U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MIGUEL NAZARIO-ACOSTA and U.S. POSTAL SERVICE, POST OFFICE, Anchorage, AK

Docket No. 01-177; Submitted on the Record;
Issued September 11, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, BRADLEY T. KNOTT, PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to justify termination of compensation effective November 22, 1999; and (2) whether the Office properly refused to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a).

On January 19, 1999 appellant, then a 49-year-old distribution clerk, fainted from exposure to fumes from a floor sealant. Appellant stopped work and was released to his light-duty position by his physician on February 15, 1999.[1] However, the employing establishment could not accommodate his new light-duty restrictions and appellant did not return to work. The Office accepted appellant's claim for headache and cervical strain. Appellant was paid appropriate compensation.[2]

Dr. Barbara J. Doty, a family practitioner and appellant's attending physician, noted that appellant was totally disabled from February 4 to 16, 1999, but could resume work on February 17, 1999 subject to lifting, standing, bending, pulling and pushing restrictions. She indicated that appellant was a lung cancer survivor with significant respiratory compromise.

In a report dated April 9, 1999, Dr. Doty listed the resolved diagnoses of post-traumatic headache, paracervical strain and syncopal episode. She noted that appellant had no permanent effects of the work injury and had returned to previous limited pulmonary function. Dr. Doty opined that appellant's concurrent disability due to lung cancer and obstructive lung disease was not related to appellant's work injury. She recommended that appellant return to his previous work site, with continued evaluation for his overall lung status and pulmonary capacity.

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[1] At the time of the injury appellant was on light duty due to a nonwork-related lung cancer resection.

[2] On April 7, 1999 appellant filed a claim for a schedule award.

On September 22, 1999 the Office issued a notice of proposed termination of compensation on the grounds that appellant's current disability was not related to the injury sustained on January 19, 1999.

In a letter dated October 18, 1999, appellant indicated that he still experienced head and neck pain unrelated to his cancer.

On November 22, 1999 the Office terminated appellant's compensation on the grounds that the weight of the medical evidence rested with Dr. Doty who opined that appellant returned to his preinjury status and had no continuing disability resulting from his January 19, 1999 employment injury.

By letter dated May 30, 2000, appellant requested reconsideration and submitted a June 29, 1999 letter from Dr. Doty, a January 21, 2000 statement from a coworker and a magnetic resonance imaging (MRI) scan dated March 6, 2000 of the upper left shoulder joint. Dr. Doty noted that appellant was treated for fume inhalation on January 19, 1999 and was cleared to return to light duty on February 17, 1999. She stated that appellant's significant lung compromise was "felt to be preexisting due to his lung resection and subsequent radiation exposure and limited lung capacity prior to the incident that occurred on January 19, 1999." The statement from a coworker dated January 21, 2000, indicated that he saw appellant after the employment incident and appellant was unconscious. He indicated that coworkers threw appellant onto a truck after the incident. The MRI scan noted a history of lung cancer and resection and revealed a deformity of the humeral head consistent with previous trauma; irregularity of the glenoid labrum, especially inferiorly, also most likely post-traumatic.

By decision dated June 22, 2000, the Office denied reconsideration on the grounds that the evidence submitted was cumulative in nature and, therefore, insufficient to warrant review of the prior decision.

The Board finds that the Office has met its burden of proof to terminate benefits effective November 22, 1999.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[3] 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.[4]

In this case, Dr. Doty's February 15, 1999 note indicated that appellant had improved as a result of physical therapy, that his headache had resolved and that he was capable of returning to his previous light-duty position. The report dated April 9, 1999 prepared by Dr. Doty noted that appellant had no permanent effects of the January 19, 1999 injury and had returned to his

[3] *Harold S. McGough*, 36 ECAB 332 (1984).

[4] *Vivian L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

previous limited pulmonary function. Dr. Doty stated that appellant's concurrent disability due to lung cancer was not related to his work injury. She indicated that appellant was able to return to the regular light duties he performed prior to the January 19, 1999 incident.

