United States Department of Labor
Employees' Compensation Appeals Board

A.K., Appellant	)	
and	)	**Docket No. 06-1514**
	)	**Issued: January 8, 2007**
DEPARTMENT OF DEFENSE, DEFENSE CONTRACT AUDIT AGENCY, Central Islip, NY, Employer	)	

Appearances:
Paul Kalker, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 20, 2006 appellant filed a timely appeal from the June 29, 2005 merit decision of the Office of Workers' Compensation Programs, which suspended his compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the suspension. The Board also has jurisdiction to review the Office's July 20, 2005 merit decision terminating compensation for wage loss, as well as the Office's June 12, 2006 nonmerit decision denying reconsideration.

ISSUES

The issues are: (1) whether the Office properly suspended appellant's compensation on the grounds that he obstructed a medical examination; (2) whether the Office properly terminated his compensation for wage loss on the grounds that he had no further neurologic disability for work; and (3) whether the Office properly denied his request for reconsideration.

FACTUAL HISTORY

On November 8, 2001 appellant, then a 41-year-old senior auditor, filed a claim for compensation alleging that he had developed symptoms of bilateral carpal tunnel syndrome: "Since June of 2000, the symptoms of carpal tunnel syndrome have become noticeable in both the right *and* left hand and have progressively gotten more painful to the current state where I cannot perform my job effectively. My job function has increased to 70 to 80 percent computer time and surgery was not a guaranteed permanent cure." The Office accepted his claim for bilateral carpal tunnel syndrome and paid compensation on the periodic rolls.[1]

On November 3, 2004 the Office notified appellant in writing that he had an appointment at 11:00 a.m. on December 3, 2004 with Dr. Allen Zippin, a referral physician, whose address the Office provided. It notified appellant that failure to report for examination without good cause could result in the suspension of his benefits under 5 U.S.C. § 8123(d). The Office provided appellant a chance to present any objections to its choice of physician.

In a November 12, 2004 letter, appellant stated that he was uncomfortable seeing Dr. Zippin again because when he saw that doctor in March 2003, "he had me strip to my underwear, and felt my privates." Appellant advised the Office: "I am complying with your request to see a doctor, but the objection submitted to seeing Dr. Zippin is very serious, and am sure a hearing officer will agree should this case come down to that, which it shouldn't, for I am trying to work with your office as much as possible."

The Office informed appellant on December 1, 2004 that he did not raise this concern for over 18 months and that there was no showing that Dr. Zippin had no legitimate neurological reason for examining appellant the way he did, given appellant's low back complaints. The Office advised appellant that it would suspend his benefits if he did not attend the December 3, 2004 appointment.

Appellant wrote again on December 2, 2004. He reiterated that he was not refusing to see a doctor regarding his work-related injury, but reiterated his objection to seeing Dr. Zippin.

Appellant did not keep his appointment on December 3, 2004. On December 7, 2004 the Office asked him in writing to provide an explanation within 14 days. The Office advised that failure to show good cause would result in a suspension of his compensation.

Appellant responded on December 15, 2004 that the Office already had a complete explanation from earlier letters objecting to the selected physician, which he again related.

In a decision dated December 22, 2004, the Office suspended appellant's compensation under 5 U.S.C. § 8123(d) effective that date. It notified him that his right to compensation was suspended until the refusal or obstruction stopped.

[1] The Office previously accepted that appellant developed bilateral carpal tunnel syndrome in the performance of duty in 1997. The Office authorized surgeries and appellant returned to his job in 1998.

On January 28, 2005 the Office advised appellant's congressman that it would schedule an appointment with another physician "in order to move this case forward." The Office referred appellant to Dr. Chandra M. Sharma, a Board-certified neurologist, to resolve a conflict between the referral physician, Dr. Zippin, and appellant's attending anesthesiologist, Dr. Meeru Sathi-Welsch.

Appellant kept his appointment on March 23, 2005. Dr. Sharma related appellant's history, reviewed his medical records, described his complaints and reported findings on neurologic examination. She diagnosed multiple subjective pain and paresthesias in both hands. Dr. Sharma was unable to relate this subjective pain to appellant's job-related activities. She explained that there were no objective signs of central or peripheral neurological lesion. Dr. Sharma added that there was no neurological disability: "I see no neurological limitations to resumption of regular job-related activity without any limitations." She concluded that there was no further need for neurological testing or treatment and no need for household help, special supplies or special transportation.

