U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN H. DURST and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Bonham, TX

Docket No. 00-2391; Submitted on the Record;
Issued March 6, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was insufficient to warrant merit review of the claim.

Appellant, then a 59-year-old chief dentist, filed a claim on October 30, 1993 alleging that he sustained an emotional condition causally related to his employment factors. The Office accepted the claim for an adjustment disorder with mixed features and he was placed on the automatic rolls for temporary total disability.

In a report dated May 7, 1998, Dr. Ricky A. McCorkle, a second opinion Board-certified psychiatrist, concluded that appellant was capable of working a light-duty position. Dr. McCorkle noted the medical evidence of record supported that appellant suffered from a disabling emotional condition. Regarding appellant's work capability, he noted that appellant was capable of working light duty provided that it was not at the employing establishment. In an attached work restriction form dated May 25, 1998, Dr. McCorkle concluded that appellant was capable of working possibly four hours per day and that he was incapable of performing his usual job. He also noted that appellant had "very limited stress tolerance specific to his usual employment."

On October 13, 1998 the employing establishment offered appellant the position of part-time staff dentist working four hours per day at the employing establishment. The job offer noted no physical restrictions and the hours as 8:00 a.m. to 12:00 p.m.

On October 16, 1998 the Office requested Dr. McCorkle to review the proposed job offer. After reviewing the proposed job offer, he opined that appellant was not

capable of performing the job and noted October 23, 1998 as the date of disapproval on the Office form.[1] In an attached letter, Dr. McCorkle noted:

> "The job offered, with limited clinical responsibilities and no administrative duties appears reasonable although I anticipate it, too, will be rejected. [Appellant] reported that he appears incapacitated by just pulling into the parking lot at the employing establishment and expressed fear that returning to work there would kill him. Further, the opinions of Dr[s]. Das, Caldwell, Korenman, Peniston and Slotnik that he was disabled due to work-related stress have been very reinforcing of [appellant]'s self-fulfilling prophesy. As a practical matter, there appears to be no way [appellant] can or will return to a job he considers to be the cause of his disability."

By letters dated October 20 and November 1, 1998, appellant rejected the job offer.

By letter dated October 27, 1998, the Office notified appellant that it had reviewed the part-time staff dentist offer and found it suitable with his work capabilities. Appellant was advised that he had 30 days in which to accept the job offer or provide reasons for refusing it. He was informed that failure to accept the position could result in the termination of his compensation benefits.

By letter dated November 27, 1998, the Office advised appellant that it found his reasons for refusing the job to be unacceptable. Appellant was given 15 days to accept the job offer. In an undated letter received on December 10, 1998, he declined the position of staff dentist.

By decision dated December 15, 1998, the Office terminated appellant's compensation benefits effective January 3, 1999 for failing to accept suitable employment pursuant to section 8106(c)(2). The Office found that the weight of the evidence rested with Dr. McCorkle and that "Dr. Froelich's failure to respond is construed by this office as agreeing to the report by Dr. McCorkle."

In a letter dated January 22, 1999, appellant requested an oral hearing, which the Office denied as untimely by letter decision dated February 19, 1999.

In a letter dated February 19, 1999, Dr. J.E. Froelich, III, an attending physician, noted that he did "not remember receiving any communication from the department which contained a letter or report from Dr. McCorkle." Dr. Froelich noted that someone had dropped off a copy of the proposed job offer without any instructions except that they required the physician's signature. He further stated that he did not see the papers until it was too late to provide his opinion and that his lack of response did not indicate any type of agreement.

[1] The Board notes that this form was submitted with appellant's reconsideration request. Appellant noted in a letter dated January 7, 2000 that this form was not in the file and requested that he send a copy.

In a letter dated March 3, 1999, appellant filed an appeal with the Employees' Compensation Appeals Board which was subsequently dismissed at appellant's request.[2]

In letters dated January 9 and March 3, 2000, appellant requested reconsideration alleging that the Office incorrectly terminated his benefits based upon its erroneous finding regarding Dr. McCorkle's opinion. He contended that the Office had made its decision when a critical document had been missing from the file. The crucial evidence was Dr. McCorkle noting on an Office form that he had not approved the offered job and appellant submitted a copy of this document to support his contention that the offered position was not suitable.[3]

By decision dated April 21, 2000, the Office denied appellant's request for merit review as he failed to submit new and relevant evidence or any new legal arguments.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[4] As appellant filed his appeal with the Board on July 14, 2000 the only decision properly before the Board is the Office's April 21, 2000 decision denying appellant's request for a review of the merits of the Office's December 15, 1998 decision.

The Board has reviewed the record and finds that the Office improperly denied appellant's request for a merit review.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[5] the Office's regulations provide that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.[6] Section 10.608(b) states that any application for review that does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.[7]

In the January 9 and March 23, 2000 reconsideration requests, appellant alleged that the Office committed a legal error in the termination of benefits under section 8106(c) when stating that Dr. McCorkle found him capable of performing the offered job when in fact the physician found the job unsuitable.[8] He also submitted a letter from Dr. Froelich disagreeing with the

[2] Docket No. 99-1458 (issued August 24, 1999).

[3] Dr. McCorkle on the form noted to see the attached letter which was in the record.

[4] 20 C.F.R. §§ 501.2(c); 501.3(d)(2).

[5] 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application)."

[6] 20 C.F.R. § 10.606(b)(2).

[7] 20 C.F.R. § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

[8] Appellant noted that his license had expired so that it would have been illegal for him to practice dentistry.

Office's construing his lack of response as agreement with Dr. McCorkle when the physician had not been informed what the papers were, that they were time sensitive or had any follow-up telephone calls.

In the instant case, appellant's primary legal argument is that the Office incorrectly terminated his compensation benefits based upon Dr. McCorkle's opinion. A review of the record shows that Dr. McCorkle found that the offered position was not suitable and noted his disapproval of the position. As the Office based its determination of suitability on Dr. McCorkle's opinion, appellant has advanced a relevant legal argument not previously considered by the Office, especially as the Office had not explained or clarified its suitability finding in light of the apparent discrepancy in Dr. McCorkle's opinion. Thus, the Office erred in failing to reopen the case for merit review and the case must be remanded for the Office to issue an appropriate merit decision.

The decision of the Office of Workers' Compensation Programs dated April 21, 2000 is set aside and the case remanded for action consistent with this decision of the Board.

Dated, Washington, DC
March 6, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member