U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FLETA J. WRIGHT and U.S. POSTAL SERVICE,
POST OFFICE, Detroit, MI

Docket No. 99-1966; Submitted on the Record;
Issued September 6, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant had any disability or injury residuals requiring further medical treatment after February 18, 1999, the date the Office of Workers' Compensation Programs terminated her compensation entitlement and entitlement to medical benefits, causally related to her March 25, 1998 accepted right knee injury.

The Office accepted that on March 25, 1998 appellant, then a 32-year-old part-time flexible city letter carrier, sustained a right knee injury when she tripped over the gate of an APC. Conditions accepted included right knee contusion and, following magnetic resonance imaging (MRI) scan, a right anterior horn lateral meniscal tear, for which appellant underwent arthroscopic surgery on September 24, 1998. A later-suspected right leg deep vein thrombosis was not accepted as being causally related to appellant's employment.[1] Appellant did not stop work, but was placed on light duty.

Appellant was terminated from the employing establishment on May 4, 1998 during her probationary period for unsatisfactory performance. The employing establishment noted that her performance deteriorated while on limited duty.

Appellant claimed compensation from her date of firing. In response to submitted Forms CA-8,[2] the Office determined appellant's rate of compensation and placed her on the daily computation log for direct payment of compensation beginning September 26, 1998.

October and November 1998 medical reports from Dr. John H. Iljas, an osteopathic vascular specialist, regarding appellant's cardiovascular status indicated that her weight

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[1] Concurrent disability not due to injury included morbid obesity and a right hand injury. A later Doppler study was negative for deep vein thrombosis.

[2] Claim for continuing compensation on account of disability.

exceeded 300 pounds and that the Coumadin therapy she was on was causing decreased platelet counts and bleeding tendencies.

By report dated November 30, 1998, Dr. Eric Borofsky, a Board-certified orthopedic surgeon, noted:

> "I am not happy with the way [appellant] is doing. She is still on a walker and I begged her to get off of it and get to a four-poster cane.... [Appellant] does walk and she puts full weight on the leg. She has good range of motion. The knee is not particularly swollen today as compared to before. There is minimal pain in the calf. [Appellant] is having more pain over the distal quad today, no doubt from the way she has been walking, especially anteriorly.... I have told her to stay with her vascular surgeon and I will see her back in a month. I expect [appellant] to be off of her walker and on her cane and walking well."

Nursing progress reports and physical therapist progress reports were also submitted.

On January 8, 1999 a disability slip was completed by someone signing on behalf of Dr. Borofsky, which checked "[appellant] may work at a limited job only" and "if limited work is not available, then employee is unable to work."

A February 2, 1999 nursing report indicated that Dr. Borofsky "continued her physical therapy for an additional month and released her to sit down work."

Multiple E-mails between appellant's case nurse and the Office addressing her release to full duty were also submitted.

On February 12, 1999 on a disability certificate someone signing for Dr. Borofsky checked that appellant "may work without limitation" but noted "recommend PT [physical therapy] [four] more w[eeks]."

In a February 17, 1999 memorandum to the Director, the Office determined that "[appellant] was released to limited duty as of February 12, 1999 by Dr. Borofsky and to full and unrestricted duty effective February 17, 1999."

By decision dated February 18, 1999, which incorporated the February 17, 1999 memorandum, the Office terminated appellant's compensation entitlement finding that the evidence of record established that appellant no longer suffered from injury-related residuals and that her injury-related disability had ceased. The Office found that Dr. Borofsky released appellant to limited duty effective February 12 and to unrestricted duty effective February 17, 1999.[3]

The Board finds that the case must be reversed.

[3] Following the February 18, 1999 issuance of the termination decision, the Office received further medical evidence and other related documents. As this evidence was not before the Office at the time of its most recent final decision, it is not now before the Board on this appeal; *see* 20 C.F.R. § 501.2(c).

The evidence of record reveals that appellant's claim was accepted by the Office and she was placed on the daily roll. Payment of compensation was made for the period September 26, 1998 to February 18, 1999 pursuant to the filing of Office Forms CA-8, claims for continuing compensation due to disability. In *Lan Thi Do*,[4] the Board noted that, under the procedures promulgated by the Office, the daily roll is to be used "where the term of disability is not likely to exceed 60 days, unless return to work is imminent."[5] The Board noted that under the Office's procedures, no pretermination notice is required when daily roll payments are terminated.[6] The Board further noted, however, that when the period of disability is likely to exceed 60 days, the Office's procedures require that the claim be placed on the short-term or periodic rolls.[7] The short-term rolls is for payment of compensation for a specified, relatively near-term period where the medical evidence indicates full recovery within several months; only periods of disability within one year of the date of the injury may be paid on the short-term rolls. The periodic rolls is reserved for cases that involve clearly defined and well-established long-term disability early in the development of the claim.[8]