On April 13, 2005 Dr. Sharma reviewed electrodiagnostics obtained on March 3, 2005. Testing showed findings consistent with moderate bilateral distal median neuropathies "as may be seen with bilateral carpal tunnel syndrome." Dr. Sharma observed that this study was similar to one obtained on December 5, 2001, which she noted in her March 23, 2005 report. On examination, she stated, subjective Tinel's signs were positive and appellant was unable to assume the Phalen's sign posture due to wrist pain; however, "the examination did not show objective signs of carpal tunnel syndrome in either the right or left hand." Dr. Sharma opined that the presence of electrodiagnostic abnormalities on tests and the presence of subjective Tinel's signs "do not constitute neurological disability."

The Office reinstated appellant's compensation effective March 23, 2005, the date he kept his appointment with Dr. Sharma. On June 29, 2005 the Office reviewed the merits the suspension and found it appropriate. On July 20, 2005 the Office terminated appellant's compensation for wage loss effective July 11, 2005 on the grounds that the weight of the medical evidence rested with the opinion of the impartial medical specialist, Dr. Sharma, who reported no neurologic disability.

On March 14, 2006 appellant requested reconsideration of the Office's June 29 and July 20, 2005 decisions. In a decision dated June 12, 2006, the Office denied this request as untimely and found that it failed to establish clear evidence of error.

LEGAL PRECEDENT -- ISSUE 1

An employee shall submit to examination by a medical officer of the United States, or by a physician designated or approved by the Secretary of Labor, after the injury and as frequently and at the times and places as may be reasonably required.[2] If an employee refuses to submit to or obstructs an examination, his or her right to compensation is suspended until the refusal or obstruction stops. Compensation is not payable while a refusal or obstruction continues, and the

[2] 5 U.S.C. § 8123(a).

period of the refusal or obstruction is deducted from the period for which compensation is payable to the employee.[3]

To invoke this provision of the law, the Office must ensure that the claimant has been properly notified of his or her responsibilities with respect to the medical examination scheduled. Either the claims examiner or the medical management assistant may contact the physician directly and make an appointment for examination. The claimant and representative, if any, must be notified in writing of the name and address of the physician to whom he or she is being referred as well as the date and time of the appointment. The notification of the appointment must contain a warning that benefits may be suspended under 5 U.S.C. § 8123(d) for failure to report for examination. The claimant must have a chance to present any objections to the Office's choice of physician, or for failure to appear for the examination, before the Office acts to suspend compensation.[4]

If the claimant does not report for a scheduled appointment, he or she should be asked in writing to provide an explanation within 14 days. If good cause is not established, entitlement to compensation should be suspended in accordance with 5 U.S.C. § 8123(d) until the date on which the claimant agrees to attend the examination. Such agreement may be expressed in writing or by telephone (documented on Form CA-110). When the claimant actually reports for examination, payment retroactive to the date on which the claimant agreed to attend the examination may be made. The claimant's statement that he or she will not appear for an examination is not sufficient to invoke the penalty.[5]

ANALYSIS -- ISSUE 1

Appellant refused to submit to the examination scheduled for December 3, 2004. He does not contend otherwise. Appellant's stated willingness to see any other physician in no way minimizes his unequivocal refusal to see the physician to whom the Office had referred him. The Office has express statutory authority to arrange for medical examinations "as frequently and at the times and places as may be reasonably required." This gives the Office broad discretion, and the evidence before the Board fails to establish an abuse of that discretion. The Office received additional evidence following appellant's March 4, 2003 appointment with Dr. Zippin and determined that additional development of the medical evidence was warranted.

Because appellant failed to report for the December 3, 2004 examination, the question is whether he showed good cause within 14 days of the Office's December 7, 2004 request. The Board finds that he did not. His lay opinion on the medical appropriateness of Dr. Zippin's March 4, 2003 neurologic examination is no proof that the physician treated him in anything other than a professional manner. Dr. Zippin did not report the touching alleged. This, coupled with appellant's prolonged failure to bring the matter to the Office's attention, raises doubt about

[3] *Id*. at § 8123(d).

