U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KENNETH L. HELMS, JR. and DEPARTMENT OF THE NAVY, SECURITY DEPARTMENT, Ingleside, TX

Docket No. 97-1942; Submitted on the Record;
Issued January 5, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by denying merit review on May 21, 1996.

On November 20, 1992 appellant, then a 49-year-old patrolmen, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that he injured his neck, back and pelvis on November 19, 1992 when he slipped on some spilled paint, fell and hit his head on the floor. The Office accepted the claim for contusions; cervical, lumbar and thoracic strains; brief concussion and aggravation of coronary artery disease and quadruple bypass.

By decision dated December 2, 1993, the Office denied appellant's request for a hot tub and/or treadmill. In the attached memorandum, the Office noted that appellant had been awarded attendant allowance for the period December 20, 1992 to March 20, 1993 and found that the medical opinion evidence failed to establish that the hot tub and/or treadmill would be likely to give relief, reduce the degree or length of disability, cure or assist in decreasing the amount of compensation for appellant's accepted orthopedic problems.

By decision dated December 2, 1993, the Office denied appellant's request for an attendant allowance after March 20, 1993. In the attached memorandum, the Office found that the medical evidence was insufficient to justify an attendant allowance after March 20, 1993.

By decision dated May 27, 1994, the Office denied appellant's request for a schedule award.

By decision dated May 27, 1994, the Office found that appellant's depression/post traumatic was not causally related to or aggravated by the accepted November 19, 1992 employment injury.

By letter dated June 22, 1995, appellant requested reconsideration and submitted medical evidence in support of his request.

In a May 10, 1994 report, Dr. Carlos R. Estrada, opined that appellant's November 19, 1992 employment injury "provoked a relapse of his [d]epression and post-traumatic stress disorder."

In an October 12, 1994 report, Dr. Estrada, based upon a review of the medical records and physical examination of appellant, diagnosed major depression with psychotic features and post-traumatic stress syndrome.

By decision dated August 15, 1995, the Office denied appellant's request for modification of the decisions denying his request for a hot tub, a schedule award for permanent impairment and an attendance allowance and the Office's finding that his post-traumatic stress disorder was not causally related to his accepted November 12, 1992 employment injury.

On April 18, 1996 appellant, requested reconsideration and submitted various medical and factual evidence in support of his request. The evidence submitted included reports dated April 20, July 14, September 22, October 6 and November 1993, February 2, May 5 and December 8, 1994 from Dr. John P. Masciale,[1] a May 28, 1993 report from Dr. H.P. Roosth,[2] reports dated June 28, September 9 and October 25, 1993 and November 20, 1995 from Dr. Gilbert R. Meadows,[3] an October 12, 1993 report from Dr. Jesus G. Garcia,[4] a November 15, 1993 report from Dr. Robert L. Jones,[5] a December 9, 1993 report from Dr. Carlos Martinez-Quinonez,[6] reports dated April 10, 1996, February 15 and May 10, 1994 from Dr. Estrada and an April 11, 1994 report from Dr. William H. Edwards, Jr.[7] as well as an April 1, 1996 letter regarding repossession of two automobiles, a notice of appellant's conversion to Chapter 7 in his bankruptcy case. Appellant noted that the new evidence he submitted included a November 9, 1995 report from Dr. Masciale, a November 20, 1995 report from Dr. Meadows and an April 10, 1996 report from Dr. Estrada.

Dr. Masciale, in a November 9, 1995 report, attributed appellant's post-traumatic stress syndrome to his employment injury and subsequent heart attack. He opined that "[t]here is a clearcut relationship, both from a medical point of view and from a temporal or time table standpoint." Regarding the hot tub, Dr. Masciale indicated that appellant "derives great benefit from that type of treatment," and noted that since appellant might lose his home, that he might

[1] An attending Board-certified orthopedic surgeon.

[2] A second opinion Board-certified orthopedic surgeon.

[3] An attending Board-certified orthopedic surgeon.

[4] Board-certified in cardiovascular disease and internal medicine.

[5] A second opinion Board-certified orthopedic surgeon.

