

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAROLYN M. JOHNSON and DEPARTMENT OF HEALTH & HUMAN SERVICES, FOOD & DRUG ADMINISTRATION, Cleveland, Ohio

*Docket No. 97-145; Submitted on the Record;
Issued December 8, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits as of August 20, 1995; and (2) whether the Office properly denied appellant's request for reconsideration.

On September 24, 1984 appellant, then a 57-year-old lab worker, filed a report of traumatic injury claim alleging that, as she was walking she slipped on oil on the floor between the hall and the lab and twisted her back. The Office accepted appellant's case for lumbosacral strain with radiculitis and placed appellant on the periodic rolls following expiration of continuation of pay.

In a September 8, 1992 medical report, Dr. Charles O. Dillard, an internist, noted that appellant primarily complained of severe low back pain aggravated by any type of physical exertion. He noted that appellant continued to be treated with analgesics, heat packs and frequent rest periods. After performing a physical examination, Dr. Dillard diagnosed severe lumbosacral strain with radiculitis. He opined that, as there had been no improvement in her condition, appellant remained totally disabled. Dr. Dillard stated that appellant remains totally disabled for all work solely due to the residuals of her work injury of September 24, 1984. He based his opinion on the history of the injury, his ongoing treatment, a computerized tomography (CT) scan report and appellant's response to medical management.

On March 26, 1993 the Office requested an updated medical report in order to review appellant's progress. No report was submitted.

Appellant sought chiropractor services and, in a November 17, 1993 letter, the Office informed appellant that they were unable to approve chiropractic services under the Federal Employees' Compensation Act and advised appellant to seek medical treatment from a medical doctor or an orthopedist.

On December 21, 1993 appellant informed the Office that she had chosen Dr. Timothy Smith, an osteopath, as her new attending physician. In a January 3, 1994 letter to appellant, the Office requested appellant provide more information concerning her request for a change in physicians before formal approval of her request could be issued. No response was received.

In a March 22, 1994 letter, the Office again requested an updated medical report. No report was submitted.

In a March 24, 1994 letter, the Office requested that appellant respond to its January 3, 1994 letter pertaining to her change of physician request. On March 31, 1994 the Office received appellant's response and, subsequently, approved her change of physicians to Dr. Smith.

In a September 30, 1994 letter, the Office requested appellant to submit a recent medical report from Dr. Smith. No report was submitted.

As the Office did not receive medical progress reports in response to their requests of March 26, 1993, March 22 and September 30, 1994, the Office referred appellant to Dr. Richard Sheridan, a Board-certified orthopedic surgeon, for a second opinion evaluation. He was provided with a statement of accepted facts and a copy of all medical evidence of record.

In an April 14, 1995 medical report, Dr. Sheridan stated that he examined appellant, reviewed her medical records and found no objective findings to support ongoing disability. He stated that appellant's diagnosis was resolved acute lumbar strain. Dr. Sheridan opined that appellant was medically capable of performing her regular job duties as a lab worker based on her accepted work-related condition. He based his reasoning on the fact that appellant did not have any positive findings on examination of her low back and lower extremities. In a work restriction evaluation (Form OWCP-5) of the same date, Dr. Sheridan indicated that appellant could work an eight-hour day without limitations.

On July 14, 1995 the Office issued a notice of proposed termination of compensation stating that the weight of the medical evidence established that appellant no longer had residuals from her work-related injury and that she was physically able to perform her date-of-injury job. In the memorandum accompanying the notice of proposed termination, the Office stated that as the last medical report received from appellant was in 1992, it was of little evidentiary or probative value and the requests to appellant for recent medical reports went unanswered. The Office concluded that Dr. Sheridan's April 14, 1995 report was both well rationalized and unequivocal and was considered the weight of the evidence. The Office allowed appellant 30 days to respond.

In a decision dated August 17, 1995, the Office denied appellant continuing compensation effective August 20, 1995 as the medical evidence of record established that appellant's work-related disability had resolved and that she was physically able to perform her date-of-injury job. In the accompanying memorandum, the Office noted that appellant failed to submit additional relevant evidence or argument with the 30 days allotted. The Office included the July 14, 1995 memorandum which accompanied the July 14, 1995 notice of proposed termination.

On September 15, 1995 the Office received copies of an August 8, 1995 total bone scan and a computerized axial tomography (CAT) scan of the lumbosacral spine.

