U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HELEN E. VELLINGA and DEPARTMENT OF THE ARMY, ARMY CORPS OF ENGINEERS, Anchorage, AK

Docket No. 01-1926; Submitted on the Record;
Issued June 11, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS, MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation effective October 8, 2000 on the grounds that she had no further condition or disability causally related to her accepted employment injury; and (2) whether appellant abandoned her request for a hearing.

On March 10, 1988 appellant, then a 61-year-old biologist, filed a claim for a traumatic injury occurring on March 9, 1988 when she "fell on ice." The Office accepted appellant's claim for acute low back strain, lumbar strain and a permanent aggravation of preexisting degenerative disc disease. Appellant stopped work on March 9, 1988 and did not return. The Office placed appellant on the periodic rolls effective May 28, 1988.[1]

In response to a request from the Office for a current medical opinion, appellant submitted an April 17, 1997 report from Dr. Jay Caldwell, who is Board-certified in family practice.[2] He noted that he had last seen appellant in September 1993. Dr. Caldwell found that appellant had lumbar degenerative disc disease as well as "a chronic pain syndrome of mammoth proportions" and indicated that it was unlikely that she could return to her regular employment.

On September 2, 1999 the Office referred appellant, together with the case record and a statement of accepted facts, to Dr. Alexander C. Miller, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated September 10, 1999, he reviewed the evidence of record, listed detailed findings on physical examination and ordered objective tests. Dr. Miller diagnosed a history consistent with lumbar strain and noted that appellant indicated that a magnetic resonance imaging (MRI) scan showed lumbar spondylosis and mild to moderate stenosis at L3-4. He opined that the "cause of [appellant's] current disability is not readily

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[1] On May 17, 1988 the Office of Personnel Management approved appellant's application for disability retirement.

[2] Dr. Caldwell performed a second opinion evaluation for the Office in 1993.

apparent but it is possibly due to her lumbar strain and permanent aggravation of degenerative disc disease." Dr. Miller further opined that he wished to review the results of scheduled objective tests prior to commenting further on appellant's condition. He stated that it was "doubtful that any objective findings identified on today's examination are related to residuals of the accepted work-related acute low back strain." In an accompanying work capacity evaluation, Dr. Miller found that appellant could perform sedentary employment.

In an addendum dated October 19, 1999, Dr. Miller, after reviewing x-rays and an MRI dated October 5, 1999, diagnosed spondylosis, L3-4 stenosis and L5 spondylolysis without anterolisthesis. He stated: "I suspect [appellant's] current condition is largely due to the natural progression of her lumbar intervertebral disc disease and spondylosis."

In a November 15, 1999 addendum submitted in response to a request for clarification from the Office, Dr. Miller opined that appellant's "condition is solely due to the natural progression of her lumbar intervertebral disc disease and spondylosis. Given the amount of time that has transpired since her lumbar straining injury March 9, 1988, I would not anticipate residuals which relate to this injury."

The Office, by letter dated November 22, 1999, requested that Dr. Miller provide objective findings supporting his conclusion that appellant had no residuals of her employment injury and discuss whether her work injury caused any physical limitations.

In an addendum dated November 30, 1999, Dr. Miller stated:

> "Objective findings, which verify the aggravation of degenerative disc disease is solely due to the natural progression of her lumbar intervertebral disc disease and spondylosis, include palpatory lumbar spine tenderness and limited lumbar spine flexibility, which were present when she was examined on September 10, 1999."

Dr. Miller concluded that he did "not believe [appellant's] current symptoms are related in any way to residuals of the lumbar straining injury of March 9, 1988" and that her employment injury did not "continue to aggravate [her] preexisting degenerative disc disease."

By decision dated April 11, 2000, the Office reduced appellant's compensation based on her actual earnings as an office automation assistant effective January 18, 2000. In a decision dated July 20, 2000, the Office denied merit review of its prior decision.

Upon the request of the Office, Dr. Caldwell reviewed Dr. Miller's reports. He noted that he had not treated appellant since May 1997, but that Dr. Miller's conclusions "seem quite in line with what I was thinking at that time."

On August 24, 2000 the Office informed appellant that it proposed to terminate her compensation benefits on the grounds that the weight of the medical evidence established that she had no further residuals of her accepted employment-related conditions of lumbar strain and aggravation of preexisting degenerative disc disease. In a decision dated October 2, 2000, the Office finalized its termination of appellant's compensation effective October 8, 2000.

In a letter dated October 2, 2000, appellant requested a hearing before an Office hearing representative. By decision dated July 9, 2001, the Office found that appellant had abandoned her request for a hearing.