[6] A Board-certified internist.

[7] A second opinion Board-certified orthopedic surgeon.

lose the use of a permanently placed hot tub. Thus, he noted that appellant preferred "to have access to a physical therapy center." Lastly, regarding an attendant allowance for appellant's wife, the physician opined that one should be issued due to the time appellant's wife was required to spend caring for her husband.

In a report dated November 20, 1995, Dr. Meadows stated that he agreed with Dr. Masciale's November 9, 1995 letter, that appellant was entitled to an attendance allowance for his wife and that appellant had "a significant related post-traumatic stress disorder with also suicidal ideations." Dr. Masciale also opined that "a health club membership is mandatory" for appellant.

In a report dated April 10, 1996, Dr. Estrada opined:

> "[T]he fall of November 19, 1992, while on duty resulted in a relapse of his previous conditions of post-traumatic stress disorder and [m]ajor [d]epression as, before this fall, he was functioning well.…"

Dr. Estrada supported his opinion that appellant's emotional condition was aggravated by the November 19, 1992 employment injury by noting:

> "The connection between new trauma and relapse of previous post-traumatic stress disorder is very well documented in the literature as a severe traumatic event leaves the person vulnerable to a relapse with what may appear to not be such drastic events in the future. It is very well known that Vietnam Veterans who apparently had recovered from post-traumatic, post vietnam stress disorder had a relapse during Desert Storm as the news triggered old memories and old conflicts. The same is true for industrial accidents or for civilian victims of crime.
>
> "In the case of [appellant], it is my opinion that being again injured in his neck, shoulder and back, even though the injury was not as serious as the previous one, still became connected to the previous traumas and conflicts due to the association of being again victimized."

By decision dated May 21, 1996, the Office denied appellant's request for a merit review on the basis that the evidence submitted was cumulative and repetitious.[8]

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 May 13, 1997, the Board lacks jurisdiction to review the Office's most recent merit decision dated August 15, 1995. Consequently, the only decision properly before the Board is the Office's May 21, 1996 decision denying appellant's request for reconsideration.

[8] The Office noted that appellant's request for a treadmill was subsequently approved due to appellant's heart condition.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act, the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.[9] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[10] When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.[11]

The Board finds that appellant has submitted new and relevant evidence not previously considered by the Office regarding whether appellant's depression and post-traumatic syndrome were causally related to his accepted employment injury. In his request for reconsideration appellant submitted duplicate reports contained in the record from Drs. Masciale, Roosth, Meadows, Garcia, Jones, Martinez-Quinonez, Estrada and Edwards. Appellant also submitted evidence not previously considered from a November 20, 1995 report by Dr. Meadows, a November 9, 1995 report by Dr. Masciale and an April 10, 1996 report by Dr. Estrada. While the reports of Drs. Meadows and Masciale reiterate their opinions set forth in previous reports, Dr. Estrada's report dated April 10, 1996 is relevant and new evidence. In his April 10, 1996 report, Dr. Estrada provided medical rationale to support his opinion that appellant's post-traumatic stress syndrome and depression were due to his accepted employment injury. Contrary to the Office's determination, Dr. Estrada's report is not repetitive of his May 10, 1994 report as in the May 10, 1994 report, Dr. Estrada did not provide any medical rationale supporting his opinion. Dr. Estrada's April 10, 1996 report is new and relevant evidence, which the Office should have considered in a merit review. Thus, the Office erred in finding that the evidence was insufficient to require merit review as Dr. Estrada's April 10, 1996 report is not repetitive of his prior reports as he provided a medical rationale supporting his opinion that appellant's disability is causally related to his accepted employment injury in his latest report.

[9] 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

[10] 20 C.F.R. § 10.138(b)(2).

[11] *David J.* McDonald, 50 ECAB ____ (Docket No. 97-1144, *issued* December 10, 1998).

The decision of the Office of Workers' Compensation Programs dated May 21, 1996 is hereby set aside and the case remanded for further consideration.[12]

Dated, Washington, D.C.
January 5, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[12] The Board notes that the record contains evidence from two other appellants.