U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VIVA L. ALSTON and DEPARTMENT OF THE AIR FORCE, HILL AIR FORCE BASE, UT

Docket No. 00-2165; Submitted on the Record;
Issued March 22, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for reconsideration.

In the prior appeal of this case,[1] the Board set aside the determination of the Office that appellant's ability to earn wages in her limited-duty position demonstrated no loss of wage-earning capacity. Appellant had developed carpal tunnel syndrome, with permanent impairment to her upper extremities, as a result of her federal employment. She later returned to limited duty without wage loss. On February 7, 1994 the employing establishment offered appellant the permanent position of clerk, GS-303-4. The employing establishment advised, however, that acceptance of this medical placement position might void her eligibility for disability retirement based on her current medical condition, as it would disqualify her for her current position of aircraft mechanical parts worker, WG-8840-07. Appellant declined the offer. Effective May 13, 1994 the employing establishment approved her separation for disability. She was medically disqualified from her position as an aircraft mechanical parts worker; steps were taken to loan her temporarily; it was infeasible to restructure her position to accommodate her medical restrictions; and there were no vacant positions available for which she was qualified at her current grade.

The Board held that the Office should have analyzed appellant's case as one of recurrence, not one of wage-earning capacity. The Board found that the evidence of appellant's separation for disability was "sufficient to establish that appellant has *prima facie* met her burden of proof under *Hedman* to show a change in the nature or extent of her light-duty job requirements."[2] Because the Office had issued no final decision on the issue of recurrence, the

[1] Docket No. 96-670 (issued November 10, 1998).

[2] *See Jackie B. Wilson*, 39 ECAB 915, 919 (1988) (where the record established that light duty was no longer available to the claimant, the Board found that the nature and extent of his light-duty job requirements had changed and that the claimant was totally disabled for the job he held at the time that he was injured). *See generally Terry R. Hedman*, 38 ECAB 222 (1986).

Board set aside the Office's wage-earning capacity decision and remanded the case for such further development as may be necessary and for an appropriate final decision on whether appellant's disability following her separation on May 13, 1994 was causally related to her accepted employment injury of July 2, 1990. The facts of this case as set forth in the Board's prior decision are hereby incorporated by reference.

On remand, the Office requested that appellant submit medical evidence showing a change in the nature and extent of her physical findings as a result of the bilateral carpal tunnel syndrome such that she was unable to continue performing the full duties of the medical placement clerk position. The Office requested that appellant submit, in the alternative, evidence showing a change in the nature and extent of the limited-duty job offer such that the duties were no longer within her limitations for bilateral carpal tunnel syndrome.

On December 16, 1998 appellant responded:

> "This letter is in regards to the back compensation payments that are due me by the ECAB decision dated November 10, 1998.
>
> "The pay rate at the time of separation of employment was $13.40 per hour. The date of separation was May 13, 1994.
>
> "Based on the compensation rate of 75 [percent] I believe the amount of back compensation would total $88,385; with a compensation check every month following of $1,607.00.
>
> "If you do not agree with this amount, please feel free to contact me at the above address."

In a decision dated January 19, 1999, the Office found that appellant was not entitled to benefits for wage loss, as she failed to establish a recurrence of disability at the time of her removal. The Office observed that appellant had failed to provide any medical evidence showing a change in the nature and extent of her physical findings such that she could no longer perform the duties of a clerk, nor had she provided a statement as to how the limited-duty position of clerk changed such that she was no longer physically able to perform those duties.[3] The Office explained that appellant had not shown how the permanent medical placement as a clerk differed from the limited duty she had performed since June 2, 1992. The employing establishment indicated that the medical placement position had the same duties and the employing establishment medical officer cleared appellant on January 26, 1994 for this position. Although appellant contended that her condition continued to deteriorate in her limited-duty position, the Office found that the medical evidence failed to support this.

The Office claims examiner recommended that a notice of proposed termination of medical care be issued, as appellant no longer suffered from residuals of the accepted work-related condition.

[3] *See supra* note 3.

Pursuant to this recommendation, on January 19, 1999 the Office proposed to terminate appellant's medical care on the grounds that the medical evidence failed to establish that she continued to suffer from her employment injury of July 2, 1990. The Office noted that when Dr. Weiss examined appellant on March 29, 1996 he failed to find evidence of bilateral carpal tunnel syndrome.

