U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PALMIRA L. O'BRIEN and DEPARTMENT OF THE ARMY, NATIONAL GUARD, Albany, NY

Docket No. 98-1324; Submitted on the Record;
Issued October 18, 2000

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective November 9, 1996; and (2) whether the Office properly denied appellant's request for reconsideration on the merits.

On December 8, 1995 appellant, filed a (Form CA-1) traumatic injury claim alleging that on December 5, 1995 she pulled something in her back when she reached to answer a telephone at work in the performance of duty. The Office accepted the claim for a cervical strain.[1] Appellant stopped work on December 5, 1995 and has not returned.

In a report dated December 8, 1995, Dr. Richard F. Holub, a Board-certified neurologist, noted appellant's history of injury and symptoms. Dr. Holub diagnosed "new onset of cervical pain, radiating into right shoulder and back, rule out new radiculopathy." He rendered appellant totally disabled until the completion of NCV/EMG testing.

On a CA-20 form dated February 13, 1996, Dr. Holub released appellant for treatment by Dr. George Forrest, a Board-certified physician in physical medicine and rehabilitation. In a report dated February 26, 1996, Dr. Forrest discussed appellant's long history of neck problems and recommended that she undergo a trial of physical therapy. He opined that appellant suffered from a soft tissue injury superimposed on degenerative disc disease.

A magnetic resonance imaging of the cervical spine performed on April 25, 1996 revealed osteoarthritic joint changes at C3-4, bilateral foraminal encroachment, but no gross evidence of a disc herniation.

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[1] Appellant underwent a cervical laminectomy in 1974. On January 26, 1987 appellant was involved in a car accident in the performance of duty and sustained cervical and back injuries. The Office accepted the claim for a cervical strain and placed appellant on the periodic rolls. She was off work from the date of injury until November 29, 1995.

In a June 18, 1996 report, Dr. Forrest indicated that appellant did not want to return to work and had essentially been out on disability since January 1987 with the exception of the one week from November 29 to December 5, 1995. He stated that appellant could be expected to do no more than sedentary work given the severe osteoarthritic changes in her spine. Dr. Forrest noted, however, that since appellant clearly did not want to work and felt entitled to disability, that further medical testing would not be cost effective.

In reports dated July 22 and August 22, 1996, Dr. Forrest diagnosed that appellant suffered from chronic pain due to degenerative disc disease, osteoarthritis and epidural fibrosis. He stated that appellant was unable to work.

The Office subsequently referred appellant, along with a copy of the medical record and a statement of accepted facts, to Dr. Thomas S. Eagan, a Board-certified orthopedic surgeon, for an examination on September 23, 1996. In his report dated September 23, 1996, Dr. Eagan discussed appellant's history of cervical injuries beginning with a motor vehicle accident in the early 1970s and ending with the December 5, 1995 work incident. He recorded physical findings and stated: "[t]he patient does not currently exhibit subjective signs of having a cervical strain. No muscle spasm was noted on cervical examination and she had essentially normal range of motion." Dr. Eagan opined that appellant's current medical condition was not attributable to the work incident of December 5, 1995 and that further medical treatment for the cervical strain caused by the work incident was not necessary. He concluded that adequate physical therapy and time had allowed the cervical strain to resolve. Although Dr. Eagan considered appellant to be disabled from work, he stated, "It [is] my opinion, full recovery of the accepted condition of the cervical strain has occurred and her current symptoms are from her previous underlying cervical degenerative disc disease."

On October 3, 1996 the Office issued a notice of proposed termination of compensation and advised appellant that she had 30 days to submit additional evidence or argument regarding the proposed action.

In a decision dated November 4, 1996, the Office terminated appellant's compensation benefits effective November 9, 1996 on the grounds that the weight of the medical evidence established that appellant had no continuing disability and no residuals related to the December 5, 1995 work injury.

In a November 12, 1996 letter, appellant requested a hearing.

