U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FLOY G. FRANKLIN and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Mountain Home, Tenn.

Docket No. 95-2656; Submitted on the Record;
Issued March 9, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective July 13, 1993.

On August 19, 1991 appellant, then a 64-year-old food service worker, filed a notice of traumatic injury alleging that she injured her back on August 14, 1991 lifting a case of milk in the course of her federal employment. The Office accepted the claim on October 4, 1991 for lumbar strain and appropriate compensation benefits were awarded.

Based on his December 4, 1991 examination, Dr. Judson C. McGowan, appellant's treating physician and a Board-certified orthopedic surgeon, diagnosed degenerative disc disease at L5-S1 with a vacuum defect as well as a foraminal encroachment on the right side. He stated that appellant could not return to her regular employment due to continued chronic pain. On January 29, 1992 Dr. McGowan indicated that appellant had a 15 percent functional loss of motion of her thoracolumbar spine.

On June 18, 1992 the Office requested that Dr. McGowan respond to questions concerning appellant's continued entitlement to compensation. In particular, the Office asked Dr. McGowan to discuss whether appellant's condition was directly caused, accelerated, precipitated, or aggravated by her accepted injury. The Office also asked Dr. McGowan to differentiate between permanent and temporary aggravation. It defined a permanent aggravation as "a continuing and irreversible change in the underlying condition, thus adversely altering the course of the condition or disease process."

On June 27, 1992 Dr. McGowan stated that appellant had a painful degenerative disc. He stated that the injury "was job-related, and subsequent injuries have aggravated that condition. Therefore, according to your definition, I believe the patient would qualify for the classification of permanent aggravation."

On October 26, 1992 Dr. McGowan checked "yes" to indicate that appellant's present condition was due to the injury for which compensation was claimed.

On February 24, 1993 the Office referred appellant to Dr. Fred R. Knickerbocker, a Board-certified orthopedic surgeon, for a second opinion examination. Dr. Knickerbocker examined appellant on March 23, 1993. He recorded a history from appellant and reviewed lumbar spine films. He indicated that they revealed a type I or II degenerative spondylolisthesis of L5 over SI. Dr. Knickerbocker stated that he did not "feel that the degenerative disc disease or the degenerative spondylolistheis at L5-S1 level was caused by the work injuries, I do think the pain she had associated with this could have been aggravated by the work injuries." He further stated that appellant was permanently unable to work due to her pain.

The Office subsequently requested that both Drs. McGowan and Knickerbocker clarify their reports.

On May 27, 1993 Dr. Knickerbocker stated that his opinion was based purely on appellant's subjective complaints and that "I think the pain she continues to have is related to her work injury."

On June 2, 1993 Dr. McGowan stated that he agreed with Dr. Knickerbocker's conclusions regarding appellant's work status. On August 12, 1993 Dr. McGowan stated he agreed with Dr. Knickerbocker's comments that appellant had degenerative disc disease or degenerative spondylolisthesis at the L5-S1 level and that the pain is associated with disc degenerative changes and could have been aggravated by her work injuries. He further stated that he agreed that there was no direct evidence that the degenerative disc disease was the direct result of any specific work-related injury.

In a decision dated July 13, 1993, the Office ordered that entitlement to continuing compensation be denied because there was no continuing disability related to the accepted factors of employment. In an accompanying memorandum, the Office stated that the record was devoid of a well-rationalized medical opinion supporting any subjective condition causally related to the August 14, 1991 injury. The Office accorded Dr. McGowan's January 6, 1992 opinion little weight because he failed to provide an adequate rationale and accorded Dr. Knickerbocker's opinion little weight because it was based purely on appellant's subjective complaints.

On April 18, 1994 appellant's representative requested a hearing. Appellant changed the request to a review of the written record on June 21, 1994.

On October 7, 1994 the hearing representative affirmed the Office's July 13, 1993 decision. The Office hearing representative found that the opinions of Drs. McGowan and Knickerbocker failed to support that appellant's diagnoses were related to an accepted employment injury, were entitled to little weight because they were both based solely on appellant's subjective complaints and because each physician equivocally concluded that appellant's condition could have been aggravated by her work injury.

Appellant subsequently requested reconsideration.

On December 30, 1994 Dr. Howell H. Sherrod, a Board-certified orthopedic surgeon, stated that appellant's condition was precipitated by her accepted injury and that her condition was aggravated by her work injuries. He indicated that he could "unequivocally state with reasonable medical certainty that if you subject an asymptomatic degenerative disc condition to traumatic injury which produces spasms, pain and loss of motion which continues from the time of injury forward, then the resulting impairment was caused by the traumatic injury.

In a decision dated April 5, 1995, the Office reviewed the merits of the claim and found that the evidence submitted in support of the application was not sufficient to warrant modification of the prior decision. In an accompanying memorandum, the Office discredited Dr. Sherrod's opinion because it appeared that he was related to appellant's representative, because the physician shared an office with appellant's treating physician, and because his opinion was equivocal.

The Board has reviewed the case record and concludes that the Office failed to meet its burden to terminate appellant's compensation.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. After it has determined that an employee has disability causally related to 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.[1]

In the instant case, the record is devoid of any medical evidence sufficient to meet the Office's burden of proof that appellant's disability was no longer related to her employment. Dr. McGowan, the treating physician and a Board-certified orthopedic surgeon, ultimately agreed with Dr. Knickerbocker, another Board-certified orthopedic surgeon, that appellant's condition could have been aggravated by her work injuries. The Office discredited these opinions as equivocal and based solely on appellant's subjective complaints. Dr. Sherrod, another Board-certified orthopedic surgeon, opined that appellants condition was both precipitated and aggravated by her work injuries. The Office discredited this opinion because it appeared that he was related to appellant's representative, because the physicians shared an office with appellant's treating physician, and because his opinion was equivocal. Nevertheless, none of the physicians of record specifically opined that appellant's disability was not related to her employment. Because the Office bears the burden of proof when terminating or modifying compensation benefits, it must present affirmative evidence that appellant's disability is no longer related to her employment.[2] It is not enough for the Office to simply impugn the credibility of the evidence supporting such a causal relationship.

[1] *Jason C. Armstrong*, 40 ECAB 907 (1989).

[2] *Id.*

Accordingly, the decision of the Office of Workers' Compensation dated April 5, 1995 is reversed.

Dated, Washington, D.C.
March 9, 1998

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member