U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HENRIETTA P. HARDAWAY and U.S. POSTAL SERVICE, CINCINNATI BULK MAIL CENTER, Cincinnati, OH

Docket No. 03-1754; Submitted on the Record;
Issued October 30, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
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 10, 1996; (2) whether appellant continued to suffer from any work-related residuals on or after June 10, 1996; and (3) whether the Office properly refused to reopen appellant's case for further consideration of the merits of her claim.

This case was previously before the Board.[1] By decision dated August 15, 2000, the Board affirmed the Office's May 5, 1998 and January 8, 1999 decisions, which concerned a nonmerit review of a reconsideration request and an untimely request for reconsideration, which lacked clear evidence of error. The procedural history of the case and the Board's prior decision is incorporated by reference.

Subsequent to the Board's decision in a July 6, 2001 letter, appellant requested reconsideration. By decision dated July 17, 2001, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant a merit review.[2] In an August 11, 2001 letter, appellant again requested reconsideration. In a merit decision dated November 9, 2001, the Office denied appellant's request for modification. In a June 24, 2002 letter, appellant requested reconsideration. In an August 28, 2002 decision, the Office denied reconsideration on the grounds that the evidence submitted was repetitive and cumulative. In a letter dated November 8, 2002, appellant requested reconsideration. In a merit decision dated November 19, 2002, the Office denied modification. In a January 29, 2003 letter, appellant requested reconsideration. In an April 1, 2003 decision, the Office denied reconsideration on the grounds that the evidence submitted was duplicative and repetitive.

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[1] *See* Docket No. 99-1452 (issued August 15, 2000).

[2] The Board notes that its decision of August 15, 2000, was not on the merits; however, the Office apparently viewed it as a merit decision.

The Board finds that the Office properly terminated appellant's compensation benefits on the grounds that she no longer suffered any work-related disability.

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]

In this case, the Office accepted the conditions of muscle strain of the left arm, aggravation of preexisting degenerative cervical disc disease at C5 and bilateral carpal tunnel syndrome. The record further reflects that appellant had received compensation benefits for temporary total disability since November 1988. The Office terminated benefits for wage loss finding that the weight of the medical evidence, as represented by the April 8, 1996 report of Dr. Arthur L. Hughes, a Board-certified neurologist and Office referral physician, established that appellant no longer had any work-related residuals, which substantiated her disability of performing her date-of-injury job.

In a January 17, 1995 report, appellant's treating physician, Dr. Walter G. Broadnax, Jr., a neuro-oncologist and pain specialist, advised that appellant had reached maximum medical improvement on August 2, 1994. Dr. Broadnax further advised that appellant could work an eight-hour day with intermittent breaks and restrictions on crawling, reaching, grasping and pulling with either hand. Based on Dr. Broadnax's report, the employing established offered appellant a modified job on November 24, 1995.

In a report dated November 27, 1995, Dr. Steven S. Wunder[4] advised that he was appellant's physician since May 25, 1995 and that she was considered permanently and totally disabled. Upon receiving a clarification request from the Office, Dr. Wunder advised, in a January 13, 1996 letter, that appellant has a chronic pain syndrome, which accompanies her bilateral carpal tunnel syndrome. He noted that the chronic pain syndrome was of such a severity that psychologically she was unable to pursue surgical intervention. Dr. Wunder further advised that appellant had underlying diabetes. Objective findings included weakness and atrophy of the abductor pollicis brevis and numerous abnormal electrodiagnostic studies.

