U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MEI CHEN CHUNG and U.S. POSTAL SERVICE,
POST OFFICE, City of Industry, CA

Docket No. 01-487; Submitted on the Record;
Issued April 19, 2002

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's case for a merit review of his claim under 5 U.S.C. § 8128(a).

The Board has duly reviewed the case record and finds that this case is not in posture for decision.

On June 11, 1996 appellant, then a 49-year-old distribution clerk, slipped in a restroom stall, fell and lost consciousness. The Office accepted appellant's claim for cerebral concussion and fracture of the right tibia and fibula with hardware removal on November 19, 1998. Appellant worked intermittently returning to light duty for four hours a day on November 19, 1996, increasing to six hours a day on May 10, 1997 and then eight hours a day on October 25, 1997. She subsequently became totally disabled on November 19, 1998 when she had her hardware removed, returned for four hours a day on February 20, 1999 and worked up to six hours a day with restrictions as of July 5, 1999.

In a May 3, 1999 report, Dr. Thomas R. Dorsey, a Board-certified orthopedic surgeon and the second opinion physician, found there was no objective evidence of continuing neck, shoulder, knee or ankle pathology.

In a May 3, 1999 report, Dr. Robert C. Armen, Board-certified in internal medicine and a second opinion physician, noted appellant's history of injury and treatment and found that appellant had right shoulder tenderness and a low back strain due to right tibia fibular fraction. He further found that there were no abnormalities in appellant's shoulders or back. Dr. Armen also found that appellant's postoperative infection was resolved.

By letter dated June 12, 1999, appellant responded to the proposed notice of termination and indicated that there was a conflict in the medical opinions.

In a June 15, 1999 report, Dr. Steve T. Hwang, an orthopedic surgeon and appellant's treating physician, stated that appellant continued with disabling residuals and was only capable of working four hours a day, until July 4, 1999, when she could work six hours a day.

Based on this conflict of medical evidence, the Office referred appellant, the record and a statement of accepted facts to Dr. Lawrence S. Barnett, a Board-certified orthopedic surgeon.

In an August 24, 1999 report, Dr. Barnett noted appellant's history of injury and treatment. After conducting a physical examination, he stated his impression was that appellant was status post right tibia and fibular fracture treated with open reduction and internal fixation with a bone plate. Dr. Barnett noted that appellant showed satisfactory healing and subsequent removal of the plate. He stated that appellant noted continuing subjective symptomatology. Dr. Barnett opined that appellant was permanent and stationary and no longer in need of any medical treatment. He further stated that he did not feel that the back and shoulder symptoms or left hip symptoms were related to the industrial injury. Dr. Barnett further stated that appellant did have residual disability. He noted that she showed objective factors of impairment in the form of deformities, atrophy of the right calf compared to the left, the surgical scar and a decrease in motion of the right ankle. Dr. Barnett further opined that the second opinion was correct in releasing appellant to full duty eight hours a day as of May 3, 1999 and it was his opinion that appellant no longer required further medical treatment as she had fully recovered from her right leg fracture.

Based on the August 24, 1999 report of Dr. Barnett, the Office issued a notice of proposed termination of compensation on October 12, 1999.

By decision dated November 15, 1999, the Office terminated appellant's compensation effective November 12, 1999.

On November 15, 1999 the Office received physical therapy reports from Caroline Tsai, a physical therapist. The reports were dated July 7 to September 10, 1999. They documented continued pain and recommended continued treatment.

On December 3, 1999 the Office received a November 22, 1999 work capacity report from Dr. Hwang, appellant's treating physician, who checked the box "yes" that appellant could increase her number of hours per day and filled in "November 23, 1999." He further filled in limitations of eight hours of sitting and one hour of walking for appellant. Dr. Hwang repeated his request that appellant work between the hours of 6:00 a.m. and 4:00 p.m.

On June 28, 2000 appellant requested reconsideration.[1]

By decision dated September 22, 2000, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that it neither raised substantive legal questions nor included new and relevant medical evidence, and thus, it was insufficient to warrant review of the prior decision.

[1] Appellant initially requested an oral hearing; however, his request was deemed untimely and he subsequently submitted a request for reconsideration.

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

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.[2] As appellant filed her appeal with the Board on December 5, 2000, the only decision before the Board is the September 22, 2000 decision denying merit review of appellant's request for reconsideration.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[3] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.[4] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must also file his or her application for review within one year of the date of that decision.[5] When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.[6]

The Act provides that the Office shall determine and make findings of fact in making an award for or against payment of compensation after considering the claim presented by the employee and after completing such investigation as the Office considers necessary with respect to the claim.[7] Since the Board's jurisdiction of a case is limited to reviewing that evidence which was before the Office at the time of its final decision,[8] it is necessary that the Office review all evidence submitted by a claimant and received by the Office prior to issuance of its final decision. As the Board's decisions are final as to the subject matter appealed,[9] it is crucial that all evidence relevant to that subject matter which was properly submitted to the Office prior to the issuance of its final decision be addressed by the Office.[10]

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

[3] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[4] 20 C.F.R. § 10.606(b)(1)-(2).

[5] *Id.* at § 10.607(a).

[6] *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

[7] 5 U.S.C. § 8124(a)(2); 20 C.F.R. §§ 10.125-10.126.

[8] *See* 20 C.F.R. § 501.2(c).

[9] 20 C.F.R. § 501.6(c).

[10] *William A. Couch*, 41 ECAB 548 (1990).

The Board has held that proceedings before the Office are not adversarial in nature and the Office is not a disinterested arbiter. The Office shares a responsibility to develop the evidence and must do so in a fair and impartial manner.[11]

In this case, the Office did not review all of the evidence received prior to the issuance of its September 22, 2000 decision. The Office specifically addressed appellant's request for information and stated that "[n]o other information was submitted with the request." The Office denied merit review based solely upon this request. However, the record contains a new work capacity evaluation from appellant's treating physician, Dr. Hwang, who indicated that appellant still had limitations and that she could return for eight hours a day on November 23, 1999. He further stated that she continued to have restrictions due to her injury.[12]

The record also contained numerous physical therapy reports dated July 7, August 11 and September 10, 1999, which showed that appellant was receiving treatment for continuing conditions.[13]

The Board finds that the Office did not base its September 22, 2000 decision on a complete record. The instant record contains evidence submitted by appellant after the November 15, 1999 decision. The Office did not review this evidence prior to denying appellant's request for reconsideration in its September 22, 2000 decision denying merit review.

Therefore, that decision must be set aside and the case remanded for further consideration, based on the evidence timely submitted by appellant. After further development as it may find necessary, the Office should issue a *de novo* decision.

[11] *Walter A. Fundinger, Jr.*, 37 ECAB 200, 204 (1985).

[12] This report was similar to an October 22, 1999 report, but it was not the same and provided a time that appellant could return for eight hours a day.

[13] Although physical therapists are not considered "physicians" under the Act, the report was submitted by appellant for the purpose of showing that appellant was receiving treatment for continuing disability. *See* 5 U.S.C. § 8101(2); *see also Jerre R. Rinehart*, 45 ECAB 518 (1994); *Barbara J. Williams*, 40 ECAB 649 (1989); *Jane A. White*, 34 ECAB 515 (1983).

The September 22, 2000 decision of the Office of Workers' Compensation Programs is hereby vacated and the case is remanded for further action in accordance with this decision.

Dated, Washington, DC
April 19, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member