In the instant case, the term of appellant's disability, for which she received compensation benefits, exceeded 60 days on November 26, 1998 and at that time the medical evidence of record did not establish that her return to work was imminent, as Dr. Borofsky noted on November 30, 1998, appellant was still on a walker and he was trying to get her off of it and into using a four-poster cane. At that time Dr. Borofsky gave no projections at to how long appellant's disability, causally related to the original March 25, 1998 fall, would last. The Office, therefore, abused its discretion in retaining appellant's claim on the daily rolls for a period that exceeded 60 days.

As the evidence reveals that appellant's compensation benefits were paid continuously for over 60 days and that her claim should have been placed on the short-term rolls, she was entitled to a pretermination notice, *i.e.*, notice of the proposed action and given the opportunity to submit relevant evidence or argument to support entitlement to continued compensation.[9]

Further, no post-deprivation remedies for the violation were undertaken, such that the violation was not procedurally corrected following the February 18, 1999 termination.[10]

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[4] 46 ECAB 366 (1994).

[5] *Id.* at 374; *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Early Management of Disability Claims*, Chapter 2.811.7(a)(1) (April 1993).

[6] *Id.; see also* Federal (FECA) Procedure Manual, Part 2 -- Claims *Disallowances*, Chapter 2.1400.6(c) (July 1993).

[7] *See supra* note 5 at Chapter 2.811.7(a)(2) and (3) (April 1993).

[8] *Id.*

[9] *See supra* notes 4 and 6.

[10] *See supra* note 4 at 376.

Moreover, the probative medical evidence of record does not establish either that appellant's disability had ceased or that she had no further injury-related residuals which required further medical treatment.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[11] 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 disability has ceased or that it is no longer related to the employment.[12] Additionally, the right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for wage loss.[13] To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition that require further medical treatment.[14]

The Office established neither of these requirements.

Dr. Borofsky's most recent probative report of record expresses his hope that appellant would be able to give up using her walker and use a four-pronged cane instead. It in no way established the termination of her disability or of her need for further medical treatment. Therefore, this report does not support the Office's termination decision.

Subsequent disability certificates signed by someone signing for Dr. Borofsky have no probative value as there is no evidence that they were completed by Dr. Borofsky.[15] Further, these disability certificates contain no objective evidence on examination or medical rationale supporting a change in appellant's disability status. Therefore, they are insufficient to meet the Office's burden of proof. Additionally, the need for further physical therapy is noted on the most recent of these certificates. Consequently, the need for further medical treatment is supported, rather than disproved.

Nursing reports are not considered to be probative medical evidence as nurses are not physicians under the Federal Employees' Compensation Act.[16] Therefore, none of the nursing evidence stating what Dr. Borofsky found, determined or opined has any probative value. This also includes E-mails between the case nurse and the Office. This additionally applies to physical therapy reports, as physical therapists are not physicians under the Act.[17]

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[11] *Harold S. McGough*, 36 ECAB 332 (1984).

[12] *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

[13] *Marlene G. Owens*, 39 ECAB 1320 (1988).

[14] *See Calvin S. Mays*, 39 ECAB 993 (1988); *Patricia Brazzell*, 38 ECAB 299 (1986); *Amy R. Rogers*, 32 ECAB 1429 (1981).

[15] *See Sheila A. Johnson*, 46 ECAB 323 (1994) (definition of "physician" under the Act).

[16] *Id.* (nurses are not physicians); *see also Joseph N. Fassi*, 42 ECAB 677 (1991).

[17] *See Jennifer L. Sharp*, 48 ECAB 209 (1996) (physical therapists are not physicians under the Act).

Lastly, appellant vascular specialist, Dr. Iljas, did not address appellant's injury-related disability status and hence his opinions are not probative on that issue.

As no probative, rationalized medical evidence from a licensed physician, based upon objective examination and testing results, establishing that appellant's injury-related disability had fully resolved and that she had no further injury residuals which required further medical treatment, was submitted to the record prior to the Office's February 18, 1999 termination decision, the Office had no medical evidentiary basis upon which to base its termination and therefore it failed to meet its burden of proof to terminate appellant's monetary compensation and medical benefits entitlement.

Accordingly, the decision of the Office of Workers' Compensation Programs dated February 18, 1999 is hereby reversed.

Dated, Washington, D.C.
September 6, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member