U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BARBARA L. RIGGS and GALLAUDET UNIVERSITY, GALLAUDET INTERPRETING SERVICE, Washington, D.C.

Docket No. 97-1322; Oral Argument Held April 7, 1998; Issued November 6, 1998

Appearances: *Robert A. Taylor, Jr., Esq.*, for appellant; *Paul J. Klingenberg, Esq.*, for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation on the basis that she was not an "employee" pursuant to 5 U.S.C. § 8101(1)(A) of the Federal Employees' Compensation Act.

On February 28, 1995 appellant, then a 48-year-old deaf blind-interpreter, filed a notice of traumatic injury alleging that on that same date she injured her back, hip and thigh when she slipped on a wet platform in the course of her employment. Appellant stopped working on March 1, 1995.

On April 17, 1995 Dr. Richard Schmitt, appellant's treating chiropractor, indicated that the x-ray evidence revealed a rotation malposition at L5-S1, and pelvic torque. Dr. Schmitt attributed the injury to appellant's February 28, 1995 fall on wet pavement.

On April 27, 1995 the Office accepted the claim for a subluxation of L5-S1.

On May 24, 1995 Dr. Schmitt stated that appellant remained disabled from work due to her employment-related low back pain.

On May 24, 1995 Dr. Bijan Ghovanlou, a Board-certified orthopedic surgeon, reviewed appellant's history and conducted a physical examination. He stated that the x-ray evidence was negative for fracture, subluxation, dislocation or ruptured disc. Dr. Ghovanlou further stated that magnetic resonance imaging (MRI) failed to indicate a ruptured disc or impingement syndrome. He indicated on physical examination that bilateral straight leg raises were negative, that lower

extremity reflexes were present and symmetrical, that appellant could stand on her heels and tiptoes, and that the range of motion for the lumbar spine was almost normal.

Appellant subsequently received appropriate wage-loss compensation benefits.

On June 15, 1995 Dr. James C. Cobey, a Board-certified orthopedic surgeon, conducted a second opinion examination. He stated that the x-ray evidence revealed only some mild degenerative changes. Dr. Cobey indicated that an MRI revealed some early desiccation of the disc due to age without evidence of nerve pinching. He stated that an electromyogram (EMG) was inconclusive, but that it implied a S1 left radiculopathy. Dr. Cobey opined that appellant had a mild degenerative change in the back. He recommended that a return to work would be the best treatment for appellant's condition.

Due to the conflict in medical opinion, the Office referred appellant, along with a statement of accepted facts and the case record, to Dr. Louis E. Levitt, a Board-certified orthopedic surgeon, for an impartial medical examination conducted on September 11, 1995. He reviewed the history of the injury and its treatment. On physical examination he noted that appellant appeared in no distress and walked normally. Dr. Levitt noted that appellant had a normal range of motion of her lumbar spine although she experienced pain. He indicated that straight leg raising tests and valsalva maneuver were normal. Dr. Levitt stated that there were no obvious motor or sensory deficits to the lower extremities and no back spasms or atrophy to the lower extremities. He indicated that appellant failed to demonstrate objective evidence of pathology to explain her distress. Dr. Levitt stated that appellant had reached maximum medical improvement and that there was no basis for continued disability. He indicated that appellant could return to work without restriction.

On September 13, 1995 Dr. Brad D. Rosen, an osteopath and appellant's treating physician, stated that appellant needed a month of comprehensive rehabilitation prior to returning to work. He concluded that appellant was disabled enough to miss work for one more month.

On October 20, 1995 the Office issued a "notice of proposed termination of compensation" on the basis that any disability resulting from appellant's February 28, 1995 injury had ceased. The Office gave appellant 30 days to submit additional evidence and argument. In an accompanying memorandum, the Office indicated that the weight of the evidence was represented by the opinion of Dr. Levitt, the impartial medical examiner, whose opinion was well reasoned, based on a proper factual background and bolstered by the opinion of Dr. Cobey.

On November 17, 1995 appellant contended that the medical evidence established that she remained totally disabled due to her February 28, 1995 employment injury. In support, appellant resubmitted medical evidence already a part of the record. Appellant also submitted additional reports from Dr. Rosen dated October 20, 27 and 30, 1995 in which Dr. Rosen discussed appellant's condition and outlined her work restrictions.

By decision dated November 27, 1995, the Office terminated appellant's wage-loss compensation benefits effective November 22, 1995 because the weight of the medical evidence

established that appellant's disability from her February 28, 1995 employment injury had ceased. In an accompanying memorandum, the Office noted that the weight of the medical evidence rested with the opinion of Dr. Levitt, the impartial medical examiner.

