U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BARBARA R. VIENTE and DEPARTMENT OF DEFENSE, DEFENSE INVESTIGATIVE SERVICE, Long Beach, CA

Docket No. 02-1893; Submitted on the Record;
Issued December 17, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a).

On April 8, 1988 appellant, then a 32-year-old investigator, filed a claim for a traumatic injury to her neck, shoulders, hips and jaw sustained on March 31, 1988 when a truck hit the back of her car.

The Office initially accepted that appellant sustained lumbar, thoracic and cervical spine strains and later accepted that she also sustained temporomandibular joint dysfunction, for which it authorized surgery that was performed on June 21, 1989.

On February 12, 1996 appellant began working as a part-time general office clerk for a private employer. The Office, which had been paying compensation for temporary total disability, reduced appellant's compensation to that of wage-earning capacity based on her actual earnings.

By decision dated February 18, 1998, the Office terminated appellant's compensation, including medical benefits, on the basis that the medical evidence established that she had no disability or medical residuals causally related to her March 31, 1998 employment injury.

By letter dated February 16, 1999, appellant requested reconsideration and submitted additional medical evidence, including reports dated March 13, 1998 and January 15, 1999 from Dr. Franklin Kozin, a Board-certified rheumatologist.

By decision dated May 3, 1999, the Office found that the additional evidence was not sufficient to warrant modification of its prior decision.

By letter dated July 21, 1999, appellant requested reconsideration and submitted additional medical evidence, including a May 18, 1999 report from Dr. Kozin.

By decision dated August 11, 1999, the Office found that the additional evidence was repetitious, cumulative or immaterial and insufficient to warrant review of its prior decisions.

By letter dated October 8, 1999, appellant requested reconsideration and submitted a September 18, 1999 report from Dr. Kozin.

By decision dated December 27, 1999, the Office found that the evidence failed to establish that appellant's fibromyalgia was causally related to her March 31, 1988 employment injury. The Office also found that it had erroneously terminated her entitlement to medical care for her temporomandibular joint dysfunction, but that the evidence did not show disability related to this condition.

By letter dated December 4, 2000, appellant requested reconsideration, contending that the copy of the case record sent by the Office was not complete, in that certain medical reports referred to in the Office's decisions were not contained therein.

By decision dated December 14, 2000, the Office found that appellant's contention was not sufficient to warrant modification of its prior decisions and that the records in question were provided.

By letter dated November 13, 2001, appellant requested reconsideration and submitted an August 29, 2001 report from Dr. Kozin. In this report, Dr. Kozin reviewed and critiqued the report of Dr. Ellen Pichey, who is Board-certified in family practice and in preventive medicine and who reviewed the medical evidence on December 23, 1999 as an Office medical consultant. She then reviewed and commented on the findings of medical reports from 1988 and one from January 19, 1994 and described findings from articles in the medical literature on post-traumatic fibromyalgia and whiplash injuries. Dr. Kozin stated that medical reports from 1988 showed widespread musculoskeletal pain and tenderness immediately after the accident and clearly demonstrated that appellant had a widespread pain syndrome in the months after her motor vehicle accident, that these reports were entirely consistent with a diagnosis of fibromyalgia even in the absence of tender point evaluations and that the fact that tender points were not specifically reported by physicians, did not show they did not exist, as appropriate examinations for these tender points were not performed. Dr. Kozin noted that there was no evidence that symptoms were present prior to the employment injury and that there was no evidence these symptoms resolved or were worsened or maintained by another injury or medical condition. Dr. Kozin stated that the etiology and pathophysiology of many well-established medical conditions was not well understood and concluded that there was "a very high likelihood that the motor vehicle accident caused [appellant's] ongoing pain syndrome," as she was not experiencing widespread pain complaints before this accident and there was no alternative explanation for the pain syndrome and no evidence to support a psychological cause for fibromyalgia.

By decision dated April 16, 2002, the Office found that the additional evidence was of a cumulative nature and insufficient to warrant review of its prior decisions.

The only Office decision before the Board on this appeal is the Office's April 16, 2002 decision finding that appellant's application for review was not sufficient to warrant review of its

prior decision. Since more than one year elapsed between the date of the Office's most recent merit decision on December 14, 2000 and the filing of appellant's appeal on July 9, 2002 the Board lacks jurisdiction to review the merits of appellant's claim.[1]

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a).

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
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> (1) end, decrease, or increase the compensation awarded; or
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> (2) award compensation previously refused or discontinued."

Under 20 C.F.R. § 10.606(b)(2), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law, by advancing a relevant legal argument not previously considered by the Office or by submitting relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements the Office will deny the application for review without reviewing the merits of the claim. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[2]

The August 29, 2001 report from Dr. Kozin that appellant submitted with her November 13, 2001 request for reconsideration was new, but is insufficient to require that the Office reopen the case for further review of the merits of appellant's claim for the reason that it is repetitive of this physician's prior reports. Dr. Kozin had previously reviewed the medical reports from 1988 in a January 15, 1999 report, in which he also stated that fibromyalgia was not a psychological diagnosis. He had noted the absence of symptoms prior to the March 31, 1988 injury, the progression of symptoms after that injury and the absence of a careful tender point analysis in the examinations shortly after this injury in a September 18, 1999 report. In this report, Dr. Kozin also noted that appellant's pain syndrome in 1988 was widespread with multiple areas of tenderness. His conclusion, in his August 29, 2001 report, that appellant's fibromyalgia is causally related to her March 31, 1988 employment injury is a repetition of statements in each of his earlier reports.

The only new material, in Dr. Kozin's August 29, 2001 report, is the citation of additional articles from the medical literature and his criticism of Dr. Pichey's consultative review of the medical evidence. Although Dr. Kozin indicated that these articles from the

[1] 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office's final decision being appealed.

[2] *Eugene F. Butler*, 36 ECAB 393 (1984).

medical literature supported appellant's claim of causal relationship, he failed to offer any medical reasoning explaining how these articles supported that appellant's fibromyalgia was causally related to her employment injury. The Board has held that textual evidence has little probative value in resolving questions unless a physician shows the applicability of the general medical principles discussed in the text to the specific factual situation at issue in the case.[3] Dr. Kozin's criticism of Dr. Pichey's consultative review of the medical evidence did not raise any new points not previously addressed by Dr. Kozin.

The April 16, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
December 17, 2002

Michael J. Walsh
Chairman

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

[3] *Ruby I. Fish*, 46 ECAB 276 (1994).