U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CONSUELO ESTRADA and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, San Francisco, CA

Docket No. 01-230; Submitted on the Record;
Issued April 19, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether appellant has established entitlement to compensation on or after August 24, 1992, casually related to accepted employment injuries of cervical strain and aggravation of C3-4 disc herniation; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's requests for reconsideration without merit review of the claim.

In the present case, appellant, then a 55-year-old pharmacy technician, filed traumatic injury claims (Form CA-1) for injuries on June 1, 29 and July 1, 1992. Appellant indicated on the claim forms that she had pain in the neck and shoulders from data entry duties. The Office developed the claims as a single occupational illness claim.[1] The Office accepted the claim for cervical strain and aggravation of a C3-4 herniated disc. The record indicates that appellant returned to work in a modified position as an outpatient pharmacy technician. On August 7, 1992 appellant was advised that as of August 24, 1992 she would be reassigned to a modified inpatient technician position to accommodate her inability to perform the data entry duties of an outpatient technician. Appellant stopped working on August 23, 1992 and elected disability retirement benefits. The case file was closed until 1996, when appellant indicated her intent to claim compensation benefits.[2]

In a decision dated March 18, 1999, the Office determined that appellant was not entitled to compensation for wage loss as of August 24, 1992. The Office denied modification by decisions dated August 28 and December 13, 1999. In a decision dated February 15, 2000, the Office determined that appellant's request for reconsideration was insufficient to warrant merit

[1] File No. 13-0986663. In addition, the record indicates that appellant filed claims for injury in October 1989, March 23 and July 29, 1992. Those claims are not before the Board on this appeal.

[2] The record contains, for example, a CA-2a (notice of recurrence of disability) dated April 17, 1996, although the date of the original injury was reported as October 1989.

review of the claim. In a decision dated August 10, 2000, the Office again denied a request for reconsideration without merit review of the claim.

The Board finds that appellant has not established entitlement to compensation for wage loss on or after August 24, 1992.

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that light duty can be performed, the employee has the burden to establish by the weight of reliable, probative and substantial evidence a recurrence of total disability. As part of this burden of proof, the employee must show either a change in the nature and extent of the injury-related condition, or a change in the nature and extent of the light-duty requirements.[3]

In this case appellant returned to work at the employing establishment, then was offered a new light-duty position, which she chose not to accept. To be entitled to compensation under such circumstances, she must show that the light-duty position she was offered was outside her work restrictions, or that her employment-related condition changed and caused disability for the offered position on or after August 24, 1992. Appellant has not submitted sufficient evidence to establish either basis for compensation.

Appellant contends that the offered job was outside her restrictions, but the probative evidence does not support this contention. An August 7, 1992 letter indicated that the inpatient light-duty job that was to be assigned to appellant was designed to eliminate possible aggravation from data entry duties. In a September 20, 1993 letter, the employing establishment indicated that the offered position involved minimal data entry, and could be performed with no lifting of more than 10 pounds. Appellant submitted a witness' statement dated September 9, 1999 from a coworker stating that as an inpatient technician she sometimes lifted up to 20 pounds or more. The September 20, 1993 letter, however, indicated that accommodations would have been made, for the minimal lifting that the job required, to prevent appellant from having to lift more than 10 pounds. The probative evidence indicates that the job offered was primarily filling medication orders and preparing intravenous admixtures, with no lifting over 10 pounds required. The medical restrictions, as noted by Dr. Dominic Tse, an orthopedic surgeon, in a form report dated August 14, 1992, were no continuous data input and no repetitive lifting, carrying, or pushing over 15 pounds. In a narrative report of the same date, Dr. Tse noted appellant's concern about the offered position, but he does not provide work restrictions that are outside the actual duties of the offered position as described above. The Board finds that the offered position was within appellant's work restrictions.

With respect to the medical evidence, the record does not contain a reasoned medical opinion showing a change in the nature and extent of the employment-related condition on or after August 24, 1992. In a report dated October 29, 1992, Dr. Tse provided a history and stated that appellant's condition was stable, and she was released to return to work with no lifting over 20 pounds and a limit of one hour continuous computer entry. The record contains additional reports from Dr. Tse with respect to appellant's treatment for the neck and shoulder, but none of these reports discusses the accepted employment injuries under this claim. Nor do they establish

[3] *Terry R. Hedman*, 38 ECAB 222 (1986).

a change in the nature and extent of an employment-related condition causing disability on or after August 24, 1992. The Board accordingly finds that appellant has not met her burden of proof in this case.

The Board further finds that the Office properly denied appellant's request for reconsideration without merit review of the claim.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[4] 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 specific point of law, or (2) advancing a relevant legal argument not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office.[5] Section 10.608(b) states that any application for review that does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.[6]

Following the December 13, 1999 merit decision, appellant submitted a copy of a November 25, 1997 decision granting her benefits under the Social Security Act. Such evidence reveals that appellant was awarded benefits based on nonmedical factors such as her age and the totality of her medical impairments.[7] Moreover, this evidence does not establish that the offered job was outside her physical restrictions although the administrative law judge found that appellant could not perform any of her prior jobs. Such finding is not relevant in the instant claim since the issue is whether appellant could perform the offered job. Appellant did not submit relevant evidence not previously considered, nor did she meet any of the requirements of section 10.606(b)(2).[8]

[4] 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").

[5] 20 C.F.R. § 10.606(b)(2).

[6] 20 C.F.R. § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

[7] *Daniel Deparini*, 44 ECAB 657 (1993). The Board noted in that case that different standards of medical proof are involved and the Social Security Act does not require that disability be employment related.

[8] Any evidence submitted after the August 10, 2000 Office decision cannot be reviewed by the Board on this appeal. *See* 20 C.F.R. § 501.2(c).

The decisions of the Office of Workers' Compensation Programs dated August 10 and February 15, 2000, and December 13, 1999 are affirmed.

Dated, Washington, DC
April 19, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member