U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ARTHUR A. AYALA and DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, 29 Palms, CA

Docket No. 02-1858; Submitted on the Record;
Issued April 29, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO, DAVID S. GERSON

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits effective August 13, 2000 on the grounds that he had no further residual condition or disability after that date; (2) whether the Office properly terminated appellant's authorization for medical treatment; (3) whether appellant has established that he had any continuing disability after August 13, 2000; (4) whether appellant received an overpayment of compensation in the amount of $5,229.00 for the period August 13 through November 4, 2000; (5) whether the Office properly found that appellant was at fault in the creation of the overpayment; and (6) whether the Office properly denied appellant's request for reconsideration under 5 U.S.C. § 8128.

This case is before the Board for the second time. In the first appeal, the Board reversed a January 7, 1994 Office decision after finding that the Office did not meet its burden of proof to establish that appellant had the wage-earning capacity to work as a bookkeeper.[1] The findings of fact and conclusions of law from the prior decision are hereby incorporated by reference.

On July 5, 2000 the Office informed appellant that it proposed to terminate his compensation on the grounds that the evidence established that he had no further residuals of his September 26, 1988 employment injury of lumbosacral strain.

By decision dated August 10, 2000, the Office terminated appellant's compensation effective August 13, 2000. The Office found that the weight of the medical evidence, as represented by Dr. Glenn D. Cunningham, a Board-certified orthopedic surgeon, established that appellant had no further employment-related disability.

In a letter dated August 24, 2000, appellant requested a hearing on his claim.

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[1] *Arthur A. Ayala*, Docket No. 94-1699 (issued June 3, 1996).

By letter dated January 24, 2001, the Office informed appellant of its preliminary determination that he had received an overpayment of compensation in the amount of $5,229.00 for the period August 13 through November 4, 2000 because he continued to receive compensation benefits after his benefits were terminated August 13, 2000. The Office further notified appellant of its preliminary finding that he was at fault in the creation of the overpayment.

At the hearing, held on January 30, 2001, appellant requested that the hearing representative address the preliminary finding that he had received an overpayment of compensation as well as the Office's termination of benefits.

By decision dated April 10, 2001, the hearing representative affirmed the Office's August 10, 2000 termination of benefits. The hearing representative further found that appellant was at fault in the creation of an overpayment in the amount of $5,229.00 because he received compensation to which he was not entitled for the period August 13 through November 4, 2000.

In a letter dated June 8, 2001, appellant requested reconsideration of his claim. By decision dated July 11, 2001, the Office denied modification of its prior decision.

Appellant again requested reconsideration on January 14, 2001. In a decision dated February 1, 2002, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was immaterial and, therefore, insufficient to warrant review of the prior merit decision.

The Board finds that the Office met its burden of proof to terminate appellant's compensation effective August 10, 2000.

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.[2] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[3]

The Office based its termination of appellant's compensation on the November 9, 1999 report from Dr. Cunningham, a Board-certified orthopedic surgeon and his attending physician. In his initial evaluation of appellant on July 27, 1999, Dr. Cunningham discussed appellant's history of a September 26, 1988 employment injury and listed findings on examination. He diagnosed spinal stenosis and recommended a magnetic resonance imaging (MRI) study.

In a report dated September 7, 1999, Dr. Cunningham diagnosed foramina stenosis on the right at L4-5 and left at L3-4. He noted that an MRI showed a moderate bulge at L3-4 with foramina narrowing on the left and a moderate L4-5 bulge on the right with "mild foramina narrowing." He opined that appellant should remain off work. In a report dated October 5,

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

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

1999, Dr. Cunningham diagnosed resolving low back pain and opined that appellant could resume work with restrictions on heavy lifting on October 16, 1999.

In a report dated November 9, 1999, Dr. Cunningham listed findings on examination and opined that appellant's back pain had resolved and found that he could return to work without restrictions on that date.

As appellant's attending physician, Dr. Cunningham had a thorough knowledge of appellant's condition. He obtained objective studies of appellant's lumbar spine and examined him numerous times. Dr. Cuningham's opinion establishes that appellant could resume work without restrictions beginning August 13, 2000 and is sufficient to justify the Office's termination of benefits.

The remaining evidence submitted by appellant prior to the Office's termination of his benefits is insufficient to show that he had further employment-related disability. In a form report dated July 24, 1998, Dr. Caroline R. Moore diagnosed recurrent low back pain caused by appellant "hoeing several hours today." As his report predates Dr. Cunningham's November 9, 1999 finding that appellant could return to work without limitations, it is of little probative value. Further, Dr. Moore attributed appellant's condition to "hoeing" rather than his employment-related lumbosacral strain.

In an emergency room report dated June 7, 2000, Dr. Daniel Injo, who is Board-certified in emergency medicine, noted appellant's complaints of "pain in the lower back since earlier today while cleaning an old shed." He diagnosed a back sprain. Dr. Injo did not find appellant had any disability due to his employment injury but instead noted his complaints of pain after "cleaning an old shed." The Office, therefore, properly found that the weight of the evidence, as represented by the opinion of Dr. Cunningham, established that appellant could return to work without restrictions on August 13, 2000.

The Board finds that the Office did not meet its burden of proof to terminate appellant's entitlement to medical benefits.

