U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MELVIN LONBERGER and DEPARTMENT OF THE AIR FORCE, AIR TRAINING COMMAND, KEESLER AIR FORCE BASE, MS

Docket No. 02-421; Submitted on the Record;
Issued February 5, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits, effective June 17, 2001; and (2) whether the Office properly denied his request for a review of the written record under 5 U.S.C. § 8124.

On September 9, 1994 appellant, then a 35-year-old food service worker sustained an employment-related lumbar sprain and contusion of the right elbow when he slipped and fell at work. He stopped work that day. Appellant was terminated for cause, effective September 16, 1994. The accepted conditions were later expanded to include a head contusion and seizure disorder.[1] Appellant received appropriate continuation of pay and compensation and was placed on the periodic rolls on October 29, 1996.[2] The Office continued to develop the claim and in March 2000 referred appellant, along with a statement of accepted facts, the medical record and a set of questions, to Drs. William Shepherd Fleet, who is Board-certified in psychiatry and neurology and Charles J. Winters, a Board-certified orthopedic surgeon, for second opinion evaluations.

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[1] The record indicates that on November 30, 1994 appellant was walking to the kitchen at home when he lost consciousness and fell, striking his head. He was hospitalized. On December 20, 1994 appellant lost consciousness and his wife reported a possible seizure. He was again hospitalized and placed on anticonvulsant medication. Appellant continued to report seizure activity. The Office continued to develop the claim and in 1998 referred appellant to Dr. John W. Cope, a Board-certified orthopedic surgeon, for a second-opinion evaluation. In a June 18, 1998 report, he diagnosed post-traumatic seizure disorder, cervical strain, apparently resolved and a lumbar strain. Dr. Cope advised that, from an orthopedic standpoint, appellant could return to light-duty work. He advised that, while it was outside his specific field of expertise, the seizure disorder was causally related to the September 9, 1994 employment injury because appellant struck his head at the time of the injury. The Office then accepted that appellant sustained an employment-related seizure disorder.

[2] The record indicates that, in December 1995, an overpayment in compensation in the amount of $2,490.90 was created. In a decision dated March 20, 1996, waiver of the overpayment was granted.

By letter dated December 1, 2000, the Office informed appellant that it proposed to terminate his compensation, based on the opinions of Drs. Winters and Fleet and Dr. Wendell R. Helveston who had performed a neurological evaluation. The Office noted that Dr. Winters advised that there was no evidence of residuals of appellant's lumbar strain and that both Drs. Fleet and Helveston opined that appellant did not suffer from a seizure disorder. In response, appellant submitted reports from his treating general practitioner, Dr. James B. Martin. By decision dated June 11, 2001 and finalized June 21, 2001, the Office terminated appellant's compensation benefits, effective June 16, 2001, on the grounds that his injury-related disability had ceased.

On July 16, 2001 the Branch of Hearings and Review received materials submitted by appellant and received an additional submission on September 17, 2001. In a decision dated September 28, 2001, an Office hearing representative denied appellant's request for a review of the written record on the grounds that it was not timely filed. The Branch of Hearings and Review found that, as the request was postmarked September 6, 2001 which was more than 30 days after the June 11, 2001 Office decision, appellant was not entitled to a hearing as a matter of right. The hearing representative further noted that he had considered the matter in relation to the issue involved and indicated that appellant's request was further denied on the basis that the issue could be addressed through a reconsideration application. The instant appeal follows.

The Boards finds that the Office met its burden of proof to terminate appellant's compensation benefits.

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation. After it has determined that an employee has disability causally related to his or her employment, the Office may not terminate compensation without establishing that the disability has ceased or that it was no longer related to the employment.[3]

The relevant medical evidence includes a number of reports from Dr. James B. Martin, a general practitioner who began treating appellant in October 1994 and diagnosed employment-related lumbar sprain and seizure disorder.

In a report dated April 14, 2000, Dr. Fleet, a Board-certified neurologist, reported the history of injury, his review of the record and examination findings. Dr. Fleet advised that there were no objective findings such as a positive electroencephalogram (EEG), stating:

> "I have not detected any injury residuals that are causing any disability at this time. The subjective complaints of back and leg pain with totally normal studies six years after the injury are somewhat unusual but not unheard of. It is always difficult to establish whether someone is really feeling pain, because we have no objective test for this."