On November 22, 1996 appellant's attorney requested reconsideration. Appellant's attorney urged that the Office erred in failing to refer appellant to a Board-certified psychiatrist because the medical evidence established a *prima facia* case that appellant suffered a disabling psychological overlay as a consequence of the February 28, 1995 employment injury. Counsel maintained that the medical evidence established that she remained disabled as a result of this condition which directly stemmed from the February 28, 1995 employment injury. Appellant's attorney further argued that the Office erred in relying on the opinion of Dr. Levitt, based on his status as the impartial medical examiner, because there was no medical evidence which conflicted with appellant's treating physician's opinion that appellant remained disabled from the February 28, 1995 employment injury.[1] He argued that the Office erred in failing to properly develop the opinion of Dr. Ghovanlou, a treating physician, who failed to render a diagnosis or address whether appellant's current condition was related to her accepted injury. Appellant's attorney contended that the medical evidence established that appellant suffers from fibromyalgia or myofascial pain as a result of the February 28, 1995 employment injury. Finally, counsel asserted that the Office erred in failing to warn appellant that the opinion of Dr. Schmitt, her treating chiropractor, only constituted medical evidence if a subluxation was established by x-ray evidence.

In support of these arguments, appellant's attorney resubmitted evidence and he provided new medical evidence which addressed appellant's treatment and progress after the Office's November 27, 1995 decision terminating benefits. The new evidence included reports from Dr. Rosen, diagnosing myofascial pain syndrome, radiculopathy and lumbosacral somatic dysfunction; a report from Dr. P. Steven Macedo, diagnosing myofascial pain; reports from Dr. Richard N. Norris, a Board-certified physiatrist, diagnosing myofascial pain syndrome; reports from Dr. Lorenz K.Y. Ng, a physician Board-certified in psychiatry and neurology, diagnosing chronic myofascial pain and work-related sacrodynia; reports from Dr. Babak Arvanaghi, an anesthesiologist, diagnosing facet syndrome, myofascial syndrome and piriformis syndrome; a report from Dr. Peter Shay, a Board-certified anesthesiologist, diagnosing residual coccydynia from her 1995 fall; and a report from Dr. Nicholas J. Placentra, an osteopath, diagnosing disabling left piriformis muscle spasms. Appellant's attorney also submitted records of treatment from Dr. Michael E. April, a Board-certified physiatrist, and from various physical therapists. Finally, appellant's attorney submitted reports from Dr. Irene W. Leigh and Dr. Robert L. Umlauf, both psychologists, who diagnosed disabling psychological pain along with myofascial pain syndrome.

By decision dated December 18, 1996, the Office reviewed the merits of the case and found that the evidence submitted in support of the application was not sufficient to warrant modification of the November 27, 1995 decision. In an accompanying memorandum, the Office

[1] Appellant's attorney also contended that Dr. Levitt was not competent to serve as the impartial medical examiner because he was not a Board-certified radiologist and, therefore, lacked the credentials to refute the existence of appellant's accepted injury, a subluxation.

found that appellant was not a federal "employee" pursuant to 5 U.S.C. § 8101(1)(A) of the Act and that, therefore, appellant was not eligible for compensation benefits. The Office noted that section 8101(1)(A) defines the term "employee" as " a civil officer or employee in any branch of the Government of the United States, including an officer or employee of an instrumentality wholly owned by the United States."[2] The Office found that appellant's employing establishment, Gallaudet University, was a private institution, despite being a recipient of Federal funds, and not a branch or a wholly-owned instrumentality of the United States. The Office further found that the Federal government lacked the right to hire, fire, or control the activities of any Gallaudet employee. Consequently, the Office indicated that it was rescinding its acceptance of appellant's claim and that it would not modify its November 27, 1995 decision terminating benefits.

The Board finds that appellant is not an employee pursuant to 5 U.S.C. § 8101(1)(A) of the Act.

A claimant of benefits under the Act[3] has the burden to establish all the necessary elements of her claim, including that she was at the time of injury a civil employee of the United States.[4] For purposes of determining entitlement to compensation benefits under the Act, an "employee" is defined, in relevant part, as:

> "(A) a civil officer or employee in any branch of the Government of the United States, including an officer or employee of an instrumentality wholly owned by the United States...."[5]

Appellant's attorney argues that appellant is an "employee" pursuant to this definition. In support of this assertion, he states that, pursuant to 20 U.S.C. § 4301(b), Gallaudet University was established by the Federal government "to provide education and training to individuals who are deaf and otherwise further the education of individuals who are deaf."[6] Appellant's attorney further indicates that, pursuant to 20 U.S.C. § 4361, the United States Secretary of Education is charged with the supervision of "the public business relating to Gallaudet University,"[7] and that pursuant to 20 U.S.C. § 4303(a), one United States Senator and two members of the United States House of Representatives are required to serve on Gallaudet University's 21-member Board of Trustees. He also notes that the Federal government appropriates funds for Gallaudet University pursuant to 20 U.S.C. § 4360(a), that the university is accountable to the United States Department of Education for the spending of all Federal funds pursuant to 20 U.S.C. § 4363, and that the university is authorized to make purchases through the General Services

[2] 5 U.S.C. § 8101(1)(A).

