U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VICKEY C. RANDALL and U.S. POSTAL SERVICE,
POST OFFICE, Riviera Beach, FL

Docket No. 98-855; Submitted on the Record;
Issued March 10, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's health club membership after January 31, 1997; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a).

On April 22, 1991 appellant, then a 30-year-old letter carrier, filed a claim for an injury in an automobile accident while in the performance of duty on April 20, 1991. Appellant stopped work on April 22, 1991. On May 28, 1991 the Office accepted appellant's claim for cervical and lumbar strains. By decision dated November 15, 1991, the Office terminated further compensation and medical benefits after May 24, 1991 on the grounds the medical evidence established that appellant was disabled due to an intervening nonwork-related automobile accident that occurred on May 11, 1991. In a decision dated July 7, 1992, the Office vacated the November 15, 1991 decision and accepted appellant's claim for the additional condition of musculoligamentous strain of the cervical and lumbar spine. On September 30, 1993 appellant accepted a position as a modified carrier at the employing establishment and the Office ceased paying her compensation for disability.

In a decision dated February 24, 1995, the Office reopened appellant's claim for medical treatment only and authorized a health club membership. This was based on the recommendation of Dr. Robert B. Zann, appellant's attending orthopedic surgeon. By decision dated February 25, 1997, the Office denied appellant's request for continuation of her health club membership on the grounds that the medical evidence did not establish a compelling basis for continuation of her health club membership. In a merit decision dated May 15, 1997, the Office denied appellant's March 5, 1997 request for reconsideration on the grounds that the evidence was not sufficient to warrant modification of the prior decision. By decision dated June 18, 1997, the Office denied appellant's May 21, 1997 request for reconsideration on the grounds that the request was *prima facie* insufficient to reopen the record for a merit review.

The Board finds that the Office did not abuse its discretion by denying payment of appellant's health club membership benefits after January 31, 1997.

Section 8103(a) of the Federal Employees' Compensation Act, provides for furnishing to an injured employee "the services, appliances and supplies prescribed by a qualified physician," which the Office "considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of monthly compensation."[1] The Board has found that the Office has great discretion in determining whether a particular type of treatment is likely to cure or give relief.[2] Regarding membership in a health club or spa, the Office's procedure manual provides that health club memberships may be authorized if needed to treat the effects of an injury, that such memberships may be approved only for periods of six months at a time and that the treating physician must describe the specific therapy and exercise routine needed, the anticipated duration of the recommended regimen, the specific equipment or facilities needed, the treatment goals, the actual or anticipated effectiveness of the regimen, the frequency of examinations to determine the ongoing need for the program and whether the exercise routine can be performed at home.[3]

In the present case, the Office's initial written authorization of a health club membership for appellant was in February 1995. A review of the record indicates that the health club membership was authorized for treatment of appellant's accepted musculoligamentous condition on the recommendation of her attending Board-certified orthopedic surgeon, Dr. Zann. The Office verbally authorized appellant's continued health club membership in December 1996. In a letter dated January 9, 1997, the Office rescinded the verbal authorization of appellant's spa membership. By letter dated January 9, 1997, the Office requested that Jeffrey M. Rifkin, Ph.D., a licensed clinical psychologist, submit information concerning the medical necessity of appellant's request for continuation of her health club membership. In a report dated January 13, 1997, Dr. Rifkin responded to the Office's request and indicated that the continued health club membership was necessary for appellant to strengthen problematic areas of her neck and lower back and for stress reduction. He also provided answers to the questions posed by the Office's questionnaire concerning the health club program. By letter dated January 29, 1997, the Office notified appellant that her health club membership expired January 31, 1997 and the authorization for this type of treatment was made on a yearly basis. The Office indicated appellant's last authorization was over a year prior to the date of termination of the health club membership and the evidence from Dr. Rifkin was insufficient to warrant continuing said membership. The Office requested additional information from appellant's treating physician for her physical condition concerning whether the health club membership was medically necessary, to describe the exercise or therapy program to be performed, the freguency of the regimen, duration of the program and effectiveness of the prescribed regimen compared to alternative modalities. Having received no response, the Office denied payment for appellant's continuing health club membership.

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[1] *Id.*

[2] *James F. Archie*, 42 ECAB 180 (1991); *William E. Gay*, 38 ECAB 599 (1987).

[3] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.15 (April 1993).

The Board finds that this action by the Office did not constitute an abuse of its discretion. As noted above, the Office's procedure manual allows authorization of a health club membership for a maximum of six months at a time. The only written authorization in this case was given on February 24, 1995. As more than one year had elapsed since this authorization, the Office acted properly in requesting medical justification for continued membership. This request should have been directed to Dr. Zann rather than to Dr. Rifkin, as Dr. Rifkin, a clinical psychologist, was treating appellant for a mental condition rather than a physical condition. Dr. Rifkin's opinion on the necessity of a health club membership for the accepted conditions of musculoligamentous strain of the cervical and lumbar spine is of little probative value and insufficient to justify such membership. The recommendation of a physical therapist who performed a work capacity assessment on April 1, 1997, that appellant continue her gym program, does not constitute medical opinion and is of no probative value on the medical question of whether this form of treatment should be authorized by the Office.[4] Before denying payment for further health club membership, the Office did, however, request that appellant submit a report addressing the necessity of such membership from the physician treating her for her accepted physical condition, but no such report was submitted. Under these circumstances, the Office did not abuse its discretion by refusing to authorize a continuing health club membership for appellant.

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

Section 8128(a) of the 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 or her 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.

In the present case, appellant, with her May 21, 1997 request for reconsideration, submitted an unsigned April 17, 1997 treatment note from the office of Dr. Charles M. Sonu, a specialist in orthopedic surgery of the spine, stating: "I think she should continue her gym

[4] A physical therapist is not a "physician" within the meaning of section 8101(2) of the Act, and cannot render a medical opinion. *Barbara J. Williams*, 40 ECAB 649 (1989).

program which seems to have allowed her to continue to work." It is well established that to constitute competent medical opinion evidence the medical evidence submitted must be signed by a qualified physician.[5] As the evidence submitted on reconsideration was not responsive to the Office's request and failed to contain a physician's signature, the Office properly denied appellant's request for reconsideration.

The decisions of Office of Workers' Compensation Programs dated June 18, May 15 and February 25, 1997 are hereby affirmed.

Dated, Washington, D.C.
March 10, 2000

Michael J. Walsh
Chairman

George E. Rivers
Member

Michael E. Groom
Alternate Member

[5] *See James A. Long*, 40 ECAB 538 (1989); *Merton J. Sills*, 39 ECAB 572 (1988).