Dr. Fleet recommended that appellant undergo a functional capacity evaluation and a seizure monitoring study. In a work capacity evaluation dated April 17, 2000, Dr. Fleet advised that appellant could work eight hours per day with restrictions to his physical activity.

[3] *See Patricia A. Keller*, 45 ECAB 278 (1993).

Dr. Winters,[4] a Board-certified orthopedic surgeon who performed a second-opinion evaluation for the Office, reviewed the medical records and reported the history of injury and his findings on examination. In a May 8, 2000 report, Dr. Winters advised that appellant had no significant objective findings and that his lumbar strain had resolved. He concluded that appellant had no residuals relative to his lumbar spine injury which required further treatment, stating, "I do not think that [appellant's] present orthopedic condition is related to his injury of 1994 and I think there is no disability at this time based on his work[-]related injury of 1994."

On June 12, 2000 appellant was admitted to the hospital for a seizure monitoring study. Four 24-hour video EEGs were reported as normal with no epileptiform activity present and no events recorded. Neuropsychological functioning testing was characterized by an apparent questionable effort. In a discharge summary dated July 4, 2000, Dr. Helveston, a Board-certified neurologist, noted that serial video EEG monitoring had been performed with normal interictal activity. He advised that one nonepileptic seizure was recorded and stated that appellant's anticonvulsant medications would be discontinued. Dr. Helveston noted that appellant's neuropsychological monitoring showed a questionable effort, "possibly consistent with malingering." He concluded that appellant might need long-term psychotherapy to work through the problem of pseudoseizures.[5]

By report dated July 21, 2000, Dr. Fleet reported that the seizure monitoring study showed pseudoseizures only "so this cannot be used as a means to exclude him from work." He advised that appellant could work eight hours of light duty per day.

In an August 1, 2000 report, Dr. Richard J. Gorman, a Board-certified pediatrician who practices neurology, advised that Dr. Martin had restarted appellant's anticonvulsant medication. Dr. Gorman diagnosed pseudoseizures as documented on video monitoring. He stated that he saw no need for the anticonvulsant medication but would not interfere, although he would attempt to convey the results of the video monitoring to Dr. Martin.

By report dated September 25, 2000, Dr. Fleet diagnosed subjective lumbar radiculitis and pseudoseizures and advised that the only residuals were subjective with no objective residuals directly attributable to the September 9, 1994 employment injury.

Dr. Martin continued to submit reports in which he diagnosed seizure disorder, noting that appellant stated that he had seizure activity. In a December 14, 2000 report, he noted that appellant's seizures were nonepileptic in nature but opined that they were likely related to the 1994 work injury.

Initially, the Board finds that the Office properly found that appellant had no residuals of the accepted lumbar sprain or any orthopedic condition causally related to the September 9, 1994 employment injury. In a May 8, 2000 report, Dr. Winters, the Board-certified orthopedic

[4] Both Drs. Fleet and Winters were furnished with the medical record, a statement of accepted facts and a set of questions.

[5] Pseudoseizure is defined as an attack resembling an epileptic seizure but having purely psychological causes; it lacks the electroencephalographic characteristics of epilepsy and the patient may be able to stop it by an act of will. *Dorland's Illustrated Medical Dictionary*, (29th ed. 2000).

surgeon who performed a second opinion evaluation for the Office, advised that appellant did not have any condition or disability causally related to the employment injury. As there is no other contemporaneous medical evidence that provides a rationalized opinion regarding appellant's orthopedic condition, the Board, therefore, finds that the Office met its burden of proof to establish that this condition had resolved.

Regarding appellant's accepted seizure disorder, the Board notes that, in its decision dated June 11, 2001 and finalized June 21, 2001, the Office found that, based on the opinions of Drs. Fleet and Helveston, appellant did not suffer from a seizure disorder but rather had pseudoseizures. The Office, therefore, effectively rescinded acceptance of appellant's claim that he had an employment-related seizure disorder. The Board, moreover, finds that the Office met its burden to rescind acceptance of appellant's seizure disorder.

