U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID L. KOVAR and DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, Lakewood, CO

Docket No. 00-2125; Submitted on the Record;
Issued July 9, 2002

DECISION and ORDER

Before COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly rescinded acceptance of appellant's claim.

On August 30, 1992 appellant, then a 54-year-old supervisory survey statistician, filed an occupational disease claim (Form CA-2) alleging that his high blood pressure and nervous disorders were aggravated by his employment-related stress. The Office accepted the claim for permanent aggravation of hypertension and coronary artery disease and placed appellant on the automatic rolls for temporary total disability effective September 18, 1994.[1]

In its review of long-term disability cases appellant's current medical condition needed to be verified. Appellant was referred to Dr. Philip S. Vigoda, a second opinion Board-certified internist with a subspecialty certificate in cardiovascular disease. In his June 7, 1996 report, Dr. Vigoda opined that it was "possible that [appellant's] hypertension and coronary artery disease could have been aggravated by his compensable work factors" and deferred to appellant's treating physician on this issue. He also concluded that he was unable to determine from the information he had as to whether appellant's condition had been aggravated by work factors. Regarding appellant's disability, Dr. Vigoda concluded that appellant was not totally disabled and that he was physically capable of performing his usual employment. In addition, Dr. Vigoda determined that appellant was capable of working an eight-hour day.

On October 1, 1997 the Office referred appellant to Dr. Claude A. Brachfeld,[2] a Board-certified internist with subspecialty certificates in cardiovascular disease and critical care medicine, to resolve the conflict in the medical opinion evidence between Dr. Vigoda and

[1] Appellant retired from the employing establishment in June 1994.

[2] A previous referee physician, Dr. Jerry S. Miklin, Board-certified in internal medicine, with subspecialty certificates in cardiovascular disease and interventional cardiology prepared a report but was disqualified as he shared an office with Dr. Vigoda. A new referee physician was appointed.

Dr. Hugh Weily,[3] an attending physician, regarding the issue of whether appellant was totally disabled. In the accepted facts, the Office noted that in 1986 appellant had two balloon angioplasties and was hospitalized in 1992 subsequent to a syncopal episode.

In an October 21, 1997 report, Dr. Brachfeld concluded that appellant was capable of performing sedentary types of work. He stated:

> "[Appellant] has hypertension, coronary artery disease and hypertrophic obstructive cardiomyopathy. His cardiomyopathy appears to be progressive with worsening outflow tract gradients since his surgery was performed in 1993. Coronary artery disease does not appear to have worsened since his surgery and his hypertension is currently adequately controlled. I do not know of any evidence that suggests that working conditions such as those described in the '[s]tatement of [a]ccepted [f]acts' would aggravate any of these conditions or change the natural history of the conditions. This response does not imply that the patient is able to perform all of the usual duties listed in these documents, only that these duties would not be expected to change the natural history of any of his conditions. In fact, the progression of his illnesses is quite typical of patients with these problems, regardless of the work environment. Hence, I do not agree with Dr. Wiley's (sic) conclusion that his work caused aggravation of his underlying condition."

On January 27, 1998 the Office issued a proposed termination of compensation based upon the report of Dr. Brachfeld.

In response to the proposed termination, appellant submitted a February 23, 1998 report from Dr. Weily concluding that appellant was totally disabled due to his multiple medical problems. He also disagreed with Dr. Brachfeld's conclusion that appellant was not totally disabled which Dr. Weily stated was contrary to objective evidence found on examination by Dr. Brachfeld.

By letter dated March 6, 1998, the Office requested Dr. Vigoda to provide clarification regarding the issue of work-related conditions and provided him with a statement of accepted facts, Dr. Brachfeld's report and subsequent reports by Dr. Weily.

