U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GEORGE A. TSEKO and U.S. POSTAL SERVICE,
POST OFFICE, Huntington Beach, CA

Docket No. 97-2459; Submitted on the Record;
Issued August 10, 1999

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective December 10, 1995; and (2) whether appellant established any partial permanent impairment related to his accepted employment injuries for which he is entitled to a schedule award.

On September 16, 1989 appellant, then a forty-year-old V.O.M.A. clerk, filed a notice of traumatic injury and claim, alleging that he injured his back while in the performance of duty. The Office accepted appellant's claim for subluxation of the lumbar spine, lumbosacral strain, aggravation of preexisting spinal arthritis and myofascitis of the cervical and lumbar spine. On October 4, 1992 appellant was reemployed as a modified V.O.M.A. clerk. By letter dated December 18, 1992, the Office notified appellant that he no longer had any loss of wage-earning capacity. On May 2, 1994 appellant filed a claim for a schedule award. By decision dated November 20, 1995, the Office determined that appellant had no permanent partial impairment for which he was entitled to a schedule award and also terminated appellant's compensation benefits effective December 10, 1995, on the grounds that the medical evidence established he was no longer disabled as a result of his work injury. On December 15, 1995 appellant filed a claim for a new traumatic injury to his back. In a decision dated February 16, 1996, the Office denied appellant's claim on the grounds that the medical evidence did not establish any injury that was causally related to appellant's federal employment. In a letter dated September 1, 1995, the Office notified appellant that it proposed termination of his compensation benefits on the grounds that the medical evidence did not establish that he had any residuals of his accepted employment injuries. By decision dated May 8, 1997, the Office denied appellant's request for reconsideration of the November 20, 1995 decision, on the grounds that the evidence submitted was not sufficient to establish modification.

The Board has duly considered the entire case record on appeal and finds that the Office properly terminated appellant's compensation effective December 10,1995.[1]

Under the Federal Employees' Compensation Act,[2] once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of compensation.[3] After the Office determines than an employee has a disability causally related to his or her employment, the Office may not terminate compensation without establishing that its original determination was erroneous or that the disability has ceased or is no longer related to the employment injury.[4]

The fact that the Office accepts appellant's claim for a specified period of disability does not shift the burden of proof to appellant to show that he or she is still disabled. The burden is on the Office to demonstrate an absence of employment-related disability in the period subsequent to the date when compensation is terminated or modified.[5] Therefore, the Office must establish that appellant's condition was no longer aggravated by employment factors after December 10, 1995 and the Office's burden includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[6]

In the present case, the Office properly determined that there was a conflict in the medical opinion evidence. Appellant's physicians, including Dr. Paul Barkopoulos, a psychiatrist, and Dr. Robert E. Cassidy, an orthopedic surgeon, indicated that appellant continued to have physical and psychiatric conditions which were residuals of his accepted employment injury. On the other hand, the Office referred appellant to Dr. Benjamin Cox, a Board-certified neurosurgeon, specializing in spinal orthopedics, and Dr. Charles Cole, a Board-certified psychiatrist, who reported that appellant had no physical or psychiatric conditions that were causally related to factors of his federal employment or his accepted employment injuries. In a report dated December 21, 1994, Dr. Cox concluded that appellant was not suffering from any neurological, orthopedic or pathological conditions or disabilities related to his accepted employment injuries. In a report dated January 10, 1995, Dr. Cole determined that appellant had no psychiatric disability as a result of factors of his employment. Based on the conflict in the medical evidence, the Office referred appellant to Dr. Joseph A. Swickard, a Board-certified orthopedic surgeon, for an impartial medical examination and report. In a report dated July 21, 1995, Dr. Swickard determined that appellant did not have any residuals of his accepted

[1] The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal. As appellant filed his appeal with the Board on July 23, 1997, the only decision before the Board is the Office's May 8, 1997 decision. *See* 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[2] 5 U.S.C. §§ 8101-8193.

[3] *William Kandel*, 43 ECAB 1011 (1992).

