U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GREGG D. JAMES and DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, Laguna Niguel, CA

Docket No. 00-319; Submitted on the Record;
Issued July 5, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the grounds that it was untimely and failed to establish clear evidence of error.

In a decision dated July 21, 1998, the Office terminated appellant's compensation benefits. The Office found that the weight of the medical evidence, which rested with the opinion of the Office referral physician, established that he no longer suffered residuals of the accepted compression fracture of the thoracolumbar spine at T11-12 and L1.

In a July 27, 1998 report, Dr. Wesley M. Nottage, appellant's attending orthopedic surgeon, related appellant's current complaints, findings on examination, recommended treatment and disability status. Dr. Nottage expressed no opinion on whether appellant was suffering residuals of the accepted compression fracture.

In an undated letter received by the Office on August 3, 1999, appellant advised the Office that he had written in June to appeal the decision to close his future medical benefits. He explained the reason he waited to appeal and argued that his medical benefits should remain open until he was back to 100 percent. Appellant stated: "I have yet to be contacted by anyone in your office by [tele]phone or letter as of July 27, 1999." He advised that he was able to schedule an appointment with another physician and would submit a copy of his report once appellant had reviewed it with him.

In a letter dated August 18, 1999 and received by the Office on August 27, 1999, appellant advised that he had received no response to his two most recent letters, copies of which he attached. These letters, both of which were undated, expressed his disagreement with the Office's decision to terminate compensation benefits. In one of the letters he made clear that he was requesting reconsideration based on the July 27, 1998 report of Dr. Nottage.

Appellant repeated that he wanted to continue to see Dr. Nottage on an as needed basis. He enclosed a July 27, 1999 report by Dr. Daniel C. Fry, a chiropractor, who diagnosed residuals of thoracolumbar compression fracture injury, residuals of lower back myofascial strain and lumbar disc syndrome. Dr. Fry reported that the lack of substantial objective findings made it difficult to identify the origin of appellant's pain, but he found it difficult to dismiss the subjective complaints. He postulated that phenomena called neoneuralisation and adverse maladaptive nociceptive neuroplasticity could be responsible for appellant's chronic pain syndrome: "The traumatic nature of the patient's injury could very well have led to the above-described neoneuralisation and subsequent adverse maladaptive nociceptive neuroplasticity with associated allodynia." In an August 18, 1999 note, Dr. Fry reported that appellant had been evaluated and treated for a chronic lower back condition.

In a letter dated August 26, 1999, appellant submitted copies of his telephone bills to show that he made contact with the Office within a year of the Office's decision terminating compensation benefits. He again explained the reasons he did not immediately request an appeal.

Appellant wrote again on September 8, 1999 and advised that he still had not heard from the Office.

In a decision dated September 29, 1999, the Office denied appellant's request for reconsideration on the grounds that it was untimely and failed to present clear evidence of error in the July 21, 1998 decision terminating his compensation benefits.

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

Section 10.607 of the Code of Federal Regulations provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. The Office will consider an untimely application only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.[1]

The Board has thoroughly searched the record on appeal and can find no request for reconsideration made within one year of the Office's July 21, 1998 decision terminating his compensation benefits. A clue to the confusion surrounding this issue appears in appellant's letter of appeal to the Board, wherein he asserted that he did respond within a year: "I sent that in June 1998." Appellant advised the Office only that he had sent an appeal in "June," which the Office took to mean June 1999. In fact, the record shows a facsimile transmission on June 2, 1998 in response to the Office's May 26, 1998 notice of proposed termination. In this transmission appellant stated that he had received "the decision" from the Office; however, the notice of proposed termination, as its name implies, is not a final decision of the Office and carries no review rights. The notice advised that if appellant disagreed with the proposed action, he could submit additional evidence or argument within 30 days. Appellant responded by sending the June 2, 1998 facsimile. This cannot be considered an exercise of the review rights that accompanied the formal decision that the Office later issued on July 21, 1998 and copies of

[1] 20 C.F.R. § 10.607.

appellant's telephone bill do not show that appellant made a written request for reconsideration within a year of the Office's final decision.

The earliest correspondence from appellant following the Office's July 21, 1998 decision is an undated letter received by the Office on August 3, 1999. In this letter, appellant stated that he had yet to be contacted by anyone "as of July 27, 1999," indicating that he wrote this letter no earlier than July 27, 1999. This places the letter outside the one-year period following the formal decision of July 21, 1998. Appellant submitted a copy of a letter that requested reconsideration, but the letter itself is undated and there is no evidence that he mailed the request within one year of the July 21, 1998 decision. Based on the foregoing, the Office properly found that appellant's request for reconsideration was untimely.

The Board further finds that appellant's request for reconsideration fails to present clear evidence of error in the Office's July 21, 1998 decision. The issue upon which the Office terminated compensation benefits -- whether appellant continues to suffer residuals of his accepted compression fracture -- is a medical issue that must be addressed by reasoned medical opinion evidence. Appellant's arguments that the termination was unfair are immaterial, and the medical evidence submitted after the termination of benefits fails to establish clear error in the Office's decision. In his July 27, 1998 report, Dr. Nottage expressed no opinion on this specific issue. The only other medical evidence received (other than a brief note of treatment dated August 18, 1999) is the July 27, 1999 report by Dr. Fry, a chiropractor, who did not appear to diagnose a subluxation of the spine as demonstrated by x-ray to exist. It appears, therefore, that he is not a "physician" as that term is defined by 5 U.S.C. § 8101(2).[2] Regardless, his opinion is purely speculative and therefore of little probative value.[3]

Because appellant's untimely request for reconsideration fails to demonstrate clear evidence of error in the Office's decision to terminate his compensation benefits, the Office properly denied a merit review of his claim.

[2] 5 U.S.C. § 8101(2) (the term "physician," as used therein, "includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulation by the Secretary.)" *See generally Theresa K. McKenna*, 30 ECAB 702 (1979).

[3] *See Philip J. Deroo*, 39 ECAB 1294 (1988) (although the medical opinion of a physician supporting causal relationship does not have to reduce the cause or etiology of a disease or condition to an absolute medical certainty, neither can such opinion be speculative or equivocal); *Jennifer Beville*, 33 ECAB 1970 (1982) (statement of a Board-certified internist that the employee's complaints "could have been" related to her work injury was speculative and of limited probative value).

The September 29, 1999 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
July 5, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member