U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RONALD H. BROWNING and U.S. POSTAL SERVICE,
FOREST HILLS ANNEX, Tampa, FL

Docket No. 98-1425; Submitted on the Record;
Issued December 22, 1999

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated benefits effective February 1, 1998; and (2) whether the Office properly denied modification of its decision dated February 1, 1998.

The case has been before the Board on a prior appeal. In a decision dated August 23, 1996, the Board reversed a decision of the Office which had terminated appellant's compensation effective April 3, 1994.[1] The Board found that the requirements of appellant's letter carrier position exceeded his employment-related physical restrictions. The Board also determined that the record contained no evidence that a full-time light-duty position was available within appellant's physical restrictions or that his employment-related disability had ceased. The history of the case is set forth in the Board's prior decision and is incorporated herein by reference.

On remand, the Office reinstated appellant's benefits retroactive to April 4, 1994.

By letter dated June 24, 1997, the Office referred appellant, together with a statement of accepted facts, medical records, position description and a list of questions, to Dr. William B. Jones[2] for a second opinion as to whether appellant could perform the duties of a modified city carrier and whether he has any residuals from his accepted employment injury.

[1] Docket No. 94-1917 (issued August 23, 1996).

[2] A Board-certified orthopedic surgeon.

In a report dated July 22, 1997, Dr. Jones, based upon a review of the medical evidence, physical examination, position description and history of employment injury opined that appellant had recovered from his lumbar laminectomy and was capable of returning to work.[3] Regarding the offered position of modified city carrier, Dr. Jones opined that appellant would be capable of performing the position which would include a maximum lifting restriction of 50 pounds.

In an unsigned report dated September 25, 1997, Dr. Jones opined, after reviewing a videotape of appellant in various physical activities such as getting in and out of his truck and working on his truck, that appellant had no impairment or disability causally related to his accepted employment injury and was capable of performing his usual employment without any restrictions.

By letter dated September 26, 1997, the Office referred appellant together with a copy of the duties of a modified city carrier, statement of accepted facts and medical records to Dr. John Peter Evans[4] to resolve a conflict in the medical evidence as to work restrictions.

In a report dated November 12, 1997, Dr. Philip F. Macon,[5] after a review of surveillance videotapes by the employing establishment inspection service and a review of a September 25, 1997 report by Dr. Jones, opined that appellant was capable of working eight hours per day in the position of city letter carrier with a lifting restriction of 70 pounds. Dr. Macon, however, disagreed with Dr. Jones that appellant had no disability as he had sustained a lumbar laminectomy.

Based upon Dr. Macon's November 12, 1997 report, the Office found there was no longer a conflict in the medical opinion evidence and cancelled the appointment with Dr. Evans.[6]

On December 16, 1997 the Office issued a proposed termination of appellant's compensation on the grounds that he had no continuing disability as a result of his accepted employment injury.

In a letter dated January 5, 1998, appellant responded to the proposal to terminate his compensation by noting that he had not seen the surveillance videotapes or pictures. Appellant

[3] Dr. Jones noted that appellant assisted a friend in his automotive repair shop by answering the telephone, getting parts and other menial tasks. Appellant submitted a letter from Leon Arrowood dated September 27, 1997 which stated that Dr. Jones was wrong in his statement that appellant worked at his garage. Mr. Arrowood stated that while appellant visited his garage and on occasion answered the telephone when it rang if he was sitting near it, but he was not employed by Mr. Arrowood. Appellant, in an unsigned letter, responded to Dr. Jones' report by denying that he had worked at Mr. Arrowood's garage and stated that Dr. Jones' statements were misleading and taken out of context regarding his daily activities.

[4] Board-certified in orthopedic and hand surgery.

[5] Appellant's attending Board-certified orthopedic surgeon.

[6] The record contains a report of a telephone or office call indicating that the independent medical examination appointment had been cancelled with Dr. Bhole as there was no longer a conflict in the medical evidence.

also noted that the videotapes did not show the breaks he had to take nor that he had two friends helping him lower his truck springs.

