U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ARLETA D. RICHARDSON and U.S. POSTAL SERVICE, POST OFFICE, Newark, NJ

Docket No. 00-441; Submitted on the Record;
Issued April 24, 2001

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT, PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation on the grounds that she had no continuing disability due to her accepted employment injury.

On October 12, 1994 appellant, then a 33-year-old mail carrier, filed a traumatic injury claim for an injury sustained on October 11, 1994. The Office accepted the claim for contusions of the right foot and chest. Appellant stopped work on October 11, 1994, returned to limited duty on January 3, 1995 working six and one-half hours per day and on January 30, 1995 increased her hours to eight per day in a limited-duty position.

On June 27 and 30, and August 9, 1995 appellant filed claims for a recurrence of disability due to her accepted October 11, 1994 employment injury. The Office accepted appellant's recurrence claims and benefits were paid.

In a report dated February 23, 1996, Dr. Arthur T. Canario, an employing establishment Board-certified orthopedic surgeon, concluded that appellant was capable of performing her usual job as a mail carrier and required no further medical treatment. Dr. Canario opined that appellant had completely recovered from her ankle sprain.

In a report dated May 15, 1996, Dr. David Rubinfeld, a second opinion Board-certified orthopedic surgeon, noted normal range of motion, motor strength and sensation in appellant's right ankle. He found evidence of swelling or point tenderness on palpation. Dr. Rubinfeld diagnosed cervical and lumbar strains and opined that appellant was mildly disabled, but capable of working an eight-hour day with restrictions. He concluded that her chest and right ankle problems had resolved.

On June 13, 1996 the Office issued a proposed notice to terminate medical benefits. In a July 15, 1996 decision, the Office determined that appellant did not have any continuing disability due to her accepted employment injury and terminated compensation.

In a July 26, 1996 report, Dr. Nazar H. Haidri, appellant's attending Board-certified neurologist, indicated that appellant was capable of working 8 hours per day with restrictions which included no walking more than 30 minutes, no standing more than 4 hours and no lifting or carrying more than 10 pounds.

By letter dated July 29, 1996, appellant requested a hearing before an Office hearing representative.

On August 7, 1996 the employing establishment issued a notice of removal on the basis that appellant failed to meet the physical requirements of her position.

By decision dated December 19, 1996, the hearing representative vacated the July 15, 1996 decision and remanded the case for further development. Specifically, the hearing representative instructed the Office to request clarification from Dr. Rubinfeld whether appellant continued to have any residual disability from her accepted employment injuries.

In response to the Office's request for further clarification, Dr. Rubinfeld, in a February 21, 1997 report, opined that appellant's lumbosacral problem had been aggravated by the October 11, 1994 employment injury and was further temporarily aggravated by the March 30, 1996 incident. He concluded that appellant's cervical sprain was temporarily aggravated and was expected to resolve due to the lack of supporting objective findings.

On May 1, 1997 the Office suspended appellant's continuing compensation benefits on the basis that she failed to appear for an examination by Dr. Rubinfeld on March 31, 1997 as directed by the Office.

In a letter dated May 23, 1997, appellant requested a hearing on the decision, which was held on January 14, 1998.

On June 7, 1997 appellant was referred to Dr. Allen S. Glushakow, a second opinion Board-certified orthopedic surgeon, to determine whether appellant had any continuing disability or residuals due to her accepted October 11, 1994 employment injury. In a report dated July 14, 1997, Dr. Glushakow diagnosed lumbosacral sprain history, right ankle torn ligaments and contusion of the left chest wall. A physical examination revealed normal gait, no true spasms and intact neurological sensation in both lower extremities. Appellant's shoes showed no signs of wear on the heels, she did not walk with crutches or a cane and she "was able to get up from a supine position from the table with no difficulty whatsoever." Dr. Glushakow concluded that appellant's current complaints were unrelated to her October 11, 1994 employment injury and that she had no permanent orthopedic injuries.

By decision dated March 26, 1998, the hearing representative vacated the May 1, 1997 decision suspending appellant's entitlement to compensation. The hearing representative instructed the Office on remand "to take appropriate action with regard to any current disability

claims currently of record, evaluate the medical evidence now of record in the case file" and then issue a decision regarding appellant's "ongoing entitlement to compensation." In addition, the hearing representative noted that appellant had seen Dr. Glushakow for a second opinion report and that this report was in the record.

