U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLA AKUNNA and U.S. POSTAL SERVICE,
MARKET STATION, Los Angeles, CA

Docket Nos. 99-1414 and 00-252; Submitted on the Record;
Issued May 18, 2001

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits effective June 21, 1997; (2) whether the Office abused its discretion by refusing to reopen appellant's claim for consideration of the merits on August 31 and February 9, 1998; and (3) whether the Office abused its discretion by refusing to reconsider appellant's claim on August 26, 1999 on the grounds that the request was untimely and failed to submit clear evidence of error.

Appellant, a 30-year-old mail carrier filed a notice of traumatic injury on October 25, 1989 alleging on October 24, 1989 she injured her back in the performance of duty. The Office accepted appellant's claim for subluxation at L5-S1; thoracic outlet syndrome and thoracic and lumbosacral radiculopathy. In a letter dated April 23, 1997, the Office proposed to terminate appellant's compensation and medical benefits on the grounds that she had no disability or medical residuals of her accepted conditions. By decisions dated May 27, 1997 and reissued on June 19, 1997, the Office terminated appellant's compensation and medical benefits effective May 21, 1997.

Appellant requested reconsideration of this decision on August 27, 1997, January 6 and March 19, 1998. The Office denied modification of its June 19, 1997 decision on October 6, 1997, January 16 and May 13, 1998 respectively. Appellant requested reconsideration on May 16, 1998, and February 2, 1999 and the Office declined to reopen appellant's claim for review of the merits on August 31, 1998 and February 9, 1999 respectively. She requested reconsideration on July 24, 1999 and the Office declined to consider her request for reconsideration as it was untimely filed and failed to contain clear evidence of error on August 26, 1999.

Appellant filed an appeal with the Board on February 16, 1999 docketed as No. 99-1414. She filed a second appeal with the Board on October 25, 1999 docketed as No. 00-252. The

Board's jurisdiction in this case includes decisions issued by the Office from February 16, 1998 through October 25, 1999.[1]

The Board finds that the Office failed to meet its burden of proof to terminate appellant's compensation benefits effective June 21, 1997.

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 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]

In this case, appellant's attending physician, Dr. P. Perry Wich, a Board-certified neurologist, completed a report on July 12, 1996 and provided appellant's work restrictions due to her accepted employment injuries. He stated that appellant could return to work with a limitation of driving no more than 10 miles to and from work. Dr. Wich repeated these findings on July 26 and September 9, 1996 and explained that driving with a seatbelt for 45 minutes was more tiring than sitting for 45 minutes.

The Office referred appellant to Dr. Ian D. Brodie, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding her restrictions for work. In his March 11, 1996 report, Dr. Brodie diagnosed chronic strain/sprain of the cervical and thoracolumbar spine stated that appellant could work with restrictions including the avoidance of long hours of driving.

The Office requested a supplemental report from Dr. Brodie addressing whether appellant could drive for 45 minutes one way. On August 21, 1996 he responded and stated that appellant should drive for no more than 30 minutes.

The Office found a conflict of medical opinion evidence regarding the amount of time that appellant was capable of commuting to work and referred appellant to Dr. Leslie W. Metcalf, Jr., a Board-certified orthopedic surgeon for an impartial medical examination to resolve the conflict. In his December 23, 1996 report, Dr. Metcalf stated that appellant could not perform the duties of her date-of-injury position and provided restrictions. He noted that appellant could sit for 60 minutes and be driven to work in the vanpool provided by the

[1] 20 C.F.R. § 501.3(d)(2).

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

[3] *Id.*

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

[5] *Id.*

employing establishment. Dr. Metcalf also stated that appellant had no objective findings supporting her continuing disability and medical residuals.

On February 10, 1997 the Office requested that Dr. Metcalf clarify whether he believed that appellant was partially disabled and had medical residuals due to her employment injuries. He responded on March 3, 1997 and stated that appellant had no objective findings of cervical or lumbar strains and that she presented evidence of symptom magnification.

The Office relied on Dr. Metcalf's report to terminate appellant's compensation benefits finding that as the impartial medical examiner his report was entitled to special weight and that this report established that appellant had no objective findings supporting continuing disability or medical residuals due to her accepted employment injuries.[6]

The Board finds that there is an unresolved conflict of medical opinion evidence in the record. Dr. Metcalf was selected as the impartial medical examiner to resolve the limited question of the extent of appellant's driving restrictions. That was the only conflict of medical opinion in the record at the time that he was designated as the impartial medical examiner. Both appellant's attending physician, Dr. Wich, and the Office second opinion physician, Dr. Brodie, agreed that appellant continued to experience disability due to her employment injury and continued to experience medical residuals. As Dr. Metcalf was not an impartial medical examiner on the question of appellant's continuing partial disability for work and continuing residuals due to her accepted employment injuries, his report is not entitled to special weight on these issues.

While Dr. Metcalf provided a detailed report with a history of injury and physical findings as well as medical reasoning in support of his conclusion that appellant's employment-related injuries and residuals had resolved, his report is not sufficient to constitute the weight of the medical evidence. Appellant's attending physician, Dr. Wich provided equally detailed reports, with a proper history of injury and physical findings, reaching the conclusion that appellant was still partially disabled. Therefore, the Board finds that there is an unresolved conflict of medical opinion evidence between appellant's attending physician, Dr. Wich, and the Office's physician, Dr. Metcalf, on the issues of whether appellant had any disability or medical residuals due to her accepted conditions.[7] Due to this unresolved conflict of medical opinion evidence, the Office failed to meet its burden of proof to terminate appellant's compensation benefits.[8]

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[6] In situations were there are 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 on a proper factual background, must be given special weight. *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

[7] The Federal Employees' Compensation Act 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." 5 U.S.C. §§ 8101-8193, 8123(a).

[8] Due to the Board's disposition on this issue, it is not necessary for the Board to address whether the Office abused its discretion by refusing to reopen appellant's claim for consideration of the merits.

The May 13, 1998 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC
May 18, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member