U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANN BUCKMASTER and THE FEDERAL JUDICIARY,
U.S. DISTRICT COURT, Washington, DC

Docket No. 00-2480; Submitted on the Record;
Issued March 15, 2002

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant was entitled to augmented compensation after her dependent child became 18 years of age.

On August 23, 1976 appellant, then a 31-year-old legal secretary, sustained an employment-related lumbosacral strain. The accepted condition was later expanded to include compression fracture of T8 and permanent aggravation of spondylolisthesis. She resigned in December 1976 and has not returned. Appellant subsequently sought compensation under the Federal Employees' Compensation Act and was placed on the periodic rolls in 1982 at the augmented rate.[1]

By letters dated March 31, May 24 and July 9, 1999, the Office of Workers' Compensation Programs informed appellant that she needed to submit a medical report indicating that her daughter, Carol A. Buckmaster, was totally disabled and unable to provide care for herself. Appellant was warned that her compensation could be suspended if she did not furnish the requested information.

In response appellant submitted treatment notes regarding her daughter Carol dated November 30, 1998, January 26, February 23 and March 23, 1999 from Dr. Michael Danzig, an osteopathic physician. He diagnosed, *inter alia*, chronic low back pain, herniated nucleus pulposus at L4-5 with radiculitis of the legs, colitis, degenerative joint disease and cephalgia. Dr. Danzig noted that Carol was under a lot of stress because her daughter, Nicole, had undergone a kidney transplant. Appellant also submitted an Office letter dated October 12, 1989 that acknowledged that Carol was "permanently disabled and incapable of self-support" due to a

[1] The record indicates that appellant's case file was reconstructed in 1985. In an Office Form EN1032 dated March 12, 1986, appellant indicated that she was married and had a dependent daughter, Carol Buckmaster, who was born on November 16, 1964 and was disabled. In subsequent forms EN1032 she continued to indicate that her daughter Carol was a dependent. By letter dated March 26, 1986, appellant indicated that Carol had been injured in a motor vehicle accident in 1979 and suffered severe closed-head injuries.

1979 car accident. Appellant further submitted a decision issued by the Social Security Administration (SSA) dated September 28, 1988, which found Carol to be totally disabled. In that decision, the administrative law judge found that, considering all the medical evidence of record, appellant's daughter did not have the ability to perform sedentary work. He, however, recommended that she be reevaluated in one year. Also submitted were notices dated November 23, 1987 and November 27, 1989 which indicated that Carol was then receiving supplemental security income (SSI).[2]

In a decision dated August 17, 1999, the Office informed appellant that her compensation was being reduced, effective August 15, 1999, because she failed to submit sufficient medical evidence to support her claim that her 35-year-old daughter, Carol was totally disabled and unable to provide for herself. On September 1, 1999 appellant, through her attorney, requested a hearing and submitted additional evidence regarding her daughter's condition. This included a report dated August 23, 1996 from Dr. Shoemaker, who examined Carol for the SSA and a November 18, 1999 report from Dr. Danzig.

At the hearing held on March 1, 2000, appellant testified that her daughter, who had suffered a closed-head injury, was then 35 years old and lived with her. She further testified regarding her daughter's disability and that she received SSI and Medicaid. In a decision dated May 22, 2000 and finalized May 24, 2000, an Office hearing representative affirmed the prior decision. The instant appeal follows.

The Board finds that this case is not in posture for decision.

Section 8110(a)(3)(B) of the Federal Employees' Compensation Act[3] which provides for augmented compensation defines a dependent, in pertinent part, as an unmarried child, while living with the employee or receiving regular contributions from the employee, who is "over 18 years of age and incapable of self-support because of physical or mental disability."[4] The employee may establish that his or her child, who has turned 18 years of age, is incapable of self-support by submitting a medical report from the child's physician describing the mental or physical disability which caused the child's incapacity for self-support.[5]

Section 10.537 of the implementing regulations provides that at least twice each year, the Office will ask an employee who receives compensation based on a child's physical or mental

[2] Appellant also submitted a discharge summary from her daughter's initial hospitalization in 1979, following the motor vehicle accident and treatment notes from Dr. H.P. Hogshead, which dated from 1980 to 1984. These, however, are irrelevant to Carol's condition on August 15, 1999, the date the Office reduced appellant's compensation. The Board, however, notes that, in his August 23, 1996 report, Dr. James R. Shoemaker, an osteopathic physician, diagnosed status post closed-head injury with secondary left central facial weakness and right upper extremity motor weakness, scoliosis of the thoracic spine with convexity to the right, cervical sprain/strain, possible old compressive changes at C7, moderate osteoarthritis at C5, status post fracture of the proximal radius and status post fracture of the right third metacarpal.

