U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DOROTHY ZEO and DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Holtsville, NY

Docket No. 02-1519; Submitted on the Record;
Issued December 11, 2002

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation and medical benefits effective August 15, 2001 on the grounds that she had no further disability for work or injury residuals requiring further medical treatment; and (2) whether the Office abused it discretion in denying appellant's request for further review of her case on its merits under 5 U.S.C. § 8128(a).

The Office accepted that on April 16, 1982 appellant, then a 40-year-old mail clerk, sustained left shoulder strain and left cervical radiculitis when she picked up a container of mail.[1] She stopped work following the incident and did not return; appellant received appropriate compensation and medical benefits.

Appellant continued to be treated by her attending physician, Dr. Harvey A. Levine, a Board-certified orthopedic surgeon, for neck discomfort with radiation into the left scapula. By report dated December 4, 1998, he reviewed appellant's current complaints, noted cervical examination results,[2] diagnosed left cervical radiculitis causally related to the accident and opined that appellant continued to be disabled and required ongoing symptomatic treatment. On April 6, 1999 Dr. Levine noted that appellant complained of a burning sensation at the base of her neck, which was relieved with massage. On May 25, 1999 he noted that appellant continued to have discomfort in the left side of her neck into her shoulder and occasionally had paresthesia in her left hand as well.

[1] Concurrent disability not due to injury was noted as cervical strain eight years prior to the date of injury.

[2] Foraminal compression tests and Soto-Hall's tests were negative, no atrophy or weakness was found, deep tendon reflexes were equal and symmetrical and sense of touch was normal in the upper extremities. However, the Valsalva test was positive and range of motion was somewhat diminished.

By report dated January 17, 2000, Dr. Levine indicated that appellant remained under his care for cervical radiculitis and that she still complained of left shoulder blade pain and severe headaches with occasional cramping of her left thumb musculature. Dr. Levine noted that upon examination appellant had tenderness about the left suprascapular area with a negative foraminal compression test but with positive Valsalva and Soto-Hall tests. He opined that she remained totally disabled from functioning in any meaningful capacity.

The Office then determined that a second opinion examination was required and on September 11, 2000 it referred appellant, together with a statement of accepted facts, questions to be addressed and the relevant case record, to Dr. Richard S. Goodman, a Board-certified orthopedic surgeon, for a second opinion evaluation.

By report dated September 28, 2000, Dr. Goodman reviewed appellant's factual and medical history, presented her present subjective complaints, reported the negative results of his physical examination and concluded:

> "[Appellant] incurred a sprain of the left shoulder and cervical radiculitis. There are no chronic objective findings. She suffers from no other known medical condition. There are no objective findings. There are no current objective findings related to the event of April 16, 1982. There is no evidence of any preexisting conditions. She has no concurrent condition. [Appellant] has no injury-related disability. She is capable of performing the full duties of a clerk despite her complaints. There are no limitations regarding her job. There is no evidence in this entire medical record of any organic disease related to the event of 1982."

Upon receipt of this report, the Office then determined that a conflict in medical opinion had arisen between appellant's treating physician, Dr. Levine and the second opinion specialist, Dr. Goodman and on January 31, 2001 it referred appellant, together with a statement of accepted facts, questions to be addressed and the relevant case record, to Dr. Raymond P. Koval, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict.

By report dated January 16, 2001, Dr. Levine reiterated appellant's subjective complaints of left shoulder pain into her neck and occasionally into her chest, noted repetitive testing results, opined that appellant continued to "show evidence for a herniated left cervical disc with radiculitis" and opined that she was unable to work in any capacity.