In a July 26, 1996 letter, appellant, through her representative, requested reconsideration. Appellant's representative indicated that a report from appellant's physician would be forthcoming.

On August 16, 1996 the Office received an August 8, 1996 medical report from Dr. Charles O. Dillard and the results of an August 9, 1995 CAT scan of the lumbosacral spine. In his August 8, 1996 report, he stated that appellant suffered from a work-related injury in September 1984, from which she has never recovered. Dr. Dillard stated that appellant suffers from severe lower back pain with radiation down both legs which has rendered her a semi-invalid, as the slightest exertion causes intensification of her back pain. He stated his examination findings and discussed appellant's treatment regime. Dr. Dillard stated that appellant remains totally disabled.

By decision dated August 19, 1996, the Office denied appellant's reconsideration request on the basis that no substantive legal questions were raised nor any new and relevant evidence were submitted.

The Board finds that the Office met its burden of proof to terminate appellant's compensation on August 20, 1995.

Once the Office has accepted a claim and pays compensation, it has the burden of proof of justifying termination or modification of compensation benefits.¹ 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.²

The Board finds that the weight of the medical evidence rests with the April 14, 1995 report of Dr. Sheridan, to whom the Office referred appellant, who determined that appellant ceased to have residuals of her September 24, 1984 employment injury and was capable of performing her date-of-injury job. The report of Dr. Sheridan is well rationalized and based on a complete and accurate factual and medical history. The Board finds that the Office properly relied on this report when it terminated appellant's compensation effective August 20, 1995.

Appellant submitted a September 8, 1992 report of Dr. Dillard. Although his report indicates that appellant continued to have residuals of the employment injury, it is of diminished probative value in that it is approximately three years older than Dr. Sheridan's report and, thus, does not adequately represent appellant's current condition. Appellant was notified over a span of one year and a half of the necessity of providing updated medical reports to her file, but failed to comply with the Office's requests. Additionally, the report by a specialist in the appropriate field of medicine, Dr. Sheridan is entitled to more weight than that of one whose speciality is in a

¹ *Robert C. Fay*, 39 ECAB 163 (1987).

² *Jason C. Armstrong*, 40 ECAB 907 (1989).

less appropriate field, Dr. Dillard, an internist.³ Therefore, Dr. Dillard's September 8, 1992 report is not of sufficient weight to create a conflict in the medical evidence or to overcome the weight of the medical evidence as represented by the report of Dr. Sheridan.

The Board further finds that the Office properly denied appellant's request for reconsideration.

Section 10.138(b)(1) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.⁴ Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without review the merits of the claim.⁵

Following the Office's August 17, 1995 decision, appellant's representative requested reconsideration but did not submit any additional evidence or raise any substantive legal questions. Appellant's representative indicated, however, that a report from appellant's physician would be forthcoming. On August 16, 1996 the Office received an August 8, 1996 medical report from Dr. Dillard and the results of an August 9, 1995 CAT scan of the lumbosacral spine. The Office issued its denial of appellant's reconsideration request on August 19, 1996 on the grounds that no substantive legal questions were raised nor any new and relevant evidence were submitted.

In this case, appellant's attorney has not raised a legal argument or explained how the August 9, 1995 CAT scan is relevant to the issue adjudicated by the Office in the August 17, 1995 decision. Moreover, although the August 8, 1996 report from Dr. Dillard states that appellant is totally disabled from the work injury from which she has never recovered, his report is cumulative evidence as it reflects the same information pertaining to appellant's condition as the previous reports of record do. As this evidence repeats or duplicates evidence already in the case record, it has no evidentiary value and does not constitute a basis for reopening a case.⁶

Inasmuch as appellant failed to submit any new and relevant medical evidence or advance substantive legal contentions in support of her request for reconsideration, appellant's reconsideration request is insufficient to require the Office to reopen the claim for further consideration of the merits.

The August 19, 1996 and August 17, 1995 decisions of the Office of Workers' Compensation Programs are affirmed.

³ *Mildred L. Cook*, 31 ECAB 1655 (1980).

⁴ 20 C.F.R. § 10.138(b)(1).

⁵ 20 C.F.R. § 10.138(b)(2); *Gloria Scarpelli-Norman*, 41 ECAB 815 (1990); *Joseph W. Baxter*, 36 ECAB 228 (1984).

⁶ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

Dated, Washington, D.C.
December 8, 1998

George E. Rivers
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member