The Office referred appellant's medical records and a statement of accepted facts to Dr. Hughes, a Board-certified neurologist. In a report dated April 8, 1996, he provided a history and results on examination, diagnosing severe symptom magnification with possible malingering, neck pain and bilateral hand pain and numbness and noting the varying findings presented on the objective testing of record. He advised that appellant demonstrated multiple pain behaviors, multiple instances of symptom magnification and nonorganic findings. Dr. Hughes further opined that appellant was malingering. He stated that there were no objective findings that the muscle strain left arm, nonspecific and aggravation of the preexisting degenerative cervical disc disease C5-6 were still active and disabling. There was no medical evidence that bilateral carpal tunnel syndrome was currently active and causing objective

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

[4] Credentials for Dr. Wunder could not be found.

findings. His rationale was that severe symptom magnification obscures the clinical findings and makes them unreliable. Dr. Hughes further stated that he did not believe that the carpal tunnel findings were causally related to her work experience and provided a discussion. Based on his evaluation of appellant's objective findings and on Dr. Broadnax's conclusion in January 1995, that appellant could perform the tasks as identified in the permanent rehabilitation job offer, Dr. Hughes opined that appellant was not currently disabled from her date-of-injury job as a clerk-keyer and was able to perform the duties of the modified sorter-keyer position without restriction.

In an April 22, 1996 report, Dr. Wunder stated that appellant was difficult to evaluate because of a chronic pain disorder. He reported that appellant has diabetes. Dr. Wunder further reported, that she has had severe carpal tunnel syndrome and noted his examination findings, which included complaints of pain in the joints, upper back and neck, fatigue along with a positive Tinel's and positive Phalen's test, weakness in the abductor pollicis brevis, give way responses on motor examination, a diminished sensory examination, symmetric reflexes, which were depressed, weak grip strength and questionable synovial thickening of the small digits. In a May 28, 1996 letter to appellant, Dr. Wunder advised that he reviewed all the records appellant had forwarded to him, including Dr. Hughes' evaluation. He stated that appellant's findings were compatible with bilateral carpal tunnel syndrome and that there was diminished motion in her neck and shoulders. Dr. Wunder further indicated that appellant notes increased pain associated with stress and nervousness and that the pain complaints have been work prohibitive.

The Board finds that Dr. Hughes represents the weight of the medical evidence. He provided a reasoned medical opinion that the employment-related conditions were no longer active or disabling and appellant could perform her date-of-injury job and could also perform the modified job without restrictions. He provided a well-reasoned report, which discussed his through examination of appellant and the lack of current objective findings. Dr. Hughes opined that appellant's severe symptom magnification was obscuring the clinical/objective findings and made them unreliable, as demonstrated by the numerous varying findings presented on the objective testing of record. He further stated that appellant had demonstrated multiple pain behaviors, multiple instances of symptom magnification and nonorganic findings.

The reports provided by Dr. Wunder fail to contain sufficient reasoning to support that appellant suffers from any current work-related conditions. In his April 22, 1996 report, Dr. Wunder specifically stated that appellant was difficult to evaluate because of her chronic pain disorder. Although Dr. Wunder's reports describe appellant's subjective complaints of pain and contain some objective findings, his reports fail to include a rationalized, probative medical opinion explaining how appellant's current conditions were caused or aggravated by the accepted employment conditions.[5] Accordingly, Dr. Wunder's reports are of little probative or evidentiary value. Additionally, the Office has not accepted that appellant's conditions of chronic pain disorder or diabetes are work related. Although appellant submitted a May 30, 1996 letter disagreeing with the proposed termination, there are no relevant arguments to support that the findings regarding the proposed reduction were in error. Accordingly, the Board finds that the Office met its burden of proof in terminating wage-loss compensation on June 10, 1996.

[5] *William C. Thomas,* 45 ECAB 591 (1994).

After termination or modification of benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that she had an employment-related disability that continued after termination of compensation benefits.[6]

The Board finds that appellant has not submitted sufficient evidence to establish a continuing employment-related condition or disability after June 10, 1996.

In a medical note dated June 24, 1996 and a medical report of the same date, Dr. Wunder noted that appellant's subjective complaints were the same with no new objective abnormality. He indicated that the objective findings were weakness and atrophy of the abductor pollicis brevis and abnormal electromyogram (EMG) studies. Dr. Wunder stated that there was restricted cervical motion, but no neurologic deficit, which correlated to a specific myotome. A positive Tinel's and positive Phalen's test over the hand were noted. Grip strength was weak and reflexes were depressed but symmetric. The conditions of chronic pain disorder, diabetes and severe bilateral carpal tunnel syndrome were diagnosed. Dr. Wunder opined that appellant would be unable to perform repetitive activities, use her hands on a repetitive basis or perform repetitive motion of the wrist or elbow.