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits on the grounds that the weight of the medical evidence established that she had no further condition or disability causally related to her March 9, 1988 employment injury.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. The Office may not terminate or modify compensation without establishing that the disabling condition ceased or that it was no longer related to the employment.[3] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[4]

The Board finds that the Office met its burden of proof to terminate appellant's compensation based on its finding that the opinion of the Office referral physician, Dr. Miller, constituted the weight of the medical evidence. In a report dated September 10, 1999, he reviewed the medical evidence of record, performed a physical examination and ordered additional objective tests prior to rendering his conclusion regarding appellant's condition. In a report dated October 19, 1999, Dr. Miller, after reviewing x-rays and an MRI dated October 5, 1999, diagnosed spondylosis, stenosis at L3-4 and spondylolysis at L5. He attributed the diagnosed conditions primarily "to the natural progression of [appellant's] lumbar intervertebral disc disease and spondylosis." Dr. Miller further clarified his opinion regarding the cause of appellant's current condition in an addendum dated November 30, 1999, in which he found that appellant had no residuals of her accepted condition of lumbar strain and that her employment injury did not "continue to aggravate [her] preexisting degenerative disc disease."

The Board has carefully reviewed the opinion of Dr. Miller and finds that it has reliability, probative value and convincing quality with respect to the conclusion reached regarding whether appellant has any residual condition or disability due to her accepted employment injury. Dr. Miller provided a thorough review of the factual and medical background of appellant's claim and accurately summarized the relevant medical evidence. Moreover, he provided a proper analysis of the factual and medical history and findings on examination, including the results of objective testing and reached conclusions regarding appellant's condition, which comported with this analysis.[5]

Additionally, the record contains no contrary evidence supporting a finding that appellant has any further employment-related residuals. In a report dated January 10, 2000, Dr. Caldwell reviewed Dr. Miller's findings. He related that, while he had not treated appellant since May 1997, Dr. Miller's conclusions "were quite in line with what I was thinking at that time."

[3] *David W. Green*, 43 ECAB 883 (1992).

[4] *See Del K. Rykert*, 40 ECAB 284 (1988).

[5] *See Melvina* Jackson, 38 ECAB 443 (1987).

Consequently, the Board finds that the Office met its burden of proof to terminate appellant's compensation effective October 8, 2000 on the grounds that she had no further condition or disability due to her employment injury.

The Board further finds that the Office properly terminated appellant's authorization for medical treatment.

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.[6] 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.[7] The Office met this burden through the report of Dr. Miller, who found that appellant had no residual condition caused by her employment injury.

The Board finds that appellant abandoned her request for a hearing before an Office hearing representative.

The legal authority governing abandonment of hearings rests with the Office's Procedure Manual. Chapter 2.1601.6.e of the procedure manual, dated January 1999, provides as follows:

"e. Abandonment of Hearing Requests.

"(1) A hearing can be considered abandoned only under very limited circumstances. All three of the following conditions must be present: the claimant has not requested a postponement; the claimant has failed to appear at a scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing.

"Under these circumstances, Branch of Hearings and Review will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return the case to the [d]istrict Office. In cases involving prerecoupment hearings, hearings and review will also issue a final decision on the overpayment, based on the available evidence, before returning the case to the [district Office]

"(2) However, in any case where a request for postponement has been received, regardless of any failure to appear for the hearing, hearings and review should advise the claimant that such a request has the effect of converting the format from an oral hearing to a review of the written record.

"This course of action is correct even if [hearings and review] can advise the claimant far enough in advance of the hearing that the request is not approved and

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

[7] *Id*.

that the claimant is, therefore, expected to attend the hearing and the claimant does not attend."[8]

In this case, the Office scheduled an oral hearing before an Office hearing representative at a specific time and place on June 28, 2001. The record shows that the Office mailed a May 29, 2001 notice of the hearing to the claimant at her last known address.

The record shows that appellant neither withdrew her request for a hearing nor requested postponement. The provisions of section 10.622, therefore, do not apply in this case. The record also shows that appellant failed to appear at the scheduled hearing and that she did not provide notification for such failure within 10 days of the scheduled date of the hearing. As this satisfies the criteria for abandonment specified in the Office's Procedure Manual, the Board finds that appellant abandoned her request for a hearing before an Office hearing representative.

On appeal appellant explained that she did not receive the notice of hearing in a timely manner. She argued that the notice of the hearing sent to her from the Office was postdated June 11, 2001 and that, therefore, she did not receive 30 days advance notice of the hearing. The record, however, indicates that the notice of hearing was dated May 29, 2001, 30 days in advance of the hearing scheduled for June 28, 2001. The record contains no evidence establishing that the notice of hearing mailed to appellant was dated June 11, 2001.

Appellant further contended that she did not receive notice of the scheduled hearing because she was traveling by automobile to Utah from Alaska to attend a funeral. She submitted a copy of her husband's sister's obituary in support of her contention. The Board's jurisdiction to decide appeals from final decisions of the Office is limited to reviewing the evidence that was before the Office at the time of its final decision.[9] When the Office issued its decision on July 9, 2001, the record contained no explanation for appellant's failure to appear. The Office's decision was, therefore, proper.

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6.e. (January 1999).

[9] 20 C.F.R. § 501.2(c). Appellant may submit such argument and any supporting evidence in a request for review to the Office pursuant to 5 U.S.C. § 8128.

The decisions of the Office of Workers' Compensation Programs dated July 9, 2001 and October 2, 2000 are hereby affirmed.

Dated, Washington, DC
June 11, 2002

Michael J. Walsh
Chairman

Alec J. Koromilas
Member

Michael E. Groom
Alternate Member