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14 (July 2000).

[5] *Id*.

the credibility of the allegation. Appellant has never been shy about sharing his thoughts with the Office. That he would allow an inappropriate touching by a referral physician to go unreported strains belief. The Board finds that appellant did not establish good cause for his refusal to submit to the December 3, 2004 examination.

The Office correctly followed established procedures for suspending appellant's compensation under 5 U.S.C. § 8123(d). The Board will affirm the Office's June 29, 2005 decision affirming the suspension of compensation effective December 22, 2004. The Board further finds that the Office properly reinstated compensation effective March 23, 2005, the date he actually reported for examination. The Office suspended his compensation for obstructing the December 3, 2004 examination, and that obstruction never stopped.

LEGAL PRECEDENT -- ISSUE 2

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[6] 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.[7] When the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[8]

ANALYSIS -- ISSUE 2

The Office terminated appellant's compensation for wage loss based on the opinion of Dr. Sharma, the Board-certified neurologist selected to resolve a conflict in medical opinion. The Board finds, however, that Dr. Sharma's opinion is not sufficiently rationalized to justify the termination.

Dr. Sharma's statement that there were no objective signs of central or peripheral neurological lesion appeared inconsistent with a positive Tinel's sign on examination and with documented electrodiagnostic abnormalities. She attempted to clarify that the presence of electrodiagnostic abnormalities on tests and the presence of subjective Tinel's signs "do not constitute neurological disability," but she did not fully say why she came to this conclusion. Dr. Sharma did not explain why the positive Tinel's sign should be discounted. Moreover, if the electrodiagnostic abnormalities are consistent with moderate bilateral distal median neuropathies, as may be seen with bilateral carpal tunnel syndrome, then Dr. Sharma must address why these objective findings do not limit appellant's ability to perform the specific physical requirements of his senior auditor's position. It may be that appellant has residuals of bilateral carpal tunnel syndrome that do not disable him from performing those physical requirements. The Office,

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

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

[8] *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

however, cannot discharge its burden of proof on a mere conclusion. For Dr. Sharma's opinion to carry the weight of the evidence, she must show that her conclusion is sound and logical. Because she did not, the Board will reverse the Office's July 20, 2005 decision terminating compensation for wage loss effective July 11, 2005.

LEGAL PRECEDENT -- ISSUE 3

The Federal Employees' Compensation Act provides that the Office may review an award for or against payment of compensation at any time on its own motion or upon application.[9] The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."[10]

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[11]

An application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.[12] A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[13]

ANALYSIS -- ISSUE 3

Appellant sent his March 14, 2006 application for reconsideration within one year of the Office's June 29, 2005 merit decision regarding suspension of benefits. The Office, therefore, should have applied the standard of review set forth above and not that more difficult standard of "clear evidence of error," which is properly reserved for untimely requests. The Board will set aside the Office's June 12, 2006 decision denying reconsideration and remand the case for application of the proper standard of review.

[9] 5 U.S.C. § 8128(a).

[10] 20 C.F.R. § 10.605 (1999).

[11] 20 C.F.R. § 10.606.

[12] 20 C.F.R. § 10.607(a).

[13] 20 C.F.R. § 10.608.

CONCLUSION

The Board finds that the Office properly suspended appellant's compensation under 5 U.S.C. § 8123(d). The Board further finds that the Office did not meet its burden to terminate compensation for wage loss. The impartial medical specialist did not offer sufficient reasoning to support his conclusion that appellant no longer had neurologic disability for the position of senior auditor. The Board also finds that the Office improperly denied appellant's request for reconsideration. It applied the wrong standard of review.

ORDER

IT IS HEREBY ORDERED THAT the June 29, 2005 decision of the Office of Workers' Compensation Programs, suspending compensation, is affirmed. The Office's July 20, 2005 decision terminating compensation for wage loss is reversed. The Office's June 12, 2006 nonmerit decision denying appellant's request for reconsideration is set aside and the case remanded for further action consistent with this opinion.

Issued: January 8, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board