U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of IRA D. GRAY and U.S. POSTAL SERVICE,
POST OFFICE, Denver, Colo.

Docket No. 97-2134; Submitted on the Record;
Issued May 13, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's entitlement to medical benefits effective June 3, 1991; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

This case has previously been before the Board on appeal. On the most recent prior appeal, the Board, by decision and order dated July 22, 1996, found that there was a conflict of medical opinion on the issue of whether the Office properly terminated appellant's entitlement to medical benefits effective June 3, 1991. The Board stated that the Office should refer appellant to an appropriate medical specialist to resolve this conflict.[1]

By letters dated September 13, 1996, the Office referred appellant, the case record and a statement of accepted facts to Dr. Richard Talbott, a Board-certified orthopedic surgeon, to resolve the conflict of medical opinion. The copies of the Office's referral letters in the case record do not indicate that copies were sent to appellant's authorized attorney. A report dated October 1, 1996 set forth appellant's history and findings on examination, and reviewed the prior medical evidence. Dr. Talbott diagnosed deconditioning secondary to decreased activity and restrictions imposed by the chiropractor, strain/sprain of the cervical and lumbar spine at the time of the accident, and no objective findings, noting that examination was essentially normal except for some reduced range of motion in the cervical spine. Dr. Talbott then stated: "In my opinion the chiropractic treatments can provide some subjective, symptomatic relief. However, after the first 4 to 5 visits it is also my opinion that further chiropractic care will not substantially aid in recovery-rehabilitation from injury-related maladies." Dr. Talbott stated that he agreed with the April 30, 1991 report of Dr. Jack H. Akmakjian that appellant was at maximum benefit from chiropractic and medical treatment and that further treatment would not enhance

[1] Docket No. 94-1969.

appellant's recovery. Dr. Talbott stated that he disagreed with the opinion of Dr. R. Bradley Zisch, a chiropractor, that appellant needed supportive chiropractic treatment to keep him at his current functioning level and relieve him of symptoms from his condition, and stated this disagreement was "based on my belief that chiropractic care is simply passive and palliative and will not substantially aid in recovery/rehabilitation." Dr. Talbott then stated:

> "Comments from Dr. [Kaisel] Steinhardt note that the patient probably sustained some stretching and tearing of the muscles and ligaments at his neck and back region and these injuries have healed. I agree with both of those statements. Actually a strain is a muscle injury. Second degree and third degree strains produce some hemorrhaging into the tissue which then results in some scarring. A sprain is a similar situation, but involving a ligament. The next statement of Dr. Steinhardt noted is that when the resulting scar tissue is put to stress he will experience some symptoms. I disagree with that in the sense that after 6 [to] 8 weeks healing has taken place and if the patient has been doing some exercises, the orientation of the healing tissue will be appropriate and since scar tissue has no nerve supply to mediate pain sensation, then I believe this will not be true. Next Dr. Steinhardt stated that it is likely that the patient will continue to improve, but it is likely that he will never be perfect. I agree that he continued to improve. However, I also believe he returned to preaccident status. I believe it takes 6 [to] 8 weeks for healing to occur and maybe another month or two for complete recovery from any residual muscle soreness."
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> "In summary I would say that it is my opinion that it was perfectly appropriate to terminate medical care in June 1991 as related to the workers' compensation injury of January 11, 1989."

Based on Dr. Talbott's opinion, the Office, by decision dated March 18, 1997, found that the weight of the medical evidence established that ongoing treatment was not required for appellant's January 11, 1989 employment injury.

By letter dated April 14, 1997, appellant's attorney requested reconsideration, contending that there was no showing that the referee specialist was selected by strict rotation, and that appellant was not provided an opportunity to participate in the selection of the referee specialist because the authorized attorney was not provided with the notice of the examination. Appellant's attorney requested that the case be referred to another referee specialist after providing appellant the opportunity to participate in the selection process.

By decision dated May 7, 1997, the Office found that the request for reconsideration was immaterial and not sufficient to warrant review of its prior decision.

The Board finds that the Office properly terminated appellant's entitlement to medical benefits effective June 3, 1991.

In situations where there are opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[2] In the present case, appellant, the case record and a statement of accepted facts were referred to Dr. Talbott to resolve a conflict of medical opinion found on the prior appeal. The report of Dr. Talbott was based on a proper factual background and was sufficiently well rationalized to be afforded special weight. Dr. Talbott explained why he concluded that it was appropriate to terminate medical care for appellant's January 11, 1989 employment injury in June 1991, specifically addressing and disagreeing with physicians' statements that further treatment was needed and stating that injuries such as appellant's heal within six to eight weeks and complete recovery from any residual muscle soreness occurs in another month or two. Dr. Talbott's October 1, 1996 report constitutes the weight of the medical evidence and is sufficient to meet the Office's burden of proof to terminate appellant's entitlement to medical benefits.[3]

The Board further finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "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 --
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> (1) end, decrease, or increase the compensation awarded; or
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> (2) award compensation previously refused or discontinued."

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a point of law, by advancing a point of law or fact not previously considered by the Office, or by submitting relevant and pertinent evidence not previously considered by the Office. Section 10.138(b)(2) 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.

On reconsideration, appellant's attorney contended that there was no showing that the referee specialist was selected by strict rotation, and that appellant was not provided an opportunity to participate in the selection of the referee specialist because the authorized attorney

[2] *James P. Roberts*, 31 ECAB 1010 (1980).

[3] To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further treatment *Furman G. Peake*, 41 ECAB 361 (1990).

was not provided with the notice of the examination. With regard to the first contention, the Office has developed specific procedures for the selection of impartial medical specialist, including a rotation system of selecting appropriate specialists in alphabetical order.[4] Appellant has not submitted any evidence to support an allegation that Dr. Talbott was not chosen by the Office's rotation system.[5] With regard to appellant's attorney's second contention, the Board has held that, in circumstances where appellant and his or her representative know a referee is to be appointed, a request for participation in the selection of this impartial medical examiner must be made prior to the Office's selection and a valid reason must be given.[6]

In the present case, appellant's attorney did not request to participate in the selection of the impartial medical specialist until after the specialist's report had been received and a decision rendered. No reason was given for the request to participate. Under these circumstances, appellant's attorney's contentions in his request for reconsideration do not show that the Office erroneously applied or interpreted a point of law. While the request for reconsideration did advance points of law not previously considered by the Office, reopening for further review of the merits of the claim is not required, as this point of law did not have a reasonable color of validity.[7]

The decisions of the Office of Workers' Compensation Programs dated May 7, 1997 and March 18, 1997 are affirmed.

Dated, Washington, D.C.
May 13, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member

[4] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b) (March 1994).

[5] *See Roger S. Wilcox*, 45 ECAB 265 (1993).

[6] *David Alan Patrick*, 46 ECAB 1020 (1995).

[7] *Nora Favors*, 43 ECAB 403 (1992).