U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LINDA J. ADAMS and DEPARTMENT OF HEALTH & HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION, Jersey City, NJ

Docket No. 02-1656; Submitted on the Record;
Issued May 2, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's claim for merit review.

Appellant's claim filed on April 10, 1989 was accepted for toxic fumes inhalation with bronchospasm after she experienced breathing problems at work in January 1989. She stopped work on August 3, 1989 and received wage-loss compensation.

On April 12, 1990 the employing establishment offered a teleservice position within the restrictions imposed by appellant's treating physician, Dr. George Ciechanowski, Board-certified in pulmonary medicine.

On May 22, 1990 the Office found the position to be suitable and informed appellant that she had 30 days to accept the job or explain her refusal. On June 22, 1990 the Office considered appellant's letter stating that she had sought a transfer to a cleaner workplace and determined that her explanation was unjustified. The Office found the offered position to be suitable, informed appellant that the job would remain open for 15 days,[1] and stated that wage-loss compensation would be terminated, effective July 28, 1990.

Appellant requested a hearing, which was held on November 28, 1990. On March 11, 1991 the hearing representative affirmed the termination of compensation based on appellant's refusal of suitable work. Meanwhile, appellant had returned to work, but was claiming wage-loss benefits intermittently due to the accepted condition.

On January 29, 1991 Dr. Ciechanowski recommended that the Office refer appellant for a second opinion. The Office referred appellant to Dr. Julia B. Brody, Board-certified in internal medicine, who examined her on June 17, 1991. Based on Dr. Brody's reports, the Office issued

[1] Appellant returned to work on July 30, 1990 but claimed significant amounts of leave intermittently.

a notice of proposed termination of compensation on August 26, 1991, which was made final on September 25, 1991.

Appellant requested a hearing, but the hearing representative found a conflict in the medical opinion evidence between Dr. Ciechanowski, who concluded that appellant's asthma was work related and Dr. Brody, who stated that appellant had no work-related residual breathing illness and that her current asthma was not work related. The hearing representative set aside the Office's September 25, 1991 decision terminating appellant's compensation and remanded the case for the Office to refer appellant to an impartial medical examiner to resolve the conflict.

On June 29, 1993 the Office suspended appellant's entitlement to compensation for obstructing a scheduled medical examination.

Appellant filed a recurrence of disability claim[2] on February 2, 1994 alleging that her condition had deteriorated, that she had become chemically sensitive in office settings and that even strong perfume caused breathing difficulties.

In a January 20, 1993 report, Dr. Ciechanowski stated that appellant's diagnosed bronchial asthma seemed to be related to her initial exposure to toxic substances at work. Subsequently, appellant had experienced bronchospasm and small airway obstruction with waxing and waning symptoms. Repeated spirometry testing over the past year was unchanged.

Appellant submitted a report from Dr. Michael Sherman, Board-certified in internal medicine and allergy and immunology, who stated on May 26, 1994 that appellant was unable to work in the office environment due to her occupational asthma. In an August 24, 1994 report, Dr. Eric V. Finkenstadt, Board-certified in internal medicine, concluded that appellant was totally disabled for work in any commercial building due to her ongoing bronchial hypersensitivity, which began with toxic exposure in 1989. On December 19, 1994 Dr. Ciechanowski stated that appellant had been unable to work since September 20, 1994 due to chest discomfort and shortness of breath.

Based on Dr. Finkenstadt's report, the Office accepted the claim for occupationally-induced asthma and paid compensation.

On August 19, 1998 the Office informed appellant that no compensation was due from July 29, 1990 through September 19, 1994 because her entitlement had been terminated on July 28, 1990 and the hearing representative had affirmed this decision. Also, Dr. Ciechanowski had found appellant disabled as of September 19, 1994.

On October 9, 1998 the Office issued a notice of proposed termination of compensation, based on the June 25, 1998 report of Dr. Thomas L. Kurt, Board-certified in preventive medicine and medical toxicology, to whom the Office had referred appellant for a second opinion.

[2] Appellant filed a number of recurrence of disability claims prior to the 1994 claim. Appellant also filed a traumatic injury claim on December 31, 1990, which was accepted for a compression of the left median nerve in appellant's arm.

Appellant disagreed with the proposal, filed two new claim forms and submitted medical evidence and a personal statement.