By report dated March 2, 2001, Dr. Koval reviewed appellant's factual and medical history, indicated her current subjective complaints, detailed his examination results and findings, noted the negative computerized tomography (CT) scan results, noted no muscle spasm, crepitation or weakness and indicated that the entire cervical spine was within normal limits. Dr. Koval noted that appellant had full range of left shoulder motion but with complaints of pain, the absence of muscle weakness and no visible atrophy of the left shoulder or crepitation. He indicated that the rest of appellant's left shoulder and dorsal spine examination was negative. Dr. Koval indicated that neurological examination revealed no motor deficits, that appellant's complaints of diminished sensation in a sleeve-like fashion did not follow any

anatomic or dermatome distribution, that Tinel's and Phalen's signs were negative, as were compression tests, that both arms were equal and that the neurological examination was negative. Dr. Koval opined that appellant had degenerative arthritic cervical spinal changes superimposed on her diagnosed left shoulder strain and cervical radiculitis which were consistent with her age, that she had received maximum benefit from any further conservative care and that the examination of her neck and shoulder was essentially negative. He commented that he did not understand why appellant could not return to her usual occupation working eight hours a day without restrictions and he reiterated that he did not feel she needed any further testing or formal treatment and that he found no objective findings to indicate further inability to perform all of her duties.

On July 11, 2001 the Office issued appellant a notice of proposed termination of compensation finding that the weight of the medical evidence of record, which was comprised of Dr. Koval's impartial medical examination report, established that appellant had no further disability for work or injury residuals which required further medical treatment causally related to her 1982 employment injuries. The Office gave appellant 30 days within which to submit further evidence or argument if she disagreed with the proposed action.

By letter dated August 6, 2001, appellant, through her representative, objected to the proposed termination and argued that she remained disabled and unable to perform her date-of-injury duties.

By decision dated August 15, 2001, the Office finalized its proposed termination of compensation finding that the weight of the medical evidence of record established that appellant had no further disability for work or injury residuals, which required further medical treatment causally related to her 1982 employment injuries. The Office found that the well-rationalized report from Dr. Koval resolved the conflict in medical opinion evidence and constituted the weight of the medical evidence of record.

On December 31, 2001 appellant requested reconsideration of the August 15, 2001 decision and in support, she submitted another report from Dr. Levine. By report dated November 12, 2001, he restated his earlier findings, reiterated appellant's complaints of left shoulder pain into her neck and occasionally into her chest, occipital headaches and left arm weakness, noted repetitive testing results, opined that appellant continued to show evidence for a bulging left cervical disc with radiculitis[3] and opined that she was unable to work in any capacity. Dr. Levine further found that appellant had cervical foraminal stenosis due to disc bulges at C3-4, C4-5, C5-6 and C6-7, which were not present prior to the 1982 work injury, despite the preexisting degenerative changes apparent on radiologic studies shortly after the 1982 injury. He did not explain how he, therefore, diagnosed post-traumatic neural foraminal stenosis at these levels, the first evidenced two months post injury, caused by a lifting incident in 1982. Dr. Levine concluded that appellant remained totally disabled due to the effects of the 1982 left shoulder strain injury and cervical radiculitis.

[3] Dr. Levine indicated that appellant's initial diagnosis of left cervical radiculitis was confirmed by x-ray evidence of C5-6 disc degeneration, which, therefore, had to preexist the work injury, contrary to his assertions that she had no complaints referable to her neck, nor degenerative changes until the 1982 injury.

By decision dated March 27, 2002, the Office rejected appellant's reconsideration request finding that the evidence submitted was repetitious, unrationalized and, therefore, insufficient to warrant reopening appellant's case for a further review on its merits. The Office found that Dr. Levine merely repeated his earlier assertions and did not explain how he causally related the osteodegenerative cervical spinal and foraminal changes evidenced in 1983 and 1984 to the 1982 lifting incident and soft tissue muscular strain injury.

The Board finds that the Office properly terminated appellant's compensation and medical benefits effective August 15, 2001 on the grounds that she had no further disability for work or injury residuals requiring further medical treatment

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[4] 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.[5] Further, the right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for wage loss.[6] To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition that require further medical treatment.[7]

In this case, the Office met its burden of proof to terminate both compensation and medical benefits in reliance on the complete and well-rationalized medical report of the impartial medical examiner, Dr. Koval.

In this case, appellant's treating physician, Dr. Levine, continued to provide brief reports noting appellant's continuing subjective complaints, attesting to her ongoing disability and indicating the need for further medical treatment.

The Office second opinion examination, however, Dr. Goodman, found that appellant had no objective evidence of any disability for work or injury residuals requiring further medical treatment.

The Federal Employees' Compensation Act, at 5 U.S.C. § 8123(a), in pertinent part, provides: "If there is a 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."

