U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of REGENA C. DEMPSEY and DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, Summersville, WV

Docket No. 02-847; Submitted on the Record;
Issued August 23, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits; and (2) whether the Office properly denied appellant's June 15, 2001 request for reconsideration.

On November 6, 1998 appellant, then a 38-year-old clerk, injured her right ankle and foot when she fell while walking up steps. The Office accepted her claim for right ankle sprain "resolved by [January 6, 1999]" and right foot sprain. Appellant received compensation for temporary total disability.

On March 19, 1999 appellant's attending orthopedic surgeon, Dr. J. Patrick Galey, reported that appellant had reached maximum medical improvement and could return to work with restrictions.

On May 5, 1999 Dr. Luis A. Loimil, an orthopedic surgeon and Office referral physician, reported that the diagnosis of right foot and ankle sprain was not established, as it "should not persist for such a long period of time." Appellant's very strong positive Tinel's sign in the posterior tibialis nerve of the affected foot was consistent with tarsal tunnel syndrome. Because she had no problems with her foot prior to November 6, 1998, Dr. Loimil concluded that "this would be a direct cause of the injury." He recommended a diagnostic study to rule out any underlying pathology of tarsal tunnel syndrome or diabetic neuropathy. Dr. Loimil expressly agreed with Dr. Galey that appellant was disabled due to her subjective complaints from performing work that required standing or walking more than two hours. She could sit all day and not be disabled. Dr. Loimil added a limitation on climbing and crawling.

In a follow-up report dated June 15, 1999, Dr. Loimil noted that further diagnostic testing was negative. He felt that appellant should be fitting with an orthotic and had no further recommendation.

On June 23, 1999 Dr. Galey, reported that he had not seen appellant "for awhile now." Dr. Galey thought it appropriate that appellant be fitted with an orthotic for her symptoms. In July 1999, he completed a work restriction evaluation indicating that appellant could work eight hours a day with restrictions. The employing establishment, however, had no light-duty-positions available.

On September 30, 1999 Dr. Harry H. Fathy, an orthopedic surgeon and Office referral physician, reported that as a result of her November 6, 1998 injury appellant sustained a sprain/strain like condition to her right foot. She had reached maximum medical improvement. Dr. Fathy reported that appellant was able to start light work at anytime but should be evaluated once again by Dr. Galey for consideration of releasing her to regular work.

In a supplemental report dated November 17, 1999, Dr. Fathy clarified that appellant continued to suffer objective residuals of her November 6, 1998 employment injury, that current findings warranted work restrictions and that the current necessity for light duty was due to both the accepted condition of right foot and ankle sprain and nonindustrial degenerative joint disease of the right knee.

On March 4, 2000 Dr. Galey reported, that appellant had returned with complaints of further progression of her symptoms. His findings on physical examination were negative without exception: no obvious swelling, erythema or ecchymosis; no tenderness; no loss of motion; normal motor and neurologic examination; normal circulatory examination and normal provocative tests. Dr. Galey diagnosed right foot and leg pain "without any objective findings." He recommended continuation of anti-inflammatories and stated that appellant had reached maximum medical improvement.

The Office determined that a conflict in medical opinion existed on whether the effects of appellant's work injury had resolved. The Office referred appellant, together with the case record and a statement of accepted facts, to Dr. Carl J. Roncaglione, a Board-certified orthopedic surgeon.

In a report dated December 19, 2000, Dr. Roncaglione related appellant's history and complaints. He described his findings on physical examination and reviewed x-ray studies. Dr. Roncaglione reported that it appeared appellant had reached maximum medical improvement from any stresses or strains that occurred on November 6, 1998. Careful evaluation of the right lower extremity clinically and by x-ray showed no abnormalities. He noted that a prior diagnostic test was negative for tarsal tunnel syndrome, radiculopathy and myelopathy. With respect to function, Dr. Roncaglione reported that the only restrictive influence was that of appellant's rather morbid obesity. He stated that no injury-related-disability was medically measured objectively. Disability with respect to whatever strains or sprains that occurred on November 6, 1998 had "long since subsided" and maximum medical improvement had "long since been achieved." Appellant's only physical limitations were with respect to her morbid obesity.

In a decision dated May 23, 2001, the Office, after notice, terminated appellant's compensation benefits on the grounds that she had recovered from the residuals of her

November 6, 1998 work injury. The Office found that the opinion of Dr. Roncaglione, the referee medical specialist, represented the weight of the medical evidence.

Appellant requested reconsideration on June 15, 2001. She stated that she was examined that day by Dr. John A. Snead, an orthopedic surgeon, who came to the conclusion that appellant had possible tarsal tunnel syndrome. Appellant stated that Dr. Snead recommended further testing and surgery to correct any nerve damage. In support of her request, appellant submitted an insurance form signed by him and indicating that appellant had tarsal tunnel syndrome, left [sic]. Dr. Snead referred appellant to the neurology department for nerve conduction studies. An electromyography report dated August 17, 2001, interpreted the study as suggestive of right posterior tarsal tunnel syndrome.

