U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ROCHELLE WENKOWSKY and U.S. POSTAL SERVICE, POST OFFICE, Bronx, N.Y.

*Docket No. 97-2253; Submitted on the Record;*
*Issued May 19, 1999*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON, WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective March 3, 1996; and (2) whether the Office properly determined that appellant's December 31, 1996 request for reconsideration was insufficient to require merit review of her claim for a recurrence of disability commencing May 11, 1995.

In the present case, appellant, a letter carrier, filed a claim alleging that she sustained an injury while lifting a heavy package in the performance of duty on June 7, 1994. The Office accepted the claim for low back derangement. Appellant eventually returned to work in a light-duty position at four hours per day on February 8, 1995. She continued to work at four hours per day until May 11, 1995, when she filed a claim for a recurrence of disability.

By decision dated May 18, 1995, the Office determined that appellant's actual earnings in the light-duty position fairly and reasonably represented her wage-earning capacity, and her compensation was reduced effective April 23, 1995.

In a decision dated August 23, 1995, the Office denied appellant's claim for a recurrence of total disability commencing May 11, 1995. By decision dated January 5, 1996, the Office denied modification of the August 23, 1995 decision.

In a decision dated February 20, 1996, the Office terminated appellant's compensation effective March 3, 1996, on the grounds that the weight of the evidence established that appellant did not have a continuing employment-related disability. By decision dated April 1, 1997, the Office denied modification of the February 20, 1996 decision. In a separate decision dated April 1, 1997, the Office also determined that appellant's request for reconsideration was insufficient to warrant merit review of the January 5, 1996 recurrence decision.

The Board has reviewed the record and finds that the Office did not meet its burden of proof in terminating appellant's compensation effective March 3, 1996.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.[1]

The Board notes that once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.[2] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[3]

In this case, the Office found that the weight of the medical evidence was represented by a December 20, 1995 report from Dr. Joseph S. Mulle, a Board-certified orthopedic surgeon. Dr. Mulle provided a history and results on examination, concluding that "there are no objective findings relative to the injuries sustained in the accident of June 7, 1994. There is no indication for continuation of treatment. In my opinion, [appellant] is capable of returning to work."

The Board notes that the Office referred to Dr. Mulle as an impartial medical specialist appointed to resolve a conflict under 5 U.S.C. § 8123(a).[4] There was, however, no unresolved conflict on the issue of whether appellant's employment-related condition had resolved. A second opinion referral physician, Dr. Leonard J. Infranca, a Board-certified orthopedic surgeon, had stated in a December 27, 1994 report that appellant could return to work at four hours per day initially for one week then full time with lifting restrictions. The attending physician, Dr. Bruce L. Goldberg, a Board-certified orthopedic surgeon, indicated in a work capacity evaluation dated January 31, 1995 that appellant could return to work at four hours per day with restrictions of no lifting, pushing or pulling, and then could attempt full-time work with restrictions on a trial basis. While there may have been minor differences between Drs. Goldberg and Infranca as to the specific restrictions in a light-duty job, both of the physicians appear to agree that appellant continued to have an employment-related disability. Dr. Infranca's suggestion that appellant could return to full-time light duty after one week does not provide a reasoned opinion that appellant's employment-related disability or condition had ceased, and therefore his report cannot create a conflict on these issues under section 8123(a).

[1] *Patricia A. Keller*, 45 ECAB 278 (1993).

[2] *Sue A. Sedgwick*, 45 ECAB 211 (1993).

[3] *Id.*

[4] Section 8123(a) provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.

Dr. Mulle is therefore not considered an impartial medical specialist whose opinion may be entitled to special weight,[5] but rather a second opinion physician.

The Board finds that Dr. Mulle's opinion cannot be considered the weight of the evidence. The record contains a conflicting opinion from the attending physician, Dr. Goldberg. In a report dated September 28, 1995, Dr. Goldberg provided a history, discussed appellant's treatment, and opined that appellant had an ongoing disability as a direct result of the June 7, 1994 employment injury. The Board is unable to assign greater probative value to Dr. Mulle's report in this case. Both Drs. Goldberg and Mulle appeared to have a proper factual and medical background, and neither physician provided significantly more detailed medical reasoning for the opinion offered. The record therefore contains opinions of approximately equal probative value that are conflicting on the issue of whether appellant continued to have an employment-related disability. Since it is the Office's burden of proof to terminate appellant's continuing compensation, in this case compensation reduced to reflect appellant's wage-earning capacity, the Board finds that they have not met their burden of proof.

The Board further finds that the Office improperly refused to reopen appellant's recurrence claim for merit review.

With respect to the recurrence claim, the only decision over which the Board has jurisdiction is the April 1, 1997 decision, which found that the evidence submitted was insufficient to warrant merit review of the claim.[6] To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[7] the Office's regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.[8] Section 10.138(b)(2) states that any application for review that does not meet at least one of the requirements listed in section 10.138(b)(1) will be denied by the Office without review of the merits of the claim.[9]

In this case, appellant submitted a November 12, 1996 report from Dr. Goldberg, who noted that appellant was seen on May 11, 1995 with marked stiffness to range of motion and "based on my examination of the patient and the increased pain experienced by her, it was my opinion that the extent of the effects of the patient's low back derangement, sustained at work on June 7, 1994, had worsened. As a result of the patient's condition, it was my opinion, based on the patient's history since the work-related injury, that the patient could not work even in a

[5] *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

[6] The Board's jurisdiction is limited to final decisions of the Office issued within one year of the filing of the appeal. 20 C.F.R. § 501.3(d). Appellant filed her appeal on June 24, 1997.

[7] 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application)."

[8] 20 C.F.R. § 10.138(b)(1).

[9] 20 C.F.R. § 10.138(b)(2); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

light-duty position and was redisabled at this time." While Dr. Goldberg had previously submitted reports indicating results on examination on May 11, 1995, the Board is unable to find a prior report that specifically related any disability commencing May 11, 1995 to the employment injury. Dr. Goldberg had provided an opinion in reports dated September 12 and September 28, 1995 that appellant had a continuing disability as a result of her employment injury, but in neither report did he specifically relate the findings and disability commencing May 11, 1995 to a worsening of the employment injury.

Since the underlying claim is for a recurrence of disability commencing May 11, 1995, the Board finds that the November 12, 1996 report represents relevant and pertinent evidence not previously considered by the Office. Under section 10.138(b)(iii) appellant was entitled to a merit review of her claim.

The decision of the Office of Workers' Compensation Programs dated April 1, 1997, terminating appellant's compensation, is reversed. The April 1, 1997 decision denying merit review of the recurrence claim is set aside and the case remanded to the Office for issuance of an appropriate merit decision.

Dated, Washington, D.C.
May 19, 1999

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member