In an August 6, 1998 decision, the Office accepted that the October 11, 1994 injury caused torn ligaments in the right ankle and a lumbosacral sprain. The Office, however, determined that appellant had no continuing disability or residuals due to her accepted October 11, 1994 employment injury.

In a March 11, 1999 attending physician's report (Form CA-20), Dr. Haidri diagnosed post concussion syndrome and post-traumatic headaches in addition to his prior diagnoses. He attributed appellant's disability to her March 30, 1996 injury when she was struck on the face with double doors at work.

On April 14, 1999 appellant filed a claim for lost wages from July 15, 1996 through August 6, 1998.

In a letter dated May 13, 1999, appellant's counsel noted that appellant attempted to return to work in July 1996 but the employing establishment refused to provide her with limited duty. He argued that appellant was entitled to wage-loss compensation from July 1996 through August 1998.

In a July 29, 1999 letter, appellant's counsel requested reconsideration and alleged that the Office made several errors in its August 6, 1998 decision, that the Office failed to pay wage-loss compensation from 1996 to 1998 and should not have referred her to Dr. Glushakow for a second opinion.

By merit decision dated August 9, 1999, the Office denied appellant's request for modification on the grounds that her arguments lacked "substantive probative value" and by Dr. Glushakow's report supported that appellant had no continuing disability due to her accepted employment injury.

The Board finds that the Office properly terminated appellant's compensation on the grounds that the weight of the medical evidence established that she had no continuing disability due to her accepted employment injury.

It is well established that, 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 her 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 finds that the opinion of Dr. Glushakow represents the weight of the medical evidence. He provided a reasoned opinion, based on a complete background, that residuals of

[1] *See Alfonso G. Montoya*, 44 ECAB 193, 198 (1992); *Gail D. Painton*, 41 ECAB 492, 498 (1990).

the employment injury had ceased. The remainder of the medical evidence does not contain a reasoned opinion on the issue presented. In March 11, 1999 CA-20, Dr. Haidri diagnosed post concussion syndrome and post-traumatic headaches in addition to his prior diagnoses and attributed appellant's disability to her March 30, 1996 injury when she was struck on the face with double doors at work. The Board notes that the accepted injury occurred on October 11, 1994 and that the March 30, 1996 injury date is for another claim. Dr. Haidri has provided no further medical evidence clearly explaining how appellant's October 11, 1994 employment injuries are related to her current disability. Thus, his reports are insufficient to create a conflict with the opinion of Dr. Glushakow.[2]

The Board further finds that appellant's argument regarding the second opinion report of Dr. Glushakow to be without merit. Appellant's original referral to Dr. Rubinfeld for a second opinion evaluation is not an impediment to accepting Dr. Glushakow's report as a probative second opinion evaluation. The Board notes that this sort of substitution is not allowed when the Office refers a claimant to an impartial medical specialist selected by the rotational system to resolve a conflict in medical opinion evidence. However, the Office procedure manual,[3] does not contain a similar prohibition for second opinion referrals.[4] The Board, therefore, finds that Dr. Glushakow was an appropriate second opinion physician and the Office properly relied on his opinion.

The Board therefore finds that the probative evidence of record is represented by Dr. Glushakow, who found in his July 14, 1997 report that residuals of the employment injury had ceased. As Dr. Glushakow does not address the period prior to his report, the Office has met its burden of proof in terminating compensation as of July 14, 1997. The Office's decision in the case is modified to allow payment of appropriate compensation benefits, to the extent not previously paid for a possible recurrence of disability due to termination of appellant's employment through July 14, 1997, the date that the Office met its burden of proof in terminating benefits. The Office shall consider this matter upon return of the case record.

[2] Only reports of virtually equal weight and rationale are sufficient to create a medical conflict under 5 U.S.C. § 8123(a). *See Clara T. Norga*, 46 ECAB 473 (1995).

[3] Federal (FECA) Procedure Manual, Part -- 3, Medical, *Second Opinion Examinations*, Chapter 3.500.3(b) (March 1994).

[4] *See, e.g., Harold Burkes*, 42 ECAB 199 (1992) (the reasons for using a referral physician and an impartial medical examiner are distinguishable. Referral physicians are investigatory and need not be free of any possible relationship with either party, absent the demonstration of bias.) *See Pierre W. Peterson*, 39 ECAB 955 (1988) (the Board has not extended proscriptions attendant to the selection of an impartial medical specialist to Office referral physicians).

The August 9, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed as modified.

Dated, Washington, DC
April 24, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member