In a decision dated September 14, 2001, the Office denied appellant's request for reconsideration. The Office found that appellant has submitted no relevant and pertinent evidence to support her request, as none of the medical evidence discussed the relationship, in any, between tarsal tunnel syndrome and appellant's work injury.

The Board finds that the Office properly terminated appellant's compensation benefits.

It is well established that, once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[1] After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[2]

The Office referred appellant to Dr. Roncaglione, a Board-certified orthopedic surgeon, to resolve a conflict in medical opinion on whether the effects of appellant's work injury had resolved. The record in this case establishes no such conflict. Appellant's attending orthopedic surgeon, Dr. Galey, consistently reported since March 19, 1999 that appellant had reached maximum medical improvement and could return to work with restrictions. He offered no opinion on whether she continued to suffer from her November 6, 1998 employment injury.

It was the Office referral orthopedist, Dr. Fathy, who reported on November 17, 1999 that appellant continued to suffer objective residuals of her November 6, 1998 employment injury. On March 4, 2000 Dr. Galey, noted that appellant had complaints of further progression of her symptoms, but his findings on physical examination were completely negative. He diagnosed right foot and leg pain "without any objective findings."

As no demonstrable conflict existed between appellant's physician, Dr. Galey and either of the Office referral physicians, Drs. Loimil or Fathy, on whether the effects of appellant's work injury had resolved, Dr. Roncaglione cannot serve as a referee medical specialist under 5 U.S.C. § 8123(a). His opinion cannot be accorded the special weight normally reserved for specialists

[1] *Harold S. McGough*, 36 ECAB 332 (1984).

[2] *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

of that status.[3] Dr. Roncaglione is instead a second-opinion physician, serving in the same role as Drs. Loimil and Fathy.[4]

In his December 19, 2000 report, Dr. Roncaglione explained that a careful evaluation of appellant's right lower extremity clinically and by x-ray showed no abnormalities. This was consistent with a prior diagnostic study that was negative for tarsal tunnel syndrome. Based on his examination, appellant had no objective measurable injury-related disability. Dr. Roncaglione explained that disability with respect to whatever strains or sprains that occurred on November 6, 1998 had long since subsided and that appellant had long since achieved maximum medical improvement. Her only physical limitations were with respect to her morbid obesity.

Dr. Roncaglione based his opinion on a complete and accurate factual and medical background. The Office provided him a statement of accepted facts and the entire case record. Dr. Roncaglione demonstrated his familiarity with the medical evidence of record and offered sound medical rationale to support his opinion. Although he is not a referee medical specialist, the Board finds that the opinion of Dr. Roncaglione constitutes the weight of the medical evidence and is sufficient to establish that residuals of appellant's November 6, 1998 employment injury had resolved by the time of his examination. The record contains no medical opinion evidence to the contrary. Dr. Galey's most recent report, almost nine months earlier, showed completely normal findings on physical examination and is not inconsistent with Dr. Roncaglione's report.

As the weight of the medical evidence established that residuals of appellant's November 6, 1998 employment injury had resolved, the Office met its burden of proof to terminate compensation benefits for that injury. The Board will affirm the Office's May 23, 2001 decision.

The Board also finds that the Office properly denied appellant's June 15, 2001 request for reconsideration.

The Act provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision. The employee shall exercise this right through a request to the district office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."[5]

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or

[3] Section 8123(a) of the Federal Employees' Compensation Act provides in part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

[4] *Helga Risor (Windell A. Risor)*, 41 ECAB 939 (1990).

[5] 20 C.F.R. § 10.605 (1999).

interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[6]

A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[7]

Appellant's June 15, 2001 request for reconsideration is timely. She made this request within one year of the Office's May 23, 2001 decision, to terminate her compensation benefits. This request, however, fails to meet at least one of the three standards for obtaining a merit review of her claim. It set forth no argument and contained no evidence showing that the Office erroneously applied or interpreted a specific point of law, nor did it advance a relevant legal argument not previously considered by the Office. Appellant argued instead that she had seen a new physician, but she submitted no narrative opinion from this physician explaining that she continued to suffer residuals of her November 6, 1998 employment injury.

Appellant submitted an insurance form showing a diagnosis of tarsal tunnel syndrome, left (possibly in error) and referring her to the neurology clinic for diagnostic testing. She also submitted an August 17, 2001 electromyography report, interpreting the study as suggestive of right posterior tarsal tunnel syndrome. This evidence is irrelevant because it fails to address the critical issue in this case, namely, whether appellant continues to suffer residuals of her November 6, 1998 employment injury. Evidence that does not address the particular issue involved constitutes no basis for reopening a case.[8]

As appellant's June 15, 2001 request for reconsideration failed to meet at least one of the standards for obtaining a review of the merits of her claim, the Office properly denied her request. The Board will affirm the Office's September 14, 2001 decision.[9]

[6] *Id*. § 10.606.

[7] *Id*. § 10.608.

[8] *Jimmy O. Gilmore*, 37 ECAB 257 (1985); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

[9] The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c). The Board, therefore, has no jurisdiction to review evidence received after the Office's September 14, 2001 decision.

The September 14 and May 23, 2001 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
August 23, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member