U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BARBARA J. GARDNER-WARDEN and DEPARTMENT OF DEFENSE, DEFENSE SUPPLY CENTER, Richmond, VA

Docket No. 99-1296; Submitted on the Record;
Issued January 31, 2000

DECISION and ORDER

Before DAVID S. GERSON, 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 effective December 18, 1996 on the grounds that she had no disability due to her October 28, 1989 employment injury after that date; (2) whether the Office, in its August 6 and 25, 1998 decisions, abused its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that her timely applications for review did not present new and relevant evidence or argument; and (3) whether the Office, in its February 25, 1999 decision, abused its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation effective December 18, 1996 on the grounds that she had no disability due to her October 28, 1989 employment injury after that date.

On October 28, 1989 appellant, then a 32-year-old sales store clerk, sustained an employment-related low back strain when she slipped on food at work and fell to the ground; the Office paid compensation for periods of disability. By decision dated December 4, 1996, the Office terminated appellant's compensation effective December 18, 1996 on the grounds that she no longer had disability due to her October 28, 1989 employment injury after that date. The Office based its determination on the opinion of Dr. Howard M. Baruch, a Board-certified orthopedic surgeon who served as an impartial medical examiner. By decision dated and finalized November 5, 1997 and decision dated April 7, 1998, the Office denied modification of its December 4, 1996 decision. In July 1998, appellant requested reconsideration of her claim and, by decision dated August 6, 1998, the Office denied her request for merit review on the grounds that her timely application for review did not present new and relevant evidence or argument. In August 1998, appellant requested reconsideration and, by decision dated August 25, 1998, the Office denied her request for merit review on the same grounds. In December 1998, appellant requested reconsideration and, by decision dated February 25, 1999,

the Office denied her request for merit review on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.[1] The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[2]

In the present case, the Office determined that there was a conflict in the medical opinion between Dr. Frank S. Folk, appellant's attending Board-certified surgeon, and the government physician, Dr. Joel Teicher, a Board-certified orthopedic surgeon acting as an Office referral physician, on the issue of whether appellant continued to have residuals of the October 28, 1989 employment injury.[3] In order to resolve the conflict, the Office properly referred appellant, pursuant to section 8123(a) of the Federal Employees' Compensation Act, to Dr. Baruch for an impartial medical examination and an opinion on the matter.[4]

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 resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[5] The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation effective December 18, 1996 in that the opinion of Dr. Baruch was not sufficiently well rationalized to constitute the weight of the medical evidence.

In his report dated June 4, 1996, Dr. Baruch indicated that his examination revealed no objective physical findings. He indicated that appellant exhibited full range of motion of her lumbar spine and noted that, although appellant reported limited range of motion and back pain upon left straight leg raising, she otherwise was able to fully extend her left leg without difficulty. Dr. Baruch diagnosed lumbar spine strain, cervical spine strain, left lower extremity strain and left shoulder strain and stated:

> "These injuries appear to be causally related to the date of injury of October 28, 1989. [Appellant] appears to have reached her maximum medical benefit and does not require any further treatments for the above areas. She does not appear to be disabled at this time. No further treatment would be indicated at

[1] *Charles E. Minniss,* 40 ECAB 708, 716 (1989); *Vivien L. Minor,* 37 ECAB 541, 546 (1986).

[2] *Id.*

[3] In a report dated April 4, 1996, Dr. Folk reported the history of the employment injury, diagnosed lumbar and cervical radiculopathy and indicated that appellant was totally disabled. In contrast, Dr. Teicher indicated in a May 12, 1995 report that appellant did not have any objective residuals of the employment injury.

[4] Section 8123(a) of the Act provides in pertinent part: "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." 5 U.S.C. § 8123(a).

[5] *Jack R. Smith,* 41 ECAB 691, 701 (1990); *James P. Roberts,* 31 ECAB 1010, 1021 (1980).

this time. No further diagnostic testing appears to be necessary at this time. [Appellant] should be able to return to her regular work activities."

Dr. Baruch's report is of insufficient probative value to justify termination of appellant's compensation in that it contains an opinion on causal relationship which is equivocal in nature[6] and it does not provide adequate medical rationale in support of its conclusions on causal relationship.[7] For example, he indicated that appellant continued to have a lumbar spine sprain due to the October 28, 1989 employment injury, but he did not adequately explain how this finding comported with his apparent opinion that she no longer had disability due to this condition.[8] Dr. Baruch's opinion is of limited probative value for the further reason that it is not based on a complete and accurate factual and medical history.[9] He did not provide any notable discussion of appellant's employment injury or her subsequent course of medical treatment. In particular, Dr. Baruch did not provide any discussion of the findings upon diagnostic testing.[10]

By letters dated August 6 and 26, 1996, the Office requested additional clarification of Dr. Baruch's opinion, but he did not respond to either of these requests. In a situation where the Office secures an opinion from an impartial medical examiner for the purpose of resolving a conflict in the medical evidence and the opinion from such examiner requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the examiner for the purpose of correcting the defects in the original opinion.[11] For the reasons discussed above, the opinion of Dr. Baruch is in need of clarification and elaboration. Because the Office did not correct the defects in the original opinion of Dr. Baruch, it did not adequately justify its termination of appellant's compensation effective December 18, 1996.

[6] *See Leonard J. O'Keefe*, 14 ECAB 42, 48 (1962); *James P. Reed*, 9 ECAB 193, 195 (1956) (finding that an opinion which is equivocal is of limited probative value regarding the issue of causal relationship).

[7] *See Leon Harris Ford*, 31 ECAB 514, 518 (1980) (finding that a medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship which is unsupported by medical rationale).

[8] Nor did he explain why he felt that appellant sustained a cervical spine strain, left lower extremity strain and left shoulder strain at work on October 28, 1989. As noted above, appellant's claim was accepted for low back strain.

[9] *See William Nimitz, Jr.*, 30 ECAB 567, 570 (1979) (finding that a medical opinion on causal relationship must be based on a complete and accurate factual and medical history).

[10] Although Dr. Baruch indicated that he reviewed appellant's "charts," his recitation of the factual and medical history appears to have been based on appellant's reporting at the examination.

[11] *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232, 238 (1988); *Harold Travis*, 30 ECAB 1071, 1078 (1979).

For these reasons, the Office did not meet its burden of proof to terminate appellant's compensation effective December 18, 1996 on the grounds that she had no disability due to her October 28, 1989 employment injury after that date.[12]

The decision of the Office of Workers' Compensation Programs dated April 7, 1998 is reversed.

Dated, Washington, D.C.
January 31, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

[12] Given the Board's disposition of the merit issue of the present case, it is not necessary for the Board to address the second and third issues concerning the Office's denials of her requests for merit review.