[3] 5 U.S.C. §§ 8101-8193.

[4] *Dennis G. Nivens*, 46 ECAB 926 (1995).

[5] 5 U.S.C. § 8101(1); *see also* 20 C.F.R. § 10.5(a)(11).

[6] 20 U.S.C. § 4301(b).

[7] 20 U.S.C. § 4361.

Administration pursuant to 20 U.S.C. § 4362. Appellant's attorney also states that Gallaudet University cannot dispose of its Federal property without the approval of the Secretary of Education, pursuant to 20 U.S.C. § 4302(b), and that the United States Congress changed the name of Gallaudet College to Gallaudet University pursuant to 20 U.S.C. § 4301. Finally, he indicated that the President of the United States signs the diplomas of those individuals graduating from Gallaudet University.

Appellant, however, must establish that Gallaudet University is either a part of a branch of the United States Government or that it is wholly owned by the United States, pursuant to section 8101(1)(A), in order to establish that she is an "employee" entitled to compensation. Unlike the United States Postal Service, which was "established, as an independent establishment of the executive branch of the Government of the United States,"[8] Gallaudet University is not, by statute, a part of any branch of the United States government.[9] Moreover, Gallaudet University is not wholly owned by the United States[10] as is the Smithsonian Institution, which was established as a trust instrumentality of the United States.[11] Consequently, because Gallaudet University is neither a part of any branch of the United States Government nor wholly owned by it, appellant is not an "employee" pursuant to the Act.[12]

Appellant's attorney, however, also contends that Congress intended Gallaudet University employees to be covered under the Act because it defined Gallaudet employees as "employees" in statutes making them eligible for Federal civil service retirement,[13] life insurance,[14] and health insurance benefits.[15] The word "employee," however, frequently is defined by the statute where it appears[16] and the statutory definition of a term is generally the controlling definition.[17] Consequently, because the plain language of section 8101(1) of the Act fails to support appellant's attorney's assertion that Congress intended Gallaudet University employees to be covered under the Act, the Board holds that appellant is not an "employee" as

[8] 39 U.S.C. § 201.

[9] 20 U.S.C. § 4301 *et seq.*

[10] *Id.*

[11] *Compare* 20 U.S.C. § 41 *et seq.*; *George Abraham*, 36 ECAB 194 (1984).

[12] Contrary to appellant's attorney's assertion, the Board's decision in *Doris E. Schwarz*, Docket No. 94-101 (issued September 8, 1995), is not relevant to this case because the Board did not address the issue of whether an employee of Gallaudet University is an "employee" under the Act.

[13] 5 U.S.C. § 8331(1)(H).

[14] 5 U.S.C. § 8701(a)(7).

[15] 5 U.S.C. § 8901(1)(F).

[16] *Emiliana De Guzman (Elpedio Mercado)*, 4 ECAB 357 (1951) citing *United States v. American Trucking Association*, 310 U.S. 534, 545 (1940).

[17] *See Colautti v. Franklin*, 439 U.S. 379 (1979).

defined by the Act.[18] Furthermore, the fact that Congress expressly defined employees of Gallaudet as "employees" for the purposes of obtaining other Federal benefits, but failed to supply such a definition under the Act, indicates that Congress did not intend to extend the coverage of the Act to Gallaudet University employees.[19]

Appellant's attorney also argues that the Office should be equitably estopped from denying appellant and other Gallaudet University employees coverage under the Act because appellant previously received benefits under the Act and because workers' compensation claims of employees of Gallaudet University would then be submitted to the District of Columbia's "workers' compensation system," which he states is "broken." The Board finds that equitable estoppel, however, is inapplicable inasmuch as section 8128(a) of the Act provides:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may-- (1) end, decrease, or increase the compensation awarded; or (2) award compensation previously refused or discontinued."

The Office, therefore, properly reopened appellant's claim pursuant to section 8128(a) of the Act and determined that employees of Gallaudet University were not "employees" for purposes of the Act.[20]

Accordingly, because the Office properly determined that appellant was not an "employee" pursuant to section 8101(1) of the Act, it met its burden to terminate appellant's compensation benefits.[21]

[18] *See United States v. Apfelbaum*, 445 U.S. 115 (1980).

[19] *See generally Andrus v. Glover Construction Co.*, 446 U.S. 608 (1980) (holding that where Congress exclusively enumerates exceptions, additional exceptions are not to be implied, in absence of contrary legislative intent).

[20] 5 U.S.C. § 8128(a), 20 C.F.R. § 10.138(b)(1); *see Elizabeth Pinero*, 46 ECAB 123 (1994).

[21] *Corlisia L. Sims (Smith)*, 46 ECAB 172 (1994); *Gary R. Sieber*, 46 ECAB 215 (1994).

The decision of the Office of Workers' Compensation Programs dated December 18, 1996 is hereby affirmed.

Dated, Washington, D.C.
November 6, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member