U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LUISA G. LOZANO and U.S. POSTAL SERVICE,
ST. JAMES STATION, San Jose, CA

Docket No. 98-2074; Submitted on the Record;
Issued July 19, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation benefits on the grounds that she had no residuals causally related to her June 11, 1986 and January 4, 1990 employment injuries; and (2) whether the Office abused its discretion in denying appellant's request for reconsideration.

This is the second appeal in this case. By decision dated September 28, 1989, the Board affirmed Office decisions dated April 21, 1988 and April 10, 1989 in which the Office denied appellant's claim for a recurrence of disability in October 1987 causally related to her June 11, 1986 employment injury.[1]

The Board has duly reviewed the case record in the present appeal and finds that the Office met its burden of proof in terminating appellant's compensation benefits.

It is well established that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability had ceased or that it is no longer related to the employment.[2]

The Board further finds that the Office did not abuse its discretion in denying appellant's request for reconsideration.

Section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office

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[1] Docket No. 89-1217.

[2] *See Alfonso G. Montoya*, 44 ECAB 193, 198 (1992); *Gail D. Painton*, 41 ECAB 492, 498 (1990).

erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.[3] Section 10.138(b)(2) provides that, when an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.[4]

On June 11, 1986 appellant, then a 30-year-old letter carrier, sustained a lumbosacral strain and myofascitis in the performance of duty. On January 4, 1990 appellant sustained a trapezial and thoracic strain and right shoulder bursitis in the performance of duty.

By letter dated July 8, 1997, the Office advised appellant that it proposed to terminate her compensation benefits on the grounds that the weight of the medical evidence established that she had no residuals as a result of her June 11, 1986 or January 4, 1990 employment injuries. By letter dated July 30, 1997, appellant indicated her disagreement with the Office's proposal to terminate her compensation benefits and submitted additional evidence. By decision dated August 8, 1997, the Office terminated appellant's compensation benefits. By letter dated February 25, 1998, appellant requested reconsideration and submitted additional evidence. By decision dated April 24, 1998, the Office denied appellant's request for reconsideration.[5]

In a letter dated April 14, 1997, the Office had referred appellant to Dr. Charles Miller, a Board-certified orthopedic surgeon, for an examination and evaluation as to whether she had any remaining disability or medical condition causally related to her employment injuries.

In a report dated June 10, 1997, Dr. Miller provided a history of appellant's employment-related medical conditions sustained in 1986 and 1990, a review of the medical evidence, and detailed findings on examination. He noted that appellant had severe voluntary guarding throughout the examination, with some amplification, particularly during the examination of the right shoulder, neck and back. Dr. Miller stated that there was no objective evidence of any orthopedic abnormality in appellant's neck, back, or extremities and no objective evidence of disability but that there was evidence of functional overlay, with voluntary guarding and amplification. He stated that he had reviewed appellant's job description and opined that she could perform the position without restrictions or limitations.

The Board finds that the weight of the medical evidence rests with the report of Dr. Miller, a Board-certified orthopedic surgeon, to whom the Office referred appellant, who determined that appellant no longer had any residuals of her employment injuries. The June 10, 1997 report of Dr. Miller is well rationalized and based on a complete and accurate factual and medical history. The Board finds that the Office properly relied on Dr. Miller's report when it terminated appellant's compensation benefits in its August 8, 1997 decision.

[3] 20 C.F.R. § 10.138(b)(1).

[4] 20 C.F.R. § 10.138(b)(2).

[5] The Board notes that the record contains additional evidence which was not before the Office at the time it issued its August 8, 1997 and April 24, 1998 decisions. The Board has no jurisdiction to review this evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952).

In opposition to the Office's proposal to terminate her compensation benefits, appellant submitted a one-page undated report in which Dr. Jorge V. Contreras, appellant's attending Board-certified family practitioner, indicated that appellant continued to have residuals of the her 1986 and 1990 employment injuries. He stated:

> "I have seen [appellant] over the last seven years. I know when she has an exacerbation of her injuries and when she feels fairly well. The injuries are chronic soft tissue injuries. There is really no objective test that can be done to diagnose this condition and certainly someone who examines her one time might think there is nothing wrong, nevertheless [appellant] is suffering from chronic pain and discomfort in her cervical and lumbar spine.... It is true that she has good days and bad days depending on what job she is performing but I do not think her injuries have healed.... As long as minor restrictions are placed on her, she is able to perform her work."

However, this report is of diminished probative value in that it is lacking in sufficient medical rationale to support its conclusions. Dr. Contreras provided no objective findings on examination in support of his opinion that appellant had residuals from her employment injuries and he provided insufficient medical rationale explaining why he believed that appellant's continuing complaints were causally related to her 1986 and 1990 employment injuries. In fact, there is no comprehensive narrative report of record from Dr. Contreras. The medical evidence from Dr. Contreras consists only of form duty status reports which contain no objective findings on examination and no medical rationale regarding causal relationship and the one-page undated report. The reports of Dr. Contreras are not of sufficient weight and rationale to create a conflict in the medical evidence or to overcome the weight of the medical evidence as represented by the report of Dr. Miller.[6]

In support of her February 25, 1998 request for reconsideration of the Office's termination of her compensation benefits, appellant submitted form duty status reports dated August 13, September 11 and October 9, 1997 and January 20, 1998 in which Dr. Jerome A. Chester, an internist, diagnosed a right trapezius and low back strain and provided a list of work restrictions. However, these reports contained no medical rationale addressing the critical issue of causal relationship and, therefore, they do not constitute relevant and pertinent evidence not previously considered by the Office. Thus the Office properly denied appellant's request for further merit review of her case.

[6] 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). A case must be referred to an impartial medical specialist to resolve a conflict in the medical evidence only when there are opposing reports of virtually equal weight and rationale. *William C. Bush*, 40 ECAB 1064, 1975 (1989).

The decisions of the Office of Workers' Compensation Programs dated April 24, 1998 and August 8, 1997 are affirmed.

Dated, Washington, D.C.
July 19, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member