On March 13, 1999 appellant wrote to the district Office as follows:

> "Please review the enclosed documents, especially the highlighted areas. It is obvious that Barbara McDonald cares little about the authority of the ECAB in this matter.
>
> "Any assistance you might offer would be greatly appreciated."

Appellant attached, among other things, a copy of the January 19, 1999 memorandum (written by supervisory claims examiner Ms. McDonald) that accompanied the Office's January 19, 1999 decision denying her claim of recurrence. Appellant also attached a copy of the Board's November 10, 1998 decision.

In a decision dated April 12, 1999, the Office terminated appellant's medical benefits on the grounds that the medical evidence of record failed to establish that she continued to suffer residuals of the bilateral carpal tunnel syndrome she sustained on July 2, 1990. The Office noted that diagnostic studies showed an improvement in appellant's condition and on March 29, 1996 Dr. Weiss failed to find evidence of bilateral carpal tunnel syndrome.

On February 1, 2000 appellant again wrote to the district Office regarding "[r]equest for [r]econsideration":

> "This letter is in response to the case file sent to me on November 4, 1999. The first time I saw the letter from [the Office] dated August 17, 1999 was when I received my case file.
>
> "On November 10, 1998 [the Board] ruled on my behalf stating that I had proved my Worker's Compensation claim under *Hedman* and that they did not follow proper procedures in handling my claim. I was subsequently terminated on May 13, 1994 for medical reasons.
>
> "In the response to the [m]emorandum from [the Office] dated April 15, 1999[4] under paragraph 6 of the discussion they fail to note that Dr. Provost also stated in his May 27, 1994 report that he 'could not rule out T.O.S.'; copy of which is enclosed. Also, his request for an EMG [electromyogram] [n]erve [c]onduction [s]tudy was denied by [the] Office.

[4] Appellant appears to be referring to the January 19, 1999 memorandum that accompanied the Office's January 19, 1999 decision denying her claim of recurrence.

"In paragraph 8 of the discussion, [the Office] states that my condition improved as I was performing the [c]lerk position. If this was true I would not have received an [i]ncreased [i]mpairment in October, 1993.

"In paragraph 13 of the [d]iscussion, [the Board] ruled that I *prima facie* met my burden of proof under *Hedman* and that my case should have been treated as a recurrence.

"In paragraph 14 of the [d]iscussion, it states that the employing agency medical officer cleared me for the position of [c]lerk on January 26, 1994. This offer of medical placement was not offered through [the Office] as stated in the appeal to [the Board]. The offer from [the Office] was not until September, 1994.

"I expect that the correct actions will be taken by the [r]equest for [r]econsideration."

In a decision dated March 6, 2000, the Office denied a merit review of its April 12, 1999 decision terminating medical benefits for the condition of bilateral carpal tunnel syndrome. The Office found that the evidence submitted in support of appellant's request was repetitious and insufficient under 20 C.F.R. § 10.138(b)(1) to warrant review of its April 12, 1999 decision.[5]

Because appellant mailed her May 23, 2000 appeal more than one year after the Office's January 19, 1999 decision denying her claim of recurrence, and more than one year after the Office's April 12, 1999 decision terminating her medical benefits, the Board has no jurisdiction to review those decisions.[6] The only decision that the Board may review on this appeal is the Office's March 6, 2000 decision denying appellant's request for reconsideration. Therefore, the only issue before the Board is whether the Office abused its discretion in denying that request.

The Board finds that the Office properly denied a merit review of its April 12, 1999 decision terminating appellant's medical benefits for bilateral carpal tunnel syndrome.

Section 10.606(b) of the Code of Federal Regulations[7] provides that an application for reconsideration, including all supporting documents, must be submitted in writing and set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office. The request may be granted if the Office determines that the employee has presented evidence or argument that meets at least one of these standards. If the Office grants reconsideration, the case is reopened and reviewed on its merits. Where the request fails

[5] The Office should have applied 20 C.F.R. § 10.606, which revised the standards of review in section 10.138(b)(1) and which became effective January 4, 1999.

[6] 20 C.F.R. § 501.3(d) (time for filing); *see id*. at § 501.10(d)(2) (computation of time).