Dr. Vigoda, in a March 16, 1999 report, concluded that appellant's "job did not cause any of his medical problems and did not exacerbate aggravation of his preexisting hypertension and coronary artery disease beginning May 28, 1992." He noted that appellant's condition was "the natural progression of his multiple illnesses" and that it was unrelated to his employment as appellant had not worked in the last four years.

In response to a second follow-up Office request for clarification of terms, Dr. Vigoda provided definitions for essential hypertension, high blood pressure and coronary artery disease

[3] The Office relied upon Dr. Weily's November 8, 1993 opinion in accepting appellant's claim for permanent aggravation of hypertension and coronary artery disease by employment factors.

and the effect of work stress on these diseases in a September 14, 1999 letter. He indicated that work stress can cause a temporary rise in the blood pressure.

On February 25, 1999 the Office issued a second proposed notice of termination of benefits on the basis that appellant had no continuing disability due to his accepted employment injury.

By letter dated March 23, 1999, appellant disagreed with the proposal to terminate benefits and enclosed a February 23, 1999 report from Dr. Weily. In his February 23, 1999 report, Dr. Weily diagnosed hypertension, coronary artery disease and hypertrophic obstructive cardiomyopathy and stated that Dr. Brachfeld's report was unsupported by objective findings. Dr. Weily opined that appellant is totally disabled due to his many cardiovascular problems.

By decision dated April 6, 1999, the Office terminated appellant's compensation effective April 24, 1999, stating that Dr. Brachfield's report constituted the weight of the medical evidence.

In a letter dated April 9, 1999, appellant's counsel requested an oral hearing.

By decision dated June 16, 1999, the hearing representative found the case was not in posture for an oral hearing and reversed the April 6, 1999 decision terminating appellant's compensation. The hearing representative found the medical evidence of record did not establish that the accepted aggravation had ceased or that appellant had no further residuals of the accepted employment injury and, therefore, the Office had not met its burden of proof to justify termination of compensation benefits.

On July 26, 1999 the Office issued a proposed notice of rescission of the acceptance of appellant's claim. The Office found the reports of Drs. Brachfeld and Vigoda were new evidence to justify rescinding the acceptance of the claim as appellant's condition was not related to compensable factors of employment.

Appellant elected to received Federal Employees' Compensation Act benefits effective April 25, 1999.

In a letter dated August 6, 1999, appellant's counsel disagreed with the Office's proposal to rescind acceptance of his claim but by decision dated August 26, 1999, the Office finalized the rescission of the acceptance of appellant's claim. By letter dated August 27, 1999, appellant's counsel requested an oral hearing which was held on January 15, 2000. By decision dated April 5, 2000 and finalized on April 7, 2000, the hearing representative affirmed the Office's decision rescinding acceptance of appellant's claim.

The Board finds that the Office did not meet its burden of proof to rescind its acceptance of appellant's claim.

Once the Office accepts a claim, it has the burden of justifying the termination or modification of compensation benefits. This holds true were, as here, the Office later decides

that it erroneously accepted a claim.[4] To satisfy its burden, the Office cannot merely second-guess the initial set of adjudicating officials but must establish through new evidence, legal arguments or rationale, that its acceptance was erroneous.[5] The Board has upheld the Office's authority to reopen a claim at any time on its own motion under section 8128 of the Act and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.[6] The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.[7] It is well established that, once the Office accepts a claim, it has the burden of justifying the termination or modification of compensation.[8] This holds true where, as here, the Office later decides that it has erroneously accepted a claim for compensation. To justify rescission of acceptance, the Office must establish that its prior acceptance was erroneous based on new or different evidence or through new legal argument and/or legal rationale.[9]

In the present case, the Office accepted that appellant sustained a permanent aggravation of hypertension and coronary artery disease. The Office based its acceptance upon the report of Dr. Weily who concluded that appellant was totally disabled from performing his usual employment. Following acceptance of the claim, the Office referred appellant to Dr. Vigoda for a second opinion as to the extent of appellant's disability. Dr. Vigoda opined that appellant was capable of performing his usual position and working an eight-hour day.