[4] *Carl D. Johnson*, 46 ECAB 804 (1995).

[5] *Dawn Sweazey*, 44 ECAB 824 (1993).

[6] *Mary Lou Barragy*, 46 ECAB 781 (1995).

employment injuries based on the lack of objective evidence to substantiate his subjective complaints. He concluded that appellant had no continuing disability related to his accepted employment injuries and indicated that he would be able to perform his preinjury job.

In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of the resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[7] The Board has carefully reviewed the opinion of Dr. Swickard and finds that it has sufficient probative value, regarding the relevant issue in the present case, to be accorded such special weight. Accordingly, the Office properly terminated appellant's compensation benefits based on the report of Dr. Swickard. Although appellant submitted an additional medical report by Dr. Barkopoulos, the Board notes that Dr. Swickard was selected to resolve the conflict in the medical evidence between Drs. Cox and Cole, and Drs. Barkopoulos and Cassidy. For this reason, the subsequent report by Dr. Barkopoulos which is essentially repetitive of his prior reports is insufficient to outweigh the special weight given the report by Dr. Swickard.[8] Moreover, as the Office also noted, appellant did not have any type of psychiatric condition that was accepted by the Office as employment related.

Prior to and with appellant's request for reconsideration, he submitted additional medical report evidence. Appellant submitted reports dated October 25, November 17 and December 22, 1995 by Dr. Stephen B. Graff-Radford, a dentist. In his October 25, 1995 report, Dr. Graff-Radford indicated that he was treating appellant for pain behind his left ear radiating to the mastoid region over the temple. He did not address whether there was any causal relationship between this condition and appellant's accepted employment injury. In his November 17, 1995 report, Dr. Graff-Radford indicated that appellant's condition was likely correlated to his employment injury. As this report is speculative it is of little probative value. In his December 22, 1995 report, Dr. Graff-Radford indicated that appellant could return to work. On reconsideration appellant also submitted a report dated March 4, 1996 by Dr. Graff-Radford, who indicated that his final diagnosis was that appellant had chronic neurovascular pain directly related to his employment. However, Dr. Graff-Radford did not provide any rationale for his conclusion that the diagnosed condition was causally related to appellant's employment. Therefore this report is of limited probative value. Appellant also submitted a report by Dr. Beu Lau, dated March 26, 1996. In his report, Dr. Lau indicated that appellant was suffering from Rector's syndrome related to his cervical thoracic and lumbar arthritis. There was no discussion of causal relationship. Inasmuch as none of the medical evidence submitted by appellant after the November 1995 decision, provides a rationalized medical opinion that addresses whether appellant has any continuing disability related to his accepted employment injuries, this evidence is not sufficient to establish that modification of the prior decision is warranted.

The Board also finds that appellant did not establish that he sustained any permanent impairment for which he is entitled to a schedule award.

[7] *Jack R. Smith*, 41 ECAB 691 (1990); *James P. Roberts*, 31 ECAB 1010 (1980).

[8] *Josephine L. Bass*, 43 ECAB 929 (1992); *see Dorothy Sidwell*, 41 ECAB 857 (1990).

Section 8107 of the Act[9] and its implementing regulation[10] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of specified members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fourth edition, 1993) have been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating losses.[11]

The Office determined that appellant was not entitled to any schedule award for a permanent impairment causally related to his accepted employment injuries based on the report of Dr. Swickard, who clearly concluded that there was no such impairment. Appellant has not submitted any medical evidence which would overcome the well-reasoned and rationalized report of Dr. Swickard. Consequently the Office properly determined that appellant was not entitled to a schedule award as there are no medical reports of record which contain an impairment rating.

The decision of the Office Workers' Compensation Programs dated May 8, 1997 is hereby affirmed.

Dated, Washington, D.C.
August 10, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

[9] 5 U.S.C. § 8107(c).

[10] 20 C.F.R. § 10.304.

[11] *Quincy E. Malone*, 31 ECAB 846 (1980).