U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT P. BROTEMARKLE and U.S. POSTAL SERVICE, POST OFFICE, Coon Rapids, Minn.

Docket No. 97-772; Submitted on the Record;
Issued January 11, 1999

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM, A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits effective July 20, 1996.

The Board has duly reviewed the case on appeal and finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits effective July 20, 1996.

Appellant filed a claim on December 31, 1975 alleging that he sustained injury in the performance of duty on December 23, 1975. The Office accepted his claim for muscle spasm, thoracic and lumbar spine, and psychogenic pain disorder. Appellant returned to work on April 28, 1986 and retired effective February 11, 1990. On June 3, 1996 the Office proposed to terminate appellant's compensation benefits finding that the second opinion physician's report was entitled to the weight of the medical evidence. The Office terminated appellant's compensation benefits effective July 20, 1996 by decision dated July 12, 1996. Appellant requested reconsideration[1] and by decision dated November 22, 1996 the, Office denied modification of it prior decision.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[2] 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.[3] Furthermore, the right to medical

[1] Appellant requested an oral hearing in a letter dated July 21, 1996 and received by the Office on July 26, 1996. This letter was addressed to the Office and there is no indication that it was forwarded to or reviewed by the Branch of Hearings and Review.

[2] *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

[3] *Id.*

benefits for an accepted condition is not limited to the period of entitlement for disability.[4] To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.[5]

Appellant's attending physician, Dr. Joseph D. Moriarty, a surgeon, submitted a series of reports diagnosing chronic back pain syndrome, reporting findings of severe muscle spasm and requesting an extension of physical therapy. The Office referred appellant for a second opinion evaluation with Dr. Robert A. Wengler, a Board-certified orthopedic surgeon, on December 19, 1994. In his reports dated January 19, 1995, Dr. Wengler noted appellant's history of injury and listed his findings on physical examination including spasms in the left lower lumbar area and found appellant was totally disabled. He found that the muscle spasms were work related. Dr. Wengler also recommended further diagnostic testing. In a supplemental report dated April 13, 1995, Dr. Wengler opined that appellant's continuing condition and disability was related to his December 1975 employment injury and stated that appellant was not interested in surgical treatment.

Both Drs. Wengler and Moriarty support that appellant continues to experience residuals with resultant disability due to his accepted employment injury. The physicians have offered objective findings, *i.e.*, muscle spasm in support of these conclusions.

The Office referred appellant for a second opinion evaluation with Dr. Paul A. Cederberg, a Board-certified orthopedic surgeon, on March 19, 1996.[6] In his report dated April 25, 1996, Dr. Cederberg noted appellant's history of injury and medical history. He performed a physical examination and diagnosed resolved musculoligamentous strain of the thoracic and lumbar spine, psychogenic pain disorder and mild degenerative disc disease. Dr. Cederberg found that appellant's muscle spasms were no longer active and attributed appellant's psychogenic pain disorder to secondary gain and malingering. He stated that appellant was no longer disabled due to his accepted conditions and that but for nonemployment-related cardiac conditions could return to work as a general clerk eight hours a day.

The Board finds that Dr. Cederberg's report creates a conflict of medical opinion evidence with the reports of appellant's attending physician Dr. Moriarty. Dr. Cederberg found that appellant did not have muscle spasm and was capable of working full time. Dr. Moriarty reported findings of muscle spasm and concluded that appellant was disabled. Section 8123(a) of the Federal Employees' Compensation Act,[7] provides, "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." As there is an unresolved conflict of medical opinion evidence regarding whether appellant continues to

[4] *Furman G. Peake,* 41 ECAB 361, 364 (1990).

[5] *Id.*

[6] In the March 19, 1996 referral letters, the Office improperly informed appellant and Dr. Cederberg that Dr. Cederberg was to resolve an existing conflict of medical opinion evidence. There was no conflict of medical opinion evidence at the time of the referral.

[7] 5 U.S.C. §§ 8101-8193, 8123(a).

experience muscle spasm and disability due to his accepted employment injury, the Office failed to meet its burden of proof to terminate appellant's compensation benefits.

The Board further finds that Dr. Cederberg's report is not sufficient to establish that appellant's accepted condition of psychogenic pain disorder is no longer related to his accepted employment injury. Dr. Cederberg supported a diagnosis of this condition, but opined that it was due to secondary gain and malingering by appellant. He did not offer any medical rationale explaining how and why he reached this conclusion. Therefore, his report is not sufficient to meet the Office's burden of proof to terminate compensation benefits for this condition.

The decisions of the Office of Workers' Compensation Programs dated November 22 and July 12, 1996 are hereby reversed.

Dated, Washington, D.C.
January 11, 1999

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member