U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARK G. ANNAB'ELLE and DEPARTMENT OF THE TREASURY, U.S. CUSTOMS SERVICE, Miami, Fla.

Docket No. 95-2891; Submitted on the Record;
Issued April 21, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation under 5 U.S.C. § 8106(c); and (2) whether the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a) constituted an abuse of discretion.

The Board has duly reviewed the case record and finds that the Office did not meet its burden of proof to terminate appellant's compensation.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has determined that an employee has disability causally related to his or her employment, the Office may not terminate compensation without establishing that the disability has ceased or that it was no longer related to the employment.[1]

The facts in this case indicate that on April 3, 1988 appellant, then a 28-year-old border patrol agent, sustained employment-related lacerations of the mouth and head, head trauma and vertigo for which he received appropriate continuation of pay. He returned to work on April 27, 1988 and subsequently received compensation for intermittent periods between August 17 and September 1, 1988, undergoing temporomandibular joint arthroscopy with insertion of appliance. On May 22, 1989 he sustained employment-related right shoulder and cervical strains, and sustained a recurrence of disability on February 2, 1991 for which he received compensation from April 10, 1991 to January 19, 1993. On January 20, 1993 he returned to work as a marine enforcement officer. On June 24, 1993 he filed a claim, alleging that on May 25, 1993, while aboard a high performance boat, pounding water caused reinjury to the right shoulder, neck and elbow. He stopped work on June 11, 1993. By decision dated August 6, 1993, the Office denied the claim, finding that appellant failed to establish fact of injury. He did not return to work and resigned effective September 30, 1993. On October 4, 1993 he filed a claim, alleging that he

[1] *See Patricia A. Keller*, 45 ECAB 278 (1993).

sustained a recurrence of injury, stating that the recurrence began in February 1993. An April 15, 1994 Office memorandum indicates that appellant continued to be disabled from employment injuries. Short-term psychotherapy and dental work were authorized. He received appropriate back pay and was placed on the periodic rolls effective April 21, 1994.[2]

By letter dated January 5, 1995, the Office informed appellant that it proposed to terminate his compensation based on the opinion of Dr. John F. Burns, a Board-certified orthopedic surgeon who provided a second opinion evaluation for the Office. In a letter dated January 11, 1995, appellant disputed the proposed termination, stating that the medical evidence supported continued disability. Again relying on the opinion of Dr. Burns, by decision dated February 8, 1995, the Office terminated appellant's benefits, effective March 5, 1995, on the grounds that the medical evidence indicated that he no longer had an employment-related disability. On May 4, 1995 appellant, through counsel, requested reconsideration and submitted additional medical evidence. By decision dated July 24, 1995, the Office denied appellant's request, finding it *prima facie* insufficient to warrant merit review. The instant appeal follows.

Appellant has a complex medical history that includes temporomandibular joint surgery in 1988 and diagnostic arthroscopies of the right shoulder on October 13, 1989 and April 23, 1991. The 1991 operative report indicated that no evidence of impingement syndrome was visualized and "not a lot" of adhesions or scarring. A May 17, 1991 magnetic resonance imaging (MRI) of the cervical spine demonstrated degenerative discs, most marked at C5-6 associated with a posterior spur and no evidence of disc herniation. In November 1991 appellant underwent an ulnar transposition on the right that was not authorized by the Office on the grounds that an ulnar condition was not related to an accepted condition. On September 11, 1992 he underwent authorized acromial joint resection. Ulnar conduction studies and electromyography of the right upper extremity done July 26, 1993 were essentially negative. X-ray of the cervical spine on July 28, 1993 was within normal limits. An August 11, 1993 MRI of the right shoulder demonstrated postoperative changes with no evidence of tear or fluid accumulation. A November 11, 1993 MRI of the cervical spine demonstrated degenerative discs at C2-6 with mild posterior disc bulging or protrusion at C4-5 and C5-6. By report dated November 29, 1993, Dr. Richard S. Kirby, a Board-certified orthopedic surgeon, advised that an opinion that disc herniation was due to an employment-related injury occurring five years previously was weakened by a previously negative MRI. On December 13, 1993 appellant underwent right C6-7 laminotomy and removal of herniated disc. The hospitalization discharge summary reported a history of a ski injury in 1988.

Additional relevant medical evidence includes reports from appellant's treating osteopathic physician, Dr. Michael A. Landrum, who, in a March 2, 1994 report, noted a chief complaint of neck pain, right shoulder and arm pain, and right hand pain and numbness. He reported that appellant described multiple employment-related injuries and that injuries had occurred while exercising. In a March 4, 1994 report, Dr. Landrum noted physical findings in the right upper and lower extremities on neurological examination and diagnosed, *inter alia*,

[2] By decision dated June 8, 1993, the Office granted appellant a schedule award for a 1 percent permanent impairment for loss of use of the right upper extremity for the period January 20 to February 10, 1993, for a total of 3.12 weeks of compensation. Appellant has not appealed this decision.

post-traumatic (assault) cervicalgia with a history of disc herniation, status post-laminectomy, degenerative joint disease of the neck secondary to the trauma, probable degenerative disease of the shoulder, brachial plexus neuritis, probably secondary to neck trauma, bilateral temporomandibular joint dysfunction, and history of anxiety-depression with suicidal ideation. In reports dated July 29 and October 17, 1994, he made findings of pain and weakness on the right which were employment related.