The June 24, 1996 reports from Dr. Wunder essentially repeat past contentions and contain the same findings as the prior reports, the Office had considered in the June 10, 1996 decision. Dr. Wunder failed to present any additional or new medical testing to support his findings. As such, these reports are insufficient to present a conflict with Dr. Hughes' opinion that appellant had no active residuals from the accepted work-related conditions.

In a February 20, 1997 report, Dr. Mitchell Simons, a pain specialist, advised that he had been treating appellant since September 1996, for carpal tunnel syndrome, lumbar strain with nerve irritation and cervical strain with nerve irritation.[7] Dr. Simons indicated that it was his understanding that appellant had sustained those injuries at work while working a keying station in 1987. Dr. Simons stated that, although the nerve study told him that something was going on, he needed to review the magnetic resonance imaging (MRI) scan, but opined that it was not to the degree to cause appellant's current incapacity and suggested that appellant see a psychologist. He stated that appellant was currently temporarily totally disabled as returning her to her former job would only reaggravate appellant's work-related injuries. A December 18, 1996 report, of EMG/nerve conduction studies (NCS) of the median nerve was noted to have an abnormal response.[8]

Although Dr. Simons opined that appellant was totally disabled because of her work-related injury, his report is insufficient to establish a finding of total disability causally related to

[6] *Talmadge Miller*, 47 ECAB 673, 679 (1996); *see also George Servetas*, 43 ECAB 424 (1992).

[7] Although the Office noted that Dr. Simons was not an authorized treating physician, it considered the physician's report.

[8] An October 25, 1996 EMG/NCS of the lower extremities was also provided. However, this evidence is irrelevant to this case as it fails to deal with the accepted conditions.

her accepted work factors. The history presented by Dr. Simons lacks specificity with regard to the 1987 work factors. He also failed to support his statements with medical rationale or objective findings. Appellant stopped working in November 1988. Dr. Simons fails to explain or provide any medical rationale as to how such work factors in 1987, could cause appellant's continuing symptoms 10 years later. Moreover, his opinion is not based on any objective findings. Although he noted that the nerve study told him "something was going on," Dr. Simons stated that he still needed to review the MRI scan. Moreover, an opinion that appellant could reaggravate her work-related condition does not preclude a finding that appellant can perform her date-of-injury job. The Board has held that fear of future injury, or fear of a recurrence of disability if the employee returns to work, is not compensable; there must be medical evidence showing that a claimant is currently disabled for work due to an employment-related condition.[9] Accordingly, Dr. Simons' report is insufficient to cause a conflict with Dr. Hughes' opinion that appellant had no continuing work-related residuals.

In a June 18, 1997 report, Dr. Paul M. Gangl, a Board-certified orthopedic surgeon, stated that he reviewed the somatonsensory evoke potential report from October 1996, appellant's past medical history and consultation notes. Dr. Gangl provided a diagnosis of cervical strain and bilateral carpel tunnel syndrome. He further stated that appellant has other back complaints and has an apparent superimposed peripheral neuropathy, which likely goes along with the history of diabetes. He opined that appellant continues to have complaints relating to her carpal tunnel syndrome and cervical strain. Upon reviewing the modified job offer, Dr. Gangl opined that appellant was not capable of doing such position. He opined, however, that appellant was capable of a sedentary job position and outlined specific restrictions. Dr. Gangl further noted that he was doubtful that a rehabilitation program would be helpful for appellant.