Appellant next submitted an October 22, 1996 report from Dr. Holub. He noted that while appellant's symptoms of cervical, thoracic and lumbosacral pain had continued her neurological examination was stable.

In an October 24, 1996 report, Dr. Robert N. Moukarzel, an orthopedist, noted that appellant complained of consistent pain in the neck and going down the middle of her spine and her left trapezial area. He discussed appellant's work injury on December 5, 1995 and characterized it as "causing new type of pain in neck." Dr. Moukarzel indicated that appellant did not deny the fact that she had prior cervical problems but considered this pain to be a new type of pain she had not experienced before. He diagnosed appellant's condition as myofascial

pain affecting multiple levels of the cervical spine and back. Dr. Moukarzel described it as an aggravation of her old pain and a new type of pain as well.

In an October 23, 1996 report, Dr. Forrest noted that appellant continued to complain of pain behind her neck radiating to her shoulders and down her right arm. He indicated that appellant had reduced range of motion and tenderness behind the neck. Dr. Forrest opined that appellant suffered from chronic pain syndrome secondary to degenerative disc disease, epidural fibrosis and a soft tissue injury. He further stated, "I think her symptoms are due at least in part to the incident of [December 5, 1995] and I think that she is not able to work."

In a decision dated February 18, 1997, an Office hearing representative affirmed the Office's November 4, 1996 decision.

Appellant subsequently filed a claim alleging a recurrence of disability (Form CA-2a) beginning December 5, 1995. The claim form was date-stamped and received by the Office on April 11, 1997.

In a letter dated May 30, 1997, the Office advised appellant that it had received her claim for a recurrence of disability. The Office noted, however, the following:

> "A review of our records reveal that you already filed a claim for a new injury on December 5, 1995, under Case number A2-706850. That claim had been accepted and wage-loss compensation had been paid by this Office from February 12 through November 9, 1996. Your benefits were then terminated on the grounds that the disability had ceased. Case number A2-706850 is currently under the jurisdiction of the ECAB (Employees' Compensation Appeals Board) pending an appeal requested by you. A review of your statements and the medical report dated December 8, 1995 from your physician, Dr. Richard Holub, clearly indicate that the events of December 5, 1995 constitute a new injury under our procedures. Therefore, the recurrence claim is not being processed, as this Office has already determined that a new injury occurred on December 5, 1995."

The Office further advised appellant that if she wished to dispute the determination she should "write to the ECAB and ask them to incorporate that issue into your appeal on case number A2-706850."

On June 20, 1997 the Board dismissed appellant's appeal in case number A2-706850.[2]

By letter dated July 15, 1997, appellant filed a request for reconsideration of the Office's decision terminating her compensation.[3] She submitted a copy of a form SF50-B Notification of

[2] Appellant, docket number 97-1413 (June 20, 1997).

[3] Appellant submitted a copy of form SF50-B, Notification of Personnel Action, indicating that appellant was terminated from her federal employment effective May 31, 1997 on the basis that she was unable from a medical standpoint to perform the duties of her position as an accounting technician. Appellant also submitted a May 29, 1997 report, by Dr. George Forrest and a partial copy of a CA-8 claim form for wage loss.

Personnel Action, a partial copy of a Form C-8 claim for continuing compensation and a May 29, 1997 report by Dr. Forrest.[4]

In a May 29, 1997 report, Dr. Forrest noted that appellant had been followed in his office since February 1996 and discussed her history of injuries. He diagnosed that appellant was disabled by chronic pain syndrome due to underlying degenerative disc disease. Dr. Forrest attributed appellant's degenerative back condition to her two motor vehicle accidents and noted that the condition had been exacerbated by the incident at work on December 5, 1995.

In a decision dated August 18, 1997, the Office denied appellant's request for reconsideration.

The Board finds that the Office properly terminated appellant's compensation benefits effective November 9, 1996.

