U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LINDA L. NEWBROUGH and DEPARTMENT OF THE INTERIOR, BUREAU OF RECLAMATION, Denver, CO

Docket No. 00-1100; Submitted on the Record;
Issued March 27, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM, BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly rescinded its acceptance of appellant's claim for lumbosacral strain; and (2) whether the refusal of the Office to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

On March 30, 1998 appellant, then a 50-year-old payroll technician, filed a claim alleging that she sustained an injury due to a fall at work on that date. The Office accepted that appellant sustained an employment-related lumbosacral strain and paid her compensation benefits. The Office based its acceptance on a March 30, 1998 report in which Dr. Paul K. Bolton, an attending chiropractor, indicated that appellant sustained an employment-related "lumbosacral strain injury" on that date. In May and December 1998, the Office received undated reports in which Dr. Bolton indicated that appellant had several spinal subluxations. By decision dated December 4, 1998, the Office denied appellant's request for reimbursement for chiropractic care. The Office noted that, under section 8101(2) of the Federal Employees' Compensation Act, chiropractors are only considered physicians, and their reports considered medical evidence, to the extent that they treat spinal subluxations as demonstrated by x-ray to exist.[1] The Office indicated that this requirement was not met in the present case and that therefore reimbursement for chiropractic care was not appropriate.

In January 1999 appellant submitted the results of lumbar spine x-ray testing obtained on August 18, 1998 by Dr. Mark McGehee, a Board-certified radiologist. The findings indicated that appellant had mild narrowing at L4-5; that L4 was "subluxed" anteriorly with respect to L5 approximately 2 millimeters; that there was moderate degenerative facet change at L4-5 and L5-S1; and that there was low grade anterior osteophytic lipping at L2-3 and L3-4.

[1] 5 U.S.C. § 8101(2); *see Jack B. Wood*, 40 ECAB 95, 109 (1988).

By decision dated February 24, 1999, the Office rescinded its acceptance of appellant's claim for lumbosacral strain. The Office asserted that in *Mary J. Briggs*[2] the Board found that x-rays which were taken 67 days after the claimed date of injury were not taken within "a reasonable time" and were of such limited probative value that they were insufficient to establish a causal relationship between the x-ray findings and the claimed injury. The Office noted that the August 18, 1998 x-ray findings in the present case showed a subluxation, but that due to the four and a half month interval between March 30, 1998 and the date of the x-ray findings, it was unable to determine whether the subluxation was due to the March 30, 1998 incident or some other factor. By decision dated June 8, 1999, the Office denied appellant's request for merit review.

The Board finds that the Office improperly rescinded its acceptance of appellant's claim for lumbosacral strain.

The Board has upheld the Office's authority to reopen a claim at any time on its own motion under section 8128(a) of the Act and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.[3] The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.[4] It is well established that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.[5] This holds true where, as here, the Office later decides that it has erroneously accepted a claim for compensation. To justify rescission of acceptance, the Office must establish that its prior acceptance was erroneous based on new or different evidence or through new legal argument and/or rationale.[6]

The Board finds that the Office did not submit sufficient new evidence or argument to justify the rescission of its acceptance of appellant's claim for lumbosacral strain. In its February 24, 1999 decision, the Office did not adequately discuss or apply Board precedent with respect to the treatment of evidence when diagnostic testing is obtained some period after the occurrence of a claimed employment injury. The Office improperly suggested that *Briggs* is the primary controlling case for the present claim and that *Briggs* stands for the proposition that diagnostic testing taken 67 or more days after a claimed injury is *per se* of limited probative value.[7]

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[2] 37 ECAB 578 (1986).

[3] *Eli Jacobs*, 32 ECAB 1147, 1151 (1981).

[4] *Shelby J. Rycroft*, 44 ECAB 795, 802-03 (1993). *Compare Lorna R. Strong*, 45 ECAB 470, 479-80 (1994).

[5] *See Frank J. Meta, Jr.*, 41 ECAB 115, 124 (1989); *Harold S. McGough*, 36 ECAB 332, 336 (1984).

[6] *Laura H. Hoexter (Nicholas P. Hoexter)*, 44 ECAB 987, 994 (1993); *Alphonso Walker*, 42 ECAB 129, 132-33 (1990); *petition for recon. denied*, 42 ECAB 659 (1991); *Beth A. Quimby*, 41 ECAB 683, 688 (1990); *Roseanna Brennan*, 41 ECAB 92, 95 (1989); *Daniel E. Phillips*, 40 ECAB 1111, 1118 (1989), *petition for recon. denied*, 41 ECAB 201 (1990).

[7] *See supra* note 2 and accompanying text.

However, in *Linda L. Mendenhall*,[8] the Board discussed the treatment of evidence when diagnostic testing is obtained some period after the occurrence of a claimed employment injury. The Board discussed the facts of the *Briggs* case and stated:

> "The Board does not, however, wish to impose an inflexible time limitation within which physicians must conduct diagnostic testing. How to examine a patient and when to conduct diagnostic testing are matters properly left to the physician in the exercise of his or her professional judgment. Testing conducted 67 days after the date of the alleged injury, as in *Briggs*, or 31 days after the date of the alleged injury, as in the instant case, may well document the injury claimed and may well provide a sound basis upon which to opinion on causal relationship. To discharge an employee's burden of proof, however, the physician must nevertheless provide sufficient medical rationale to support the affirmative opinion offered. Once an employee has made a *prima facie* case, *i.e.*, when he or she has submitted evidence supporting the essential elements of his or her claim, including evidence of causal relationship, the Office has the responsibility to take the next step, either of notifying the employee that additional evidence is needed to fully establish the claim, or of developing evidence in order to reach a decision on the employee's entitlement to compensation. The Board finds, therefore, that when the employee has established a prima facie case but the Office believes that a delay in diagnostic testing is so significant that it calls into question the validity of an affirmative opinion based at least in part on that testing, the Office should further develop the evidence to obtain the physician's explanation as to the reason he or she believes that such testing in fact documented the injury claimed by the employee, as well as the physician's explanation as to what extent that testing formed the basis of his or her opinion." (Footnotes omitted.)[9]

The Board further stated in a footnote, "To the extent that the Board's decision in this case is inconsistent with the precedent in *Briggs*, that diagnostic tests not performed within a short time following an employment injury are *per se* entitled to little probative value, it is overrule[d]."

As noted above, the Office did not adequately discuss or apply the relevant Board precedent in the present case when reaching its rescission determination. Therefore, the Office did not provide sufficient new evidence or argument to justify the rescission of its acceptance of appellant's claim for lumbar strain.

[8] 41 ECAB 532 (1990).

[9] *Id.* at 538-40.

The decision of the Office of Workers' Compensation Programs dated February 24, 1999 is reversed and the case remanded to the Office for proceedings consistent with this decision of the Board.[10]

Dated, Washington, DC
March 27, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

[10] Given the Board's determination regarding the merits of the present case, it is not necessary to consider the nonmerit issue.