[3] 5 U.S.C. §§ 8101-8193.

[4] 5 U.S.C. § 8110(a)(3)(B).

[5] *Teresa B. Tencati*, 21 ECAB 398, 402 (1970).

inability to support himself or herself to submit a medical report verifying that the child's medical condition persists and that it continues to preclude self-support. If the employee fails to submit proof within 30 days of the date of the request, the Office will suspend the employee's right to compensation until the requested information is received. At that time the Office will reinstate compensation retroactive to the date of suspension, provided the employee is entitled to such compensation.[6]

Office procedures provide that claims made for children over 18 who are physically or mentally incapable of self-support, must be investigated regarding the extent and expected duration of the illness involved. A child is deemed incapable of self-support if his or her physical or mental condition renders him or her unable to obtain and retain a job, or engage in self-employment that would provide a sustained living wage. This determination must be based on medical evidence. When medical evidence demonstrates incapacity for self-support, this determination will stand unless refuted by the sustained work performance. Office procedures further state that a medical report covering the child's past and present condition must be submitted and referred to the Office medical adviser to determine whether it establishes incapacity for self-support. A physician's opinion must be based on sufficient findings and rationale to establish unemployability.[7]

In the instant case, the Board finds that the evidence submitted by appellant regarding her daughter's disability is sufficient to require further development by the Office. The record indicates that Dr. Danzig's November 18, 1999 report is supportive of appellant's claim that her daughter Carol continues to be incapable of self-support because of physical disability. In that report, Dr. Danzig indicated that he had treated Carol for over 10 years. He noted that Carol and her mother had to care for Carol's daughter Nicole, who had undergone a kidney transplant. Dr. Danzig advised that Carol had "persistent and worsening medical problems" with disc disease of the lumbosacral spine and chronic low back pain, cachexia, irritable bowel syndrome, anxiety, reflux, gastritis, peptic ulcer disease, failure to thrive, aphthous ulcers of the mouth, persistent cervical and lumbar myositis, stress disorder and leukopenia. He concluded that Carol was unable to care for herself and could not work due to her physical and mental disabilities.

While Dr. Danzig's report is not sufficiently detailed to establish that Carol continues to be incapable of self-support, it is sufficient to require further development of the record.[8] Furthermore, Office procedures state that a medical report regarding the dependent child's condition must be referred to the Office medical adviser to determine the child's incapacity for

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[6] 20 C.F.R. § 10.537 (1999).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Early Management of Disability Claims*, Chapter 2.0811.10c (July 1995).

[8] *See John J. Carlone*, 41 ECAB 354 (1989). The Board notes that the case record does not contain a medical opinion contrary to appellant's claim in this matter and further notes that the Office did not seek advice from an Office medical adviser or refer the case for a second opinion evaluation regarding Carol's condition.

self-support.[9] It is well established that proceedings under the Act[10] are not adversarial in nature[11] and while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.[12] Only in rare instances where the evidence indicates that no additional information could possibly overcome one or more defects in the claim is it proper for the Office to deny a case without further development.[13] The case will, therefore, be remanded to the Office for further development regarding whether appellant is entitled to augmented compensation based on her daughter Carol's continued disability.[14] After such further development as is deemed necessary, the Office shall issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs dated May 22, 2000 and finalized May 24, 2000 is hereby set aside and the case is remanded to the Office for proceedings consistent with this opinion.

Dated, Washington, DC
March 15, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

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[9] *Supra* note 7.

[10] 5 U.S.C. §§ 8101-8193.

[11] *See, e.g., Walter A. Fundinger, Jr.*, 37 ECAB 200 (1985).

[12] *See Dorothy L. Sidwell*, 36 ECAB 699 (1985).

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2 800.5c (April 1993).

[14] *See generally Patricia A. Long*, 53 ECAB ____ (Docket No. 00-1164, issued October 29, 2001).