By decision dated November 18, 1998 the Office terminated appellant's compensation, effective January 3, 1999. Appellant requested a hearing, which was held on April 21, 1999. On August 4, 1999 the hearing representative found that the weight of the medical evidence established that appellant was not disabled due to a work-related condition. The hearing representative noted that reports from Dr. Ralph Sloan, who began seeing appellant in 1998, and from Dr. Terry Lee, who diagnosed pneumoconiosis and asthma due to toxic chemical exposure in 1989, were unrationalized and therefore of diminished probative value.[3]

Appellant requested reconsideration, which was denied on November 14, 2000 on the grounds that the evidence appellant submitted was insufficient to warrant modification of the November 18, 1998 decision terminating compensation. The Office found the December 19, 1997 report from Dr. Ciechanowski to be speculative and therefore of diminished probative value.

Appellant again requested reconsideration, stating that other medical records and reports were submitted with Dr. Ciechanowski's letter but were not considered.[4] The Office denied reconsideration on February 12, 2001 on the grounds that the evidence submitted was insufficient to warrant merit review of the prior decision.

On November 13, 2001 appellant requested reconsideration and submitted a list of 21 exhibits. On February 22, 2002 the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant merit review.

The Board finds that the Office acted within its discretion in refusing to conduct a merit review of appellant's claim.

The only Office decision before the Board on appeal is dated February 22, 2002 denying appellant's request for reconsideration. Because more than one year has elapsed between the last merit decision dated November 14, 2000 and the filing of this appeal on May 20, 2002, the Board lacks jurisdiction to review the merits of appellant's claim.[5]

[3] The hearing representative instructed the Office to issue a formal decision on appellant's entitlement to wage-loss compensation from July 29, 1990 to September 19, 1994. The record reflects that the Office has not yet issued a formal decision.

[4] These consisted of the results of laboratory tests in May 2000 that have no relevance to the issue of appellant's work-related disability.

[5] 20 C.F.R. §§ 501.2(c); 501.3(d)(2). *See John Reese*, 49 ECAB 397, 399 (1998).

Section 8128(a) of the Federal Employees' Compensation Act[6] vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[7]

Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).[8] The application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.[9] Section 10.608(b) provides that, when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review of the merits.[10]

In this case, appellant submitted a list of 21 exhibits with her request for reconsideration on November 13, 2001 and argued that hundreds of pages were missing from her file. The exhibits consist of copies of prior decisions dated November 14, 2000, March 14, 1995 and August 7, 1989; letters by her attorney and to her congressman; the results of diagnostic testing by a cardiologist, a pulmonologist and a respiratory specialist in 2001; and other medical records from 1999 and 2000 documenting her outpatient treating and testing.

The medical records from 1999 and 2000 were already in the record and considered by the hearing representative in affirming the termination of compensation. Therefore, this evidence is repetitious. The diagnostic testing results in 2001 do not address the issue of whether appellant continued to be disabled due to her work-related conditions. The letters and copies of prior decisions are also irrelevant to the issue.

The Board finds that the evidence submitted by appellant with her request for reconsideration is irrelevant or immaterial to the issue of whether her disability stemming from the accepted bronchospasms and occupational asthma continued.[11] Dr. Kurt, the second opinion specialist, concluded that appellant had no breathing disability related to the accepted conditions. And appellant provided no evidence with her request for reconsideration that contravened his opinion. Therefore, she has not met the requirement of subsection (iii) of section 10.606(b)(2).

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[6] 5 U.S.C. §§ 8101-8193.

[7] 5 U.S.C. § 8128(a) ("The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.")

[8] 20 C.F.R. § 10.608(a)(1999).

[9] 20 C.F.R. § 10.606(b)(1)-(2)(1999).

[10] 20 C.F.R. § 10.608(b)(1999).

[11] *See Kevin M. Fatzer*, 51 ECAB 407, 412 (2000) (finding that a medical report containing a vague and unrationalized opinion on appellant's disability was insufficient to require reopening of appellant's case because it failed to address his physical condition at the relevant time).

Also, appellant has presented no new legal argument.[12] Nor has she shown that the Office misapplied the law. Inasmuch as appellant has failed to meet any of the requirements for reopening her claim for merit review, the Board finds that the Office acted within its discretion in denying her request for reconsideration.[13]

The February 22, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
May 2, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

[12] Appellant has repeatedly asserted that hundreds of pages were missing from her case file, but provided no evidence beyond her bare allegation. The Board notes that the record consists of more than 6,000 pages and nothing appears to be missing.

[13] *See Eugene L. Turchin*, 48 ECAB 391, 397 (1997) (finding that evidence submitted on reconsideration regarding the occurrence of several industrial accidents was irrelevant to appellant's burden of proof to establish the timely filing of his claim and was therefore insufficient to warrant merit review by the Office).