U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALBERT B. PEEK and U.S. POSTAL SERVICE,
POST OFFICE, Stephensville, TX

Docket No. 00-741; Submitted on the Record;
Issued January 15, 2002

DECISION and ORDER

Before DAVID S. GERSON, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective August 14, 1998.

On December 30, 1985 appellant, then a 40-year-old letter carrier, was involved in a motor vehicle accident in the performance of duty, sustaining injuries to his back and neck. The Office accepted his claim for cervical and right shoulder strains and later a herniated disc at L5-S1.[1] Appellant underwent a laminectomy on October 16, 1987 and a cervical discectomy and fusion during March 1989. He received appropriate compensation and returned to limited duty. Appellant later sustained an additional work injury and also filed for a recurrence of disability. He began a limited-duty position working only four hours a day effective January 7, 1994.

In a February 9, 1994 report, Dr. Shirley A. Molenich, appellant's treating physician and a Board-certified neurologist, noted that she had been seeing appellant in the past for neck and back injuries. Dr. Molenich related that appellant had been involved in a new accident in November 1993, when he had exacerbated his "old problems" and that he was unable to work a full eight-hour day due to complaints of back and neck pain.

On May 31, 1994 the Office issued a decision finding that appellant's part-time, limited-duty carrier position represented his wage-earning capacity.

In a March 23, 1998 duty status report, Dr. Molenich advised that appellant was not physically capable of performing more than four hours of work a day and no more than one hour a day of intermittent lifting up to 20 pounds. She specified that appellant was prohibited from prolonged walking, climbing, kneeling, twisting, pulling, pushing and fine manipulation.

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[1] Appellant had two subsequent work injuries on March 23, 1987 and November 27, 1993 that were accepted by the Office for a low back sprain and a herniated disc at C6-7 respectively. The claims were doubled with the December 30, 1985 claim file under a master file number, A160233817.

In an April 4, 1998 report, Dr. Molenich opined that appellant had cervical and lumbar disc disease with chronic pain in his back and neck. She again stated that appellant was unable to work more than four hours a day.

During March and April 1998, appellant was videotaped at his home doing chores associated with his cattle ranch. The employing establishment was investigating whether appellant had properly reported self-employment income and the level of activities that he was able to participate in on his ranch. The postal inspectors taped appellant over three days, March 27, March 31 and April 10, 1998, then edited the tape to a few hours of viewing.

On April 16, 1998 the Office sent appellant a form requesting detailed information concerning the extent of his involvement in his ranching enterprise. Appellant completed the questionnaire and stated that the only work he did on the ranch was to provide hay, salt and protein in the winter. He calculated that he worked only two hours a week and eight hours a month. Appellant specifically stated that the most amount of time he had spent working on the ranch from March 1 to April 15, 1998 was one and a half hours during which time he "put out hay, salt and protein."

On May 28, 1998 appellant was interviewed and his answers were provided in an investigative memorandum dated June 3, 1998. He was shown a videotape and 35 mm still photographs of him working on his ranch. He was seen stretching wire, lifting rolls of wire and using pliers to splice and tie barbed wire to fence posts. Appellant was also using an ax, hoisting 50-pound bags of emu feed and operating his tractor and "brush hog," cutting large areas of his land. He indicated that he had never informed Dr. Molenich that he performed activities on his farm. When asked if the average time he spent working on the ranch was accurately represented by his answers to the Office questionnaire, he admitted that he probably worked more than he had indicated.

In a report dated June 5, 1998, Dr. Molenich responded to questions posed by the Office. She indicated that the work appellant was described as performing at his ranch was not consistent with his claim of severe disabling back and neck injuries. Dr. Molenich also noted that appellant's activities exceeded the physical limitations listed on the duty status report she completed on March 23, 1998.

In a June 20, 1998 report, Dr. Molenich reiterated that appellant suffered from cervical and lumbar disc disease. She stated as follows:

> "[Appellant] has been working four-hour days at the [employing establishment]. I did receive a video from Don Smiddy, Postal Inspector, showing [him] doing work on his farm. [Appellant] says he has owned his farm since 1982. He had told me he had to hire [someone to get] things done at the farm. [Appellant] says he can squat but has problems picking things up directly from the ground. He says that when he does book work for the farm, his neck bothers him. [Appellant] says he has had to modify his work. The physical activity, however, that was videotaped, was such that I would think he could return to an eight-hour day without restriction or with very limited restrictions.... [Appellant] has had cervical and lumbar [disc] disease and probably does have some pathology from

it, but if he is able to do the work at his farm I would think that he could return to an eight-hour workday."