This report is insufficient to cause conflict with Dr. Hughes' report. Dr. Gangl's report lacks any objective evidence to support appellant's complaints of pain or his diagnoses of her condition. Additionally, Dr. Gangl fails to provide a rationalized medical opinion to discuss whether appellant's current conditions and disability are related to her employment duties performed prior to her work stoppage. Accordingly, his report is of limited probative value as it is not well rationalized and contains no objective evidence.[10]

Chiropractic reports were received from Drs. Kendall Gearhart, Henry J. Bell and Andrea L. Jewell. In a November 30, 1998 report, Dr. Gearhart, a chiropractor, noted a history of injury, set forth his examination findings and opined that appellant's condition was directly related to her original employment injury. He stated that his examination showed that appellant had an alteration in the normal body architecture of the spine as shown by the extensive damage to a cervical disc and surrounding ligamentous tissue. He commented that people with these findings eventually demonstrate further evidence of disc disease. Dr. Gearhart further stated that these residual objective findings were common post-traumatic sequelae to the healing residuals of injured musculature and ligamentous tissue. He indicated that the most accurate descriptive diagnostic term for the post-traumatic healing residual symptom was myofibrositis. Dr. Gearhart

[9] *William A. Kandel*, 43 ECAB 1011 (1992); *Mary A. Geary*, 43 ECAB 300 (1991).

[10] *Charles E. Evans*, 48 ECAB 692 (1997); *Earl D. Smith*, 48 ECAB 615 (1997).

reported that recent literature had indicated that patients with these types of injuries were subject to exacerbations. He related appellant's condition to her original employment injury.

In a June 18, 2001 report, Dr. Bell, a chiropractor, noted the history of injury, appellant's subjective complaints, examination findings and findings on x-ray and diagnosed chronic bilateral carpal tunnel syndrome, cervical disc degeneration, cervical/brachial syndrome and muscle spasm. He opined that appellant's conditions were related to the employment injury she sustained at work in 1987 and that she was totally disabled as a result. In an August 2, 2001 letter to the Office, Dr. Bell stated that terminology is the primary stumbling block in this case but anatomy was something that could not be overlooked and ruled out. He noted that the Office allowed the condition of carpal tunnel syndrome, which affects the wrist extensors and flexors along with forearm flexion. Dr. Bell stated that the nerve roots leave the cervical spine, travel through an area in the upper arm known as the brachial plexus, which then supplies the forearm and wrists. He stated that it has been documented through past NCV's, computerized axial tomography scans and plain film from Dr. Miller and others, which confirmed appellant's cervical degeneration at the levels of C5-6. Dr. Bell stated that appellant was showing marked improvement of her symptoms of carpal tunnel syndrome by adjusting the cervical spine along with the wrist.

In a June 24, 2002 medical report, Dr. Jewell, a chiropractor, noted a history of the injury and appellant's medical history postinjury. She advised that appellant had had an EMG, which showed bilateral carpal tunnel syndrome and an MRI scan, which revealed a herniated nucleus pulposus. She noted that appellant's examination revealed a decreased range of motion in the cervical spine in all directions. Examination findings on orthopedic and neurological tests were provided. X-ray revealed reduction of normal cervical curve with degenerative changes at C4-6. Osteophyte formation on anterior vertebral bodies. Dr. Jewell opined that appellant has serious problems as a result of the injuries she received at work. She recommended manual manipulation of the subluxated joints in the cervical spine. Treatment notes dated June 27 to July 15, 2002 were also provided.

None of the chiropractic reports constitute substantial probative evidence in this case. Section 8101(2) of the Federal Employees' Compensation Act recognizes a chiropractor as a physician "only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist."[11] Dr. Gearhart failed to diagnose a subluxation of the spine. Although Dr. Bell has provided medical rationale explaining how appellant's symptoms of carpal tunnel syndrome have improved with the adjustments to her cervical spine and wrist, his report fails to contain a diagnosis of a subluxation of the spine. Although Dr. Jewell stated that there were subluxed joints in the cervical spine, she failed to explain the discrepancy with the x-ray finding, which revealed a reduction of the normal curvature of the cervical spine. As a result, their reports cannot be considered medical evidence.[12] Furthermore, none of the reports contain well-rationalized opinions on whether appellant was disabled from work due to any of her employment-related injuries. Dr. Gearhart failed to provide an opinion on the relevant issue.

[11] 5 U.S.C. § 8101(2); *see Marjorie S. Geer*, 39 ECAB 1099, 1101-02 (1988).

[12] *Samuel Theriault*, 45 ECAB 586 (1994).