The Office found a conflict in the medical opinion evidence between Drs. Weily and Vigoda and referred appellant to Dr. Brachfeld, who concluded that appellant's hypertension and coronary artery disease were unrelated to his employment and that he was capable of working. Subsequent to Dr. Brachfeld's report, the Office requested clarification from Dr. Vigoda on the issue of whether appellant's accepted condition was employment related and provided reports by Drs. Brachfeld and Weily for his review. Dr. Vigoda, in a report dated March 16, 1999, opined that appellant's employment did not cause or aggravate his hypertension and coronary artery disease beginning May 28, 1992.

Where the Office secures an opinion from an impartial medical specialist to resolve a conflict in the medical evidence, it has the obligation to secure a supplemental report from the specialist where the original report requires clarification. When an impartial specialist's statement of clarification or elaboration is not forthcoming or if the doctor is unable to clarify or elaborate on his original report or if the doctor's supplemental report is also vague, speculative,

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[4] *Gareth D. Allen*, 48 ECAB 438 (1997); *Daniel E. Phillips*, 40 ECAB 1111, 1119 (1989), *petition for recon. denied*, 41 ECAB 201 (1989).

[5] *Id.*

[6] *Eli Jacobs*, 32 ECAB 1147, 1151 (1981).

[7] *Shelby J. Rycroft*, 44 ECAB 795 (1993); *compare Lorna R. Strong*, 45 ECAB 470 (1994).

[8] *See Frank J. Mela, Jr.*, 41 ECAB 115, 124 (1989); *Harold S. McGough*, 36 ECAB 332, 336 (1984).

[9] *Laura H. Hoexter (Nicholas P. Hoexter)*, 44 ECAB 987 (1993); *Alphonso Walker*, 42 ECAB 129, 132-22 (1990), *petition for recon. denied*, 42 ECAB 659 (1991); *Beth A. Quimby*, 41 ECAB 683, 688 (1990); *Roseanna Brennan*, 41 ECAB 92, 95 (1989); *Daniel E. Phillips*, *supra* note 4.

or lacks rationale, the Office must submit the case record together with a detailed statement of accepted facts, to a second impartial specialist for a rationalized medical opinion on the issues in question.[10] Unless this procedure is carried out by the Office, the intent of section 8123(a) will be circumvented when the impartial specialist's medical report is insufficient to resolve the conflict of medical evidence.[11]

However, in the instant case, Dr. Brachfeld was selected to resolve the conflict in the medical opinion evidence as to the extent of appellant's disability. At the time of the referral to Dr. Brachfeld, Dr. Vigoda had not offered an opinion as to whether appellant's hypertension and coronary artery disease had been aggravated by his employment and stated he deferred to Dr. Weily as the treating physician on this issue. At the time of the referral to Dr. Brachfeld there was no conflict as to the issue of whether appellant had sustained a permanent aggravation of hypertension and coronary artery disease.

As there remains a conflict in the medical opinion under section 8123(a) of the Act, the Office has not met its burden of proof in rescinding its acceptance of appellant's claim for permanent aggravation of hypertension and coronary artery disease.

The decision of the Office of Workers' Compensation Programs dated April 5, 2000 and finalized on April 7, 2000 is hereby reversed.[12]

Dated, Washington, DC
July 9, 2002

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[10] *Leonard W. Waggoner*, 35 ECAB 461 (1983).

[11] *Roger W. Griffith*, 51 ECAB ___ (Docket No. 98-1080, issued May 2, 2000).

[12] The Board notes that subsequent to appellant's appeal to the Board on June 2, 2000, the Office issued a final overpayment decision on February 27, 2001. As this decision was based upon an issue, *i.e.*, the Office's rescission of benefits, before the Board while the Board had jurisdiction over the case, it is null and void. *Douglas E. Billings*, 41 ECAB 880 (1990).