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.[4] 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.[5] In this case, Dr. Cunningham did not address the issue of whether appellant required continuing medical treatment due to his employment injury; therefore, the Office did not meet its burden of proof to terminate authorization for medical treatment.

The Board further finds that appellant has not established that he had any continuing disability after August 13, 2000.

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

[5] *Id*.

Given that the Board has found that the Office properly relied upon the opinion of Dr. Cunningham, appellant's attending physician, in terminating compensation, the burden of proof shifts to appellant to establish that he remains entitled to compensation after that date.[6] To establish causal relationship between the claimed disability and the employment injury, appellant must submit rationalized medical opinion evidence based on a complete factual and medical background supporting such a causal relationship.[7]

Subsequent to the Office's termination of compensation, appellant submitted x-ray and MRI reports and an August 30, 2000 report from a nurse practitioner. The results of objective tests are of little probative value to the relevant issue of whether a physician has found appellant unable to work after August 13, 2000 as a result of his accepted employment injury. Regarding the August 30, 2000 report, a nurse is not considered a physician under the Federal Employees' Compensation Act and, therefore, this report is of no probative value.[8]

Accordingly, appellant has not met his burden of proof to establish that he had any disability after August 13, 2000 due to his accepted employment injury.

The Board finds that appellant received an overpayment of compensation in the amount of $5,229.00 for the period August 13 through November 4, 2000 because he continued to receive compensation after his benefits were terminated on August 13, 2000.

The record indicates that from August 13 through November 4, 2000 the Office paid appellant compensation in the amount of $5,229.00. Although the Office properly terminated appellant's compensation effective August 13, 2000, it continued to pay compensation until November 4, 2000. Accordingly, the Board finds that appellant received an overpayment of compensation in the amount of $5,229.00.

The Board finds that appellant was not without fault in the creation of the overpayment.

Section 8129 of the Act provides that an overpayment of compensation shall be recovered by the Office unless "incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of [the Act] or would be

[6] *George Servetas*, 43 ECAB 424 (1992).

[7] *John M. Tornello*, 35 ECAB 234 (1983)

[8] A "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by state law and chiropractors only to the extent that their reimbursable services are limited to treatment of a subluxation as demonstrated by x-ray to exist. 5 U.S.C. § 8101(2). Lay individuals such as physician's assistants, nurse practitioners and social workers are not competent to render a medical opinion; *see Robert J. Krstyen*, 44 ECAB 227 (1992).

against equity and good conscience."[9] Thus, the Office may not waive the overpayment of compensation unless appellant was without fault.[10]

In determining whether an individual is with fault, section 10.433 of the Office's regulations provides in relevant part:

> "A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:
>
> > (1) Made an incorrect statement as to a material fact, which he or she knew or should have known to be incorrect;
> >
> > (2) Failed to provide information which he or she knew or should have known to be material; or
> >
> > (3) Accepted a payment, which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual.)"

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment. In order for the Office to establish that appellant was with fault in creating the overpayment of compensation, the Office must show that, at the time appellant received the compensation checks in question, he knew or should have known that the payment was incorrect.[11] In this case, the Office's August 10, 2000 decision put appellant on notice that he was not longer entitled to receive compensation benefits after August 13, 2000. The cover letter accompanying the August 10, 2000 termination decision specifically stated, "Any compensation payment received after the indicated termination date must be returned to the [Office]." Therefore, in receiving compensation following the Office's decision, appellant knew or should have known that he was receiving compensation to which he was not entitled.[12]

The Board further finds that the Office properly denied appellant's request for reconsideration under section 8128.

Section 10.606 of the Code of Federal Regulations provides 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

[9] 5 U.S.C. § 8129.

[10] *See, e.g., Harold W. Steele*, 38 ECAB 245 (1986) (no waiver is possible if the claimant is not without fault in helping to create the overpayment).

[11] *See Robin O. Porter*, 40 ECAB 421 (1989).

[12] The Board notes that its jurisdiction, regarding the recovery of any overpayment, is limited to instances in which recovery is sought against continuing compensation benefits under the Act; *see Levon H. Knight*, 40 ECAB 658 (1989).

(2) advancing a relevant legal argument not previously considered by the Office; or

(3) constituting relevant and pertinent new evidence not previously considered by the Office.[13]

Section 10.608 provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without review the merits of the claim.[14]

In support of his request for reconsideration, appellant submitted x-ray reports dated October 25, 2001 and an office visit note dated January 7, 2002 from a nurse practitioner. The x-ray reports are not relevant to the issue of whether appellant has any further employment-related disability. As discussed above, evidence, which does not address the particular issue involved, does not constitute a basis for reopening a case.[15] Additionally, the January 7, 2002 office visit note is of no probative value as a nurse practitioner is, as discussed above, not considered a "physician" under the Act.[16]

As abuse of discretion can generally only be shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from known facts.[17] Appellant has made no such showing here and thus the Board finds that the Office properly denied his application for reconsideration of his claim.

[13] 20 C.F.R. § 10.606(b)(2).

[14] 20 C.F.R. § 10.608(b).

[15] *See Dominic E. Coppo*, 44 ECAB 484 (1993).

[16] *See* 5 U.S.C. § 8101(2).

[17] *Rebel L. Cantrell*, 44 ECAB 660 (1993).

The decisions of the Office of Workers' Compensation Programs dated February 1, 2002 and July 11, 2001 are affirmed.

Dated, Washington, DC
April 29, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member