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

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

[6] *Marlene G. Owens*, 39 ECAB 1320 (1988).

[7] *See Calvin S. Mays*, 39 ECAB 993 (1988); *Patricia Brazzell*, 38 ECAB 299 (1986); *Amy R. Rogers*, 32 ECAB 1429 (1981).

In this case, the Office properly determined that Dr. Levine's reports were in conflict with the second opinion report of Dr. Goodman and it properly referred appellant to an impartial medical examiner to resolve the conflict.

Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.[8]

In this case, Dr. Koval's report was based on a proper factual and medical background, is sufficiently well rationalized incorporating the findings of his physical examination of appellant and, therefore, is entitled to that special weight. According, his report that special weight results in it constituting the weight of the medical opinion evidence and establishing that appellant had no further disability for work or injury residuals requiring further medical treatment, causally related to her 1982 employment injuries. The Office, therefore, in reliance on Dr. Korval's report, met its burden of proof to terminate both wage-loss compensation entitlement and medical benefits.

The Board further finds that the Office did not abuse its discretion by denying appellant's request for a further review of her case on its merits under 5 U.S.C. § 8128(a).

The Federal Register dated November 25, 1998 advised that, effective January 4, 1999, certain changes to 20 C.F.R. Parts 1 to 399 would be implemented. The revised Office procedures pertaining to the requirements for obtaining a review of a case on its merits under 5 U.S.C. § 8128(a), state as follows:

> "(b) [T]he application for reconsideration, including all supporting documents, must:
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> (1) Be submitted in writing;
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> (2) Set forth arguments and contain evidence that either:
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> (i) Shows that the Office erroneously applied or interpreted a specific point of law;
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> (ii) Advances a relevant legal argument not previously considered by the Office; or
>
> (iii) Constitutes relevant and pertinent new 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

[8] *Aubrey Belnavis*, 37 ECAB 206, 212 (1985).

[9] 20 C.F.R. § 10.606 (b)(1),(2).

decision.[10] The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[11] When a claimant fails to meet one of the above-mentioned standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[12]

In support of her December 31, 2001 reconsideration request, appellant submitted a new report from Dr. Levine. The Office then conducted a limited review of this report and determined that and the Board now concurs, this report was repetitious of his previously submitted and considered opinions and was wholly unrationalized and internally contradictory, as it diagnosed post-traumatic neural foraminal stenosis causally related to the 1982 employment muscular strain injury, but then indicated that such degenerative changes were radiologically determined to be present two months post injury, which meant that they had to be preexisting. Dr. Levine merely repeated his conclusion, without medical rationale, that appellant remained totally disabled due to the effects of the 1982 left shoulder strain injury and cervical radiculitis.

As this new report from Dr. Levine was repetitious of his previously submitted and considered reports and was additionally internally inconsistent and unrationalized, the Office found and the Board now agrees, that it does not constitute new and relevant evidence not previously considered and, therefore, does not constitute a basis for reopening appellant's claim for further review on its merits.[13] The Office, therefore, properly denied appellant's application for reopening her case for a further review on its merits and she has not established that the Office abused its discretion by denying her request for review of its August 15, 2001 decision.

[10] 20 C.F.R. § 10.607(a).

[11] *Diane Matchem*, 48 ECAB 532 (1997); *Jeanette Butler*, 47 ECAB 128 (1995); *Mohamed Yunis*, 46 ECAB 827 (1995); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[12] 20 C.F.R. § 10.608(b); s*ee also Mohamed Yunis*, *supra* note 11; *Elizabeth Pinero*, 46 ECAB 123 (1994); *Joseph W. Baxter*, 36 ECAB 228 (1984).

[13] Further, because Dr. Levine was one of the physicians who created the conflict in the medical evidence that Dr. Korval resolved, his repetitive additional report is insufficient to overcome the weight of Dr. Korval's report or to create a new conflict with it. *See Virginia David-Banks*, 44 ECAB 389 (1993); *John M. Tornello*, 35 ECAB 234 (1983).

Consequently, the decisions of the Office of Workers' Compensation Programs dated August 15, 2001 and March 27, 2002 are hereby affirmed.

Dated, Washington, DC
December 11, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member