Dr. Stuart L. DuPen, a Board-certified anesthesiologist, submitted an October 21, 1994 report in which he noted an "apparent" history of direct brachioplexy injury on the right with concomitant cervical spine disc disease with pain. He diagnosed chronic right-sided brachial plexopathy. In a November 14, 1994 report, Dr. DuPen advised that appellant had neurological deficits of the right shoulder and arm, and in a December 8, 1994 report diagnosed hand neuropathy secondary to appellant's cervical injury.

On November 3, 1994 the Office referred appellant, along with the medical record, a statement of accepted facts and a set of questions, to Dr. John F. Burns, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a November 14, 1994 report, he advised that he found no neurological deficits or weakness on examination and diagnosed status post multiple injuries and multiple surgeries, possible personality/character disorder and chronic pain behavior. Dr. Burns opined that he could not determine whether appellant's accepted cervical strain had "anything whatsoever" to do with the cervical disc condition for which he had been treated with surgery nor whether his elbow contusion caused him to have an ulnar nerve transposition. He observed that, while appellant had pain with any type movement of the shoulder, this was purely a subjective response and stated:

> "The standards that I saw for the Marine Enforcement position certainly from a physical, mental and emotional standpoint [do] not appear to be appropriate for this particular gentleman. It is not because he has significant actual objective physical disabilities, but according to this patient, he cannot do much of anything described in the Marine Enforcement position.
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> "As far as I was concerned, [appellant] does not need further care for the orthopedic conditions. The last thing he needs is any further surgery and I would feel that any further specific diagnostic tests are probably not appropriate. I have no idea what [appellant's] underlying psychological and emotional state is but this seems to be the major factor that is interfering with his ability to function in any way. As mentioned in the report, he has been through several pain programs, has seen psychologists, etc. [and] by far, this is the most appropriate evaluation [appellant] needs at this point."

In a December 9, 1994 report, Dr. Burns reiterated his prior conclusions.

With his reconsideration request, appellant submitted pain clinic treatment notes dated June 1 and 2, 1995 which include a plan for treatment and notations concerning a telephone call regarding medication. Also submitted was an emergency note[3] dated June 6, 1995 which advises

[3] The physician's signature on this note is illegible.

that appellant reported a history of neck surgery and subsequent motor vehicle accident. Diagnoses of status post cervical disc surgery and chronic cervical pain were made.

Regarding appellant's orthopedic condition, the Board finds that the weight of the medical opinion evidence rests with the opinion of Dr. Burns, the second opinion physician who was provided with a statement of accepted facts and the medical record, conducted a complete physical examination and, in a thorough and well-rationalized report,[4] concluded that appellant's orthopedic condition was not employment related. While both Dr. Landrum and Dr. DuPen advised in 1994 that appellant's right upper extremity condition was employment related, neither discussed the mechanics of how his accepted cervical strain or right shoulder injury led to the diagnosed condition of chronic brachial plexopathy and hand neuropathy. Further, the Office has accepted neither a herniated disc nor brachioplexy neuropathy as causally related to appellant's employment injury. Their opinions are, therefore, of diminished probative value,[5] and the Office properly found that appellant's employment-related orthopedic condition had ceased at that time. Furthermore, the additional medical evidence submitted by appellant with his reconsideration request is insufficient to overcome, or create a conflict with, the weight of the medical evidence as represented by Dr. Burns' opinion as it is not relevant to the issue of the cause of appellant's orthopedic condition.

This notwithstanding, the Board finds that the Office has not met its burden of justifying termination of appellant's compensation as the medical evidence regarding appellant's accepted temporary depressive reaction with emotional overlay does not establish that it has ceased or that is no longer related to employment.[6] Richard Coder, Ph.D., submitted reports dated July 21, October 17 and November 22, 1994 in which he advised that appellant's mania exacerbated his depression and noted that he was "almost" suicidal with sleep and eating disorders. In a February 1995 report, Charles W. Freeman, Ph.D., diagnosed depression and anxiety causally related to appellant's employment injuries and advised that he needed further treatment. Furthermore, Dr. Burns noted that appellant's emotional state was interfering with his ability to function and he,

[4] Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. *Ern Reynolds*, 45 ECAB 690 (1994).

[5] *See Robert J. Krstyen*, 44 ECAB 227 (1992).

[6] *See Patricia A. Keller, supra* note 1.

too, advised that appellant needed psychological counseling. The Board, therefore, finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits.[7]

Lastly, in view of the Board's disposition of the merits of appellant's claim, the issue of whether the Office abused its discretion in denying merit review is moot.

The decisions of the Office of Workers' Compensation Programs dated July 24 and February 8, 1995 are hereby reversed.

Dated, Washington, D.C.
April 21, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

Michael E. Groom
Alternate Member

[7] The Board notes that appellant sustained an employment-related temporomandibular joint dysfunction, and there is evidence in the record to indicate that he needed continued care for this condition. The record also indicates that appellant requested a hearing on August 23, 1995 and submitted additional medical evidence. This is not before the Board, however, as the Office has not yet issued a final decision regarding appellant's request. 20 C.F.R. § 501.2(c).