By decision dated January 16, 1998, the Office terminated appellant's compensation benefits effective February 1, 1998 on the basis that appellant no longer had any disability causally related to his accepted May 24, 1993 employment injury. In the attached memorandum, the Office noted that the medical evidence of record indicated that appellant could perform the job of letter carrier. Thus, the Office found that appellant had no continuing disability causally related to his accepted employment injury.

Appellant requested reconsideration in a letter dated March 23, 1998 and submitted reports dated January 23 and February 6, 1998 by Dr. Hector Gotay. In the January 23, 1998 report, he, based upon a history of his injury and physical examination, diagnosed "S1 radiculopathy -- right -- residual -- fail-back syndrome" and status post L5-S1 discectomy. Dr. Gotay opined that appellant "could work, sedentary work, in which he stands for less than four hours per day. No bending repetitively, no stooping on a repetitive basis and no lifting anything heavier than 50 pounds." In his January 6, 1998 report, Dr. Gotay opined that appellant had a 15 percent impairment of the whole person based upon the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th edition) in his February 6, 1998 report.

By decision dated March 10, 1998, the Office noted that Dr. Gotay was unaware of the extent of the postal investigation and had not reviewed the medical opinions of either Drs. Jones or Macon. The Office found that Dr. Gotay failed to provide any medical rationale as to why appellant could not perform his date-of-injury position or whether appellant's condition continues to be related to his accepted employment injury. Thus, the Office found that Dr. Gotay's opinion was insufficient to warrant modification of its prior decision terminating benefits.

The Board has carefully reviewed the entire case record on appeal and finds that the Office properly terminated appellant's compensation benefits effective February 1, 1998 on the grounds that he had no continuing disability due to his accepted employment injury.

Under the Federal Employees' Compensation Act,[7] once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of compensation.[8] After the Office determines that 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.[9]

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

[7] 5 U.S.C. §§ 8101-8193. (1974).

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

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

on the Office to demonstrate an absence of employment-related disability in the period subsequent to the date when compensation is terminated or modified.[10] Therefore, the Office must establish that appellant's condition was no longer aggravated by employment factors after May 18, 1998 and the Office's burden includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background. [6]

The medical opinions of Drs. Jones and Macon are sufficient to establish that appellant was capable of performing the duties of a modified city carrier and thus meet the Office's burden of proof in terminating appellant's compensation.

In the present case, the Office proposed termination of appellant's compensation benefits based on the November 12, 1997 report of Dr. Macon,[11] appellant's attending physician, who opined that appellant was capable of working eight hours per day in the position of city letter carrier with a lifting restriction of 70 pounds based upon his review of Dr. Jones' report and the surveillance video. Dr. Jones,[12] a second opinion physician, also opined that appellant was capable of performing the position of modified city carrier and lifting up to 70 pounds. Although appellant was provided with the opportunity to respond to the proposed termination, he did not submit any medical evidence which refuted the reports of Drs. Jones and Macon that he could perform the position of modified city carrier. Thus the weight of the medical evidence established that appellant did not have any continuing disability related to his accepted employment injury which prevented him from working. The Office met its burden of proof in terminating appellant's compensation benefits effective February 1, 1998.

Appellant requested reconsideration on March 23, 1998 and submitted additional evidence. Dr. Gotay's February 6, 1998 report is insufficient to create a conflict with the opinion of Dr. Jones, as the report refers to an impairment rating and not to whether appellant had any continuing disability as a result of his May 24, 1993 injury. The February 23, 1998 report by Dr. Gotay is similarly insufficient to overcome the opinions of Drs. Jones and Macon or create a conflict with Dr. Jones' opinion as Dr. Gotay did not offer sufficient medical rationale as to why appellant could not return to work in the position of modified city carrier or whether appellant's disability continues to be related to his accepted employment injury. Furthermore, Dr. Gotay, in reaching his opinion, did not review the surveillance video or the reports by Drs. Jones and Macon. The Board finds that reports of Drs. Jones and Macon are sufficiently well rationalized and constitute the weight of the medical evidence.

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

[11] Board-certified orthopedic surgeon.

[12] Board-certified in orthopedic and hand surgery.

The decisions of the Office of Workers' Compensation Programs dated March 10 and January 16, 1998 are hereby affirmed.

Dated, Washington, D.C.
December 22, 1999

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member