Once the Office accepts a claim it has the burden of proof of justifying modification or termination 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 has ceased or is no longer related to the employment injury.[5] The Office's burden of proof in terminating compensation includes the necessity of furnishing rationalize medical opinion evidence based on a proper factual and medical background.[6] In the instant case, the Board finds that the Office met its burden of proof in terminating compensation as it obtained a well-reasoned and rationalized opinion from a Board-certified physician that appellant no longer had and continuing disability and no residuals related to the December 5, 1995 work injury. Dr. Eagan performed a thorough physical examination on September 23, 1996 and noted that appellant did not exhibit any subjective or objective signs of a cervical sprain. He reviewed the medical record and the Office's statement of accepted facts. According to Dr. Eagan, appellant's course of physical therapy permitted her cervical strain to resolve. He opined that she had fully recovered from her work-related injury and that any remaining symptoms of back pain would be due to her underlying cervical disc disease.

Appellant has submitted numerous reports by her treating physician, Dr. Forrest, but he failed to explain with adequate rationale why appellant continued to be disabled by her soft tissue injury and not solely by her preexisting degenerative disc disease. Dr. Forrest's opinion that appellant is disabled in part by the December 5, 1995 work injury is based solely on subjective factors such as appellant desire not to return to work and her complaints of a "new type" of pain. Because Dr. Eagan prepared a rationalized opinion finding that appellant's work injury was completely resolved, and his opinion was based on a proper medical and factual

[4] Dr. Forrest reiterated earlier statements that appellant's underlying problem was degenerative disc disease, but that her condition was exacerbated by the December 5, 1995 work injury. Dr. Forrest, however, did not provide any rationale for his opinion and his report offered no new insight into appellant's condition.

[5] *Frank J. Mela, Jr.*, 41 ECAB 115 (1989); *Mary E. Jones*, 40 ECAB 1125 (1989).

[6] *Mary Lou Barragy*, 46 ECAB 781 (1985).

background, the Board concludes that the Office properly terminated appellant's compensation benefits.

The Board further finds that the Office properly denied appellant's request for reconsideration on the merits.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with the discretionary authority to determine whether it will review an award for or against compensation.[7] The regulations provide 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 a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.[8] When application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.[9] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[10] Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.[11] Where a claimant fails to submit relevant evidence not previously of record or advance legal contentions not previously considered, it is a matter of discretion on the part of the Office to reopen a case for further consideration under section 8128 of the Act.[12]

In the instant case, appellant did not show that the Office erroneously applied or interpreted a point of law. She also failed to advance a point of law or a fact not previously considered by the Office. Although appellant submitted a new medical report by Dr. Forrest on reconsideration, that report does not constitute "relevant and pertinent evidence not previously considered by the Office." Dr. Forrest's most recent report dated May 29, 1997 simply reiterates his opinion that appellant is disabled by chronic pain syndrome due to underlying degenerative disc disease and that appellant's condition is somehow exacerbated by the December 5, 1995 work injury. Dr. Forrest failed to provide any rationale for his medical conclusions. Because Dr. Forrest's May 29, 1997 report was repetitious of his other reports that were considered by the Office prior to termination of appellant's compensation, appellant has failed to submit new and relevant evidence to warrant a merit review.[13] As such, the Board finds that the Office properly denied appellant's request for reconsideration under Section 8128.

[7] 5 U.S.C. § 8128; *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[8] 20 C.F.R. § 10.138(b)(1).

[9] 20 C.F.R. § 10.138(b)(2).

[10] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

[11] *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

[12] *Gloria Scarpelli-Norman*, 41 ECAB 815 (1990); *Joseph W. Baxter*, 36 ECAB 228 (1984).

[13] *See generally Saundra B. Williams*, 46 ECAB 546 (1995).

The decisions of the Office of Workers' Compensation Programs dated August 18 and February 18, 1997 are hereby affirmed.

Dated, Washington, DC
October 18, 2000

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member