[7] *Id*. at § 10.606(b).

to meet at least one of the standards described, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[8]

Appellant's February 1, 2000 request for reconsideration meets none of the standards for obtaining a merit review of the Office's April 12, 1999 decision terminating medical benefits for the accepted condition of bilateral carpal tunnel syndrome. While appellant is free to establish that she has an employment-related thoracic outlet syndrome, evidence pertaining to thoracic outlet syndrome is immaterial to the termination of her medical benefits for bilateral carpal tunnel syndrome. As the Office properly acted within its discretion in denying a merit review of its April 12, 1999 decision, the Board will affirm the Office's March 6, 2000 decision with respect to this issue.

The Board also finds, however, that the Office abused its discretion in denying a merit review of appellant's claim of recurrence.

Appellant first requested reconsideration of the Office's January 19, 1999 decision on March 13, 1999, when she wrote to the district Office, explicitly requested review and identified the decision she wished the Office to reconsider by attaching the memorandum that accompanied the Office's January 19, 1999 decision. Further, to show why the Office's January 19, 1999 decision should be changed, appellant attached a copy of the Board's November 10, 1998 decision, which found that the evidence of appellant's separation for disability was sufficient to establish that she had *prima facie* met her burden of proof under *Hedman* to show a change in the nature or extent of her light-duty job requirements. Though she did not use the word "reconsideration," the Board finds that appellant's March 13, 1999 letter constitutes a timely request for reconsideration of the Office's January 19, 1999 decision denying her claim of recurrence.[9]

The Office delayed acting on appellant's March 13, 1999 request for reconsideration. On February 1, 2000 appellant repeated her request. Though she also addressed the termination of her medical benefits, she made clear that she still disagreed with the Office's January 19, 1999 decision denying her claim for recurrence. She argued that on November 10, 1998 the Board ruled in her behalf, that she had *prima facie* met her burden of proof under *Hedman* to establish a recurrence of disability subsequent to her separation from employment on May 13, 1994 and that the Office had not followed proper procedures in handling her claim. The Office, having now received correspondence mentioning "reconsideration," issued a decision on March 6, 2000 denying review. The Office erroneously regarded appellant's February 1, 2000 request as pertaining only to the April 12, 1999 termination of medical benefits. By denying the whole of that request, the Office effectively denied appellant's timely request for reconsideration of the

[8] *Id*. at § 10.608.

[9] *See Vicente P. Taimanglo*, 45 ECAB 504 (1994) (letter identifying the Office decision, indicating that additional medical evidence had been submitted and stating that the claimant was "waiting for some form of response" constituted a request for the Office to reconsider the decision identified based on the new medical evidence submitted); *Richard J. Chabot*, 43 ECAB 357 (1991) (context and circumstances made clear claimant was attempting to overturn the Office's decision) (Chairman Walsh dissenting on grounds of timeliness).

Office's January 19, 1999 decision and did so without discussing the evidence or stating the basis for the decision.[10] This constitutes an abuse of discretion.

Moreover, the Office's delay in acting on appellant's March 13, 1999 request for reconsideration jeopardized her right to appeal the merits of the Office's January 19, 1999 decision to this Board,[11] which also constitutes an abuse of discretion. The remedy in such cases is for the Board to remand the case to the Office for a merit decision in order to protect the claimant's appeal rights.[12]

The Board will therefore reverse Office's March 6, 2000 decision in part and remand the case for a merit review of appellant's claim of recurrence, including the evidence and argument submitted in conjunction with appellant's requests and all other evidence and argument received by the Office in the interim.[13] After such further development as may be necessary, the Office shall issue an appropriate final decision on the merits of appellant's claim of recurrence.

[10] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.7.b(1), (June 1997) (if the evidence submitted is not sufficient to require a merit review, the senior claims examiner should prepare a notice of decision or memorandum to the Director and decision … which discusses the evidence submitted and explicitly states the basis for the finding of insufficiency).

[11] *See* text accompanying note 8, *supra*.

[12] *Tony J. Fosko*, 35 ECAB 644, 648 (1984) (noting the Board's action on the prior appeal); *Joseph L. Cabral*, 44 ECAB 152 (1992) (Office delayed more than 10 months in issuing a nonmerit decision); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.9, (June 1997) (when a reconsideration decision is delayed beyond 90 days and the delay jeopardizes the claimant's right to review of the merits of the case by the Board, the Office should conduct a merit review).

[13] *Anthony A. Degenaro*, 44 ECAB 230, 239 (1992) (Alternate Member Thomas, concurring).

The March 6, 2000 decision of the Office of Workers' Compensation Programs is affirmed in part and reversed in part. The case is remanded for further action consistent with this opinion.

Dated, Washington, DC
March 22, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member