that appellant had "a motivational problem with his work activities and that his clinical complaints are more compatible with someone who malingers."

Appellant's treating physician, Dr. Hampton J. Jackson, Jr., an orthopedic surgeon, submitted medical reports to the record which indicated that appellant's accepted diagnosis had not ceased. In a January 31, 1997 report, Dr. Jackson indicated that appellant had sustained a disc injury in his lumbar spine due to his May 28, 1996 injury based upon a magnetic resonance imaging (MRI) test. The physician diagnosed lumbar disc injury at multiple levels and opined that he did not expect appellant to fully recover. Dr. Jackson indicated in a February 28, 1997 report that appellant was totally disabled due to his May 28, 1996 employment injury based upon clinical evidence and "a confirmed positive EMG [electromyogram] and nerve conduction velocity studies and MRI findings." In a July 25, 1997 report, Dr. Jackson opined that appellant had "evidence of chronic ligamentous damage in the back" due to appellant's 1995 and 1996. Dr. Jackson further opined that appellant had "sustained a permanent partial impairment of the lower back."

Section 8123(a) of the Federal Employees' Compensation Act[6] provides that if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[7]

In the present case, an Office referral physician, Dr. Levitt, opined that appellant did not have residuals of the accepted employment injury and there was no evidence of acute discogenic

[4] *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

[5] *Warren L. Divers*, 47 ECAB 574 (1996); *Patricia A. Keller*, 45 ECAB 278 (1993); *Frank J. Mela, Jr.*, 41 ECAB 115 (1989).

[6] 5 U.S.C. § 8123(a).

[7] *See Dallas E. Mopps*, 44 ECAB 454 (1993).

disease. Appellant's attending physician, Dr. Jackson, however, continued to assert that appellant's accepted conditions of lumbar strain and lumbar radiculopathy contributed to cause total disability. Thus, a conflict exists in the medical evidence as to whether the accepted conditions ceased or whether the accepted conditions continued to disable appellant. It is, as noted above, the Office's burden of proof to terminate compensation in this case. The Office cannot meet its burden of proof until the conflict in the medical evidence is properly resolved. As the Office has not resolved the conflict in the medical evidence, it has failed to meet its burden and the termination of compensation was improper.

The decisions of the Office of Workers' Compensation Programs dated November 6 and March 20, 1997 are hereby reversed.

Dated, Washington, D.C.
August 18, 1999

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member