On July 2, 1998 the Office issued a notice of proposed termination of compensation advising appellant that the weight of the medical evidence established that he was no longer disabled as a result of his work injury.[2]

In a decision dated August 14, 1998, the Office terminated appellant's compensation on the grounds that he was no longer disabled as a result of a work-related condition.

In an August 20, 1998 letter, appellant request a hearing.

In a report dated September 22, 1998, Dr. Molenich indicated that she no longer felt it was appropriate for her to treat appellant. In an October 19, 1998 report, she stated that appellant "probably could go back to regular duty."

Appellant subsequently submitted a February 18, 1999 report from Dr. David Lemper, Board-certified in physical medicine and rehabilitation. He discussed appellant's history of injury, the details of the postal investigation and the findings of Dr. Molenich. Dr. Lemper recommended that appellant gradually return to an eight-hour workday, suggesting that appellant work one month at four hours and then work his way up month by month until he was at an eight-hour day. He further imposed a maximum 50-pound lifting restriction from knee height and a maximum regular lifting restriction of 15 pounds.

In a decision dated September 17, 1999, an Office hearing representative affirmed the Office's August 14, 1998 decision.[3]

The Board finds that the Office properly terminated appellant's compensation effective August 14, 1998.

Once the Office accepts a claim, it has the burden of proof of justifying modification or termination of compensation. After it has been determined that an employee has disability

[2] On July 2, 1998 the employing establishment issued a notice of proposed removal on the grounds that appellant misrepresented his medical condition to gain benefits of limited-duty assignment and workers' compensation benefits. Appellant was terminated effective August 14, 1998. The termination action was reversed by an administrative law judge (ALJ) with the Merit Systems Protection Board on January 7, 1999. The ALJ noted in his decision that he was persuaded by appellant's testimony that when appellant was videotaped it was his day off and it was an isolated incident where his family was in the process of putting in new fencing at the farm, that they were short-handed on the day in question and that he was forced to help out to avoid losing his cattle through gaps in the fencing. It was further noted that the amount of lifting he performed on his farm that was "caught on tape" was no more than he performed at work and consistent with his lifting restrictions. The ALJ concluded that the fact that appellant may have worked for two to three hours on his ranch on his days off did not support a conclusion that he was capable of working an eight-hour day on a daily basis.

[3] Subsequent to the hearing, appellant submitted a copy of a transcript of Dr. Molenich's testimony before the Merit Systems Protection Board. Dr. Molenich testified that appellant did not appear to be physically restricted on the videotape she had seen and that he had misrepresented his condition to her.

causally related to his employment, the Office may not terminate compensation without establishing that the disability has ceased or is no longer related to the employment injury.[4]

In this case, the Office properly relied on the opinion of appellant's treating physician to find that he was capable of working eight hours a day in a suitable position. Dr. Molenich stated in reports dated June 5 and 20, 1998 that, after reviewing videotape of appellant at his ranch during the spring months, it appeared that he was no longer under work restrictions provided in the March 23, 1998 status report. Although appellant contends that Dr. Molenich misunderstood the nature of his involvement with his ranch, he has failed to submit any medical evidence to overcome the work release by his treating physician. Dr. Lemper even agreed that appellant could return to work eight hours a day, gradually, with a 50-pound lifting restriction.

Reading the transcript of the ALJ's hearing shows that Dr. Molenich was not dissuaded from her opinion that appellant could work eight hours a day. Her choice of words, "I would think that he could return to [work] eight hours a day" is not equivocal, since she seemed more chagrinned in her testimony at appellant having "misrepresented" his condition to her. Because Dr. Molenich has approved appellant for a return to work for eight hours a day, the Office met its burden of proof in terminating appellant's compensation.

The September 17, 1999 decision of the Office of Workers' Compensation Program is hereby affirmed.

Dated, Washington, DC
January 15, 2002

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member

[4] *Frank J. Mela, Jr.*, 41 ECAB 115 (1989); *Mary E. Jones*, 40 ECAB 1125 (1989).