As stated earlier, once the Office accepts a claim and pays compensation benefits, it has the burden of justifying the termination or modification of compensation.[6] This holds true where the Office later decides that it erroneously accepted a claim. To justify rescission of acceptance, the Office must establish that its prior acceptance was erroneous.[7]

In the instant case, the acceptance of appellant's seizure disorder was based on the opinion of Dr. Cope, a Board-certified orthopedic surgeon, who provided a second-opinion evaluation for the Office in 1998.[8] In his report dated June 18, 1998, Dr. Cope advised that whether appellant had a seizure causally related to the September 9, 1994 employment injury was outside his specific field of expertise, but advised that the condition was causally related to the September 9, 1994 employment injury because it appeared that appellant struck his head on September 9, 1994 "of sufficient force to have caused a post-traumatic disorder" and, as there was no other apparent cause for the seizure disorder, it was his opinion that it was causally related to the September 9, 1994 employment injury.

Dr. Fleet, a Board-certified neurologist, noted that appellant had no objective findings of seizure disorder, such as a positive EEG, diagnosed pseudoseizures and advised that appellant had no injury-related residuals. Likewise, Dr. Helveston, who is also a Board-certified neurologist, noted that appellant's neuropsychological monitoring showed a questionable effort, possibly malingering and diagnosed pseudoseizures. He further advised that appellant could work eight hours of light duty per day. Finally, Dr. Gorman, also a neurologist, diagnosed pseudoseizures as documented on video monitoring. While appellant submitted a number of reports from his treating family practitioner, Dr. Martin, who continued to diagnose a seizure disorder causally related to the employment injury, he did not provide any explanation other than that appellant continued to report seizure activity. The Board, therefore, finds that the weight of the medical evidence rests with the opinions of the neurologists of record, Drs. Helveston, Fleet and Gorman who agree that appellant does not have a seizure disorder, but rather has

[6] *Supra* note 3.

[7] 20 C.F.R. § 10.610 (1999).

[8] *Supra* note 1.

pseudoseizures.[9] The Board, therefore, finds that the Office met its burden of proof to rescind acceptance of appellant's claim that he sustained a seizure disorder causally related to the September 9, 1994 employment injury.

The Board further finds that the Office did not abuse its discretion in denying appellant's request for a hearing.

In the instant case, the Office denied appellant's request for a hearing on the grounds that it was untimely filed. In its September 28, 2001 decision, the Office stated that appellant was not, as a matter of right, entitled to a hearing since his request, postmarked September 6, 2001, had not been made within 30 days of its June 21, 2001 decision.[10] The Office noted that it had considered the matter in relation to the issue involved and indicated that appellant's request was denied on the basis that the issue in the instant case could be addressed through a reconsideration application.

The Board has held that the Office, in its broad discretionary authority in the administration of the Federal Employees' Compensation Act,[11] has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[12] In the present case, appellant's request for a hearing was postmarked September 6, 2001 and was thus, made more than 30 days after the date of issuance of the Office's prior decision, finalized June 21, 2001. The Office was therefore, correct in stating in its September 28, 2001 decision that appellant was not entitled to a hearing as a matter of right.

While the Office also has the discretionary power to grant a hearing request when a claimant is not entitled to a hearing as a matter of right, the Office, in its September 28, 2001 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request on the basis that the issue of whether the Office properly terminated appellant's compensation benefits could be addressed through a reconsideration application. The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from established facts.[13] In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's hearing request which could be found to be an abuse of discretion.[14]

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[9] *Supra* note 5.

[10] The September 28, 2001 decision indicated that the Office's decision was rendered on June 11, 2001. The record, however, indicates that the decision was finalized on June 21, 2001.

[11] 5 U.S.C. §§ 8101-8193.

[12] *Henry Moreno*, 39 ECAB 475 (1988).

[13] *See Daniel J. Perea*, 42 ECAB 214, 221 (1990).

[14] The Board notes that appellant submitted medical evidence to the Office subsequent to the September 17, 2001 decision and with his appeal to the Board. The Board cannot consider this evidence, however, as its review of the

The decisions of the Office of Workers' Compensation Programs dated September 28 and June 11, 2001 and finalized June 21, 2001 are hereby affirmed.

Dated, Washington, DC
February 5, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

case is limited to the evidence of record which was before the Office at the time of its September 17, 2001 decision. 20 C.F.R. § 501.2(c). Appellant, however, retains the right to submit this evidence to the Office with a valid request for reconsideration.