Following issuance of the Office's notice of proposed termination of compensation, appellant submitted a narrative statement dated October 18, 1999, which indicated that he still experienced head and neck pain unrelated to his cancer. However, appellant's statement is not substantiated by the record; his treating physician found that his work-related injury had resolved and that appellant could return to his previous duties.

As appellant's attending physician, Dr. Doty had early knowledge of the relevant facts and had numerous opportunities to examine appellant and to evaluate the course of his condition. At the time wage-loss benefits were terminated she had clearly opined that appellant could return to his regular light duties. Dr. Doty's opinion, therefore, must be considered reliable. The Board finds that Dr. Doty's opinion is probative on the issue of appellant's ability to work.[5] Because the record contains no medical evidence to the contrary, the Board further finds that Dr. Doty's opinion constitutes the weight of the medical evidence and is sufficient to justify the Office's termination of benefits.[6]

The Board finds that the Office properly denied appellant's request for reconsideration on the merits under 5 U.S.C. § 8128(a).[7]

Under section 8128(a) of the Federal Employees' Compensation Act,[8] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,[9] which provides that a claimant may obtain review of the merits if her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

> "(i) Shows that the Office erroneously applied or interpreted a specific point of law; or
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> "(ii) Advances a relevant legal argument not previously considered by the Office; or
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> "(iii) Constitutes relevant and pertinent new evidence not previously considered by the Office."

[5] *See generally Melvina Jackson,* 38 ECAB 443, 450 (1987) (discussing the factors that bear on the probative value of medical opinions).

[6] The Board may not review new medical evidence submitted after issuance of the Office's December 21, 1998 decision. *See* 20 C.F.R. § 501.2(c).

[7] *See* 20 C.F.R. § 10.606(b)(2)(i-iii).

[8] 5 U.S.C. § 8128(a).

[9] 20 C.F.R. § 10.606(b) (1999).

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[10]

In support of his request for reconsideration, appellant submitted various documents, many of which were duplicative of those in the record, including: the employing establishment letter of termination dated November 12, 1999; a March 3, 1999 letter of contravention from the employing establishment; a statement dated January 21, 2000 from a coworker dated copies of the Office handbook; an employing establishment memorandum dated March 8, 2000 and a narrative statement.

Appellant also submitted a report dated January 13, 1999, emergency room records dated January 19, 1999, a letter dated June 29, 1999 from Dr. Doty and an MRI scan of the upper left shoulder joint. The medical report predated the work-related injury of January 19, 1999 and is not relevant to the issue of the appellant's continued disability. The emergency room records duplicate the information in the records appellant submitted with his claim, which were considered by the Office in its November 22, 1999 decision. The letter from Dr. Doty duplicates of reports previously submitted, specifically her progress notes of January 23 to February 15, 1999. The Board has held that evidence that repeats or duplicates evidence already in the case record has no evidentiary value in considering whether a merit review of the record is proper.[11] Therefore, none of this evidence is sufficient to require the Office to reopen appellant's claim.

The MRI scan noted a shoulder condition, but failed to discuss a causal relationship between this condition and the work-related incident of January 19, 1999. Therefore, this report is of no probative value in determining appellant's continued disability from the accepted cervical strain. Appellant neither showed that the Office erroneously applied or interpreted a point of law or advanced a point of law; fact not previously considered by the Office; nor did she submit relevant and pertinent evidence not previously considered by the Office."[12] Therefore, appellant did not submit relevant evidence not previously considered by the Office.[13]

[10] 20 C.F.R. § 10.608(b).

[11] *Id.*

[12] 20 C.F.R. § 10.606(b) (1999).

[13] With his appeal appellant submitted additional evidence. However, the Board may not consider new evidence on appeal. *See* 20 C.F.R. § 501.2(c).

The June 22, 2000 and November 22, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
September 11, 2001

Michael J. Walsh
Chairman

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member