Dr. Bell failed to address with medical rationale whether appellant is totally disabled for work because of the accepted medical conditions and why such residuals have persisted as she has been out of work for approximately 10 years. Dr. Jewell failed to provide a well-rationalized opinion, which explains how or why appellant's current conditions are causally related to her original work injury or whether her current condition is the result of the natural progression of her underlying conditions and the aging process due to the length of time she has not been working.

In an October 14, 2002 medical report, Dr. Paul Florez, a Board-certified orthopedic surgeon, noted a history of injury and the medical treatment appellant received thereafter. Examination findings were presented along with a review of an June 19, 2000 cervical spine x-ray. Dr. Florez stated that he did not see any subluxation of the joints and noted that appellant has a slight list of the cervical spine to the left. He diagnosed bilateral carpal tunnel syndrome, worse on the right side, degenerative disc disease cervical spine, C4-5, C5-6 and C7-D1 with osteophytic formation and osteoarthrosis about the cervical spine more pronounced at the level of C4-5 and C5-6 and a slight deviation of the cervical spine to the left. He opined that appellant's disability is due to the bilateral carpal tunnel syndrome, degenerative disc disease of the cervical spine, osteoarthrosis, residuals of left arm and cervical strain as a result of the employment injuries, which occurred on or about April 3, 1987 and appellant was still disabled as a result.

Although Dr. Florez opined that appellant was totally disabled as a result of her 1987 work injuries, there is no indication that he knew the physical requirements of appellant's date-of-injury position. Additionally, he has failed to provide a well-rationalized opinion explaining how or why appellant's conditions have progressed to the current point given the fact that she ceased working in November 1988. Although the Office had originally accepted an aggravation of appellant's underlying cervical degenerative disc disease, it is necessary for the physician to explain whether the work-related aggravation of the underlying condition is still present or whether her current condition is due to the natural progression of the underlying condition or appellant's activities after her work stoppage in November 1988. Additionally, although Dr. Florez opined that appellant was totally disabled as a result of her work injuries, he failed to provide any medical rationale to support his opinion or explain how appellant is disabled to the point of not being able to work. Thus, Dr. Florez's report is insufficient to cause a conflict with Dr. Hughes.

Accordingly, the evidence is insufficient to cause a conflict with or outweigh Dr. Hughes opinion.

The Board further finds that the Office properly refused to reopen appellant's case for further consideration of the merits of her claim.

Under section 8128(a) of the Act,[13] the Office may reopen a case for review on the merits. In accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provides that a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law, by

[13] 5 U.S.C. § 8128(a).

advancing a relevant legal argument not previously considered by the Office, or by submitting relevant and pertinent new evidence not previously considered by the Office.[14] Section 10.608(a) 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 reviewing the merits of the claim.[15]

Appellant's January 29, 2003 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, she did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).

On reconsideration appellant submitted an October 14, 2002 report from Dr. Florez, which was previously considered and of record. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[16] As Dr. Florez's October 14, 2002 report was previously considered by the Office in its prior decision, the repetitious nature of this report precludes reopening of the record for merit review. Accordingly, appellant is not entitled to a review of the merits of her claim based on the third requirement under section 10.606(b)(2).

As appellant is not entitled to a review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2), the Board finds that the Office did not abuse its discretion in denying appellant's January 29, 2003 request for reconsideration.

[14] 20 C.F.R. § 10.606(b)(2).

[15] 20 C.F.R. § 10.608(a).

[16] *Howard A. Williams*, 45 ECAB 853 (1994).

The decisions of the Office of Workers' Compensation Programs dated April 1, 2003 and August 28 and November 19, 2002 are hereby affirmed.[17]

Dated, Washington, DC
October 30, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[17] On appeal, appellant has submitted new evidence. However, the Board cannot consider evidence that was not before the Office at the time of the final decision; *see Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35 (1952); 20 C.F.R. § 501.2(c)(1). Appellant may resubmit this evidence and legal contentions to the Office accompanied by a request for reconsideration pursuant to 5 U.S.C. § 8128(a). 20 C.F.R. § 501.2(c).