U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HERMAN STERN and U.S. POSTAL SERVICE,
POST OFFICE, Brooklyn, N.Y.

Docket No. 96-1859; Submitted on the Record;
Issued September 16, 1998

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for a merit review on February 27, 1996.

On August 12, 1974 appellant, then a 47-year-old elevator operator, filed a claim alleging that on that same date he injured both legs and his back when he was pinned against a wall by a full skid of sacks and heavy parcels in the performance of his federal employment. The Office accepted the claim for a laceration of the left leg, a contusion of the rib cage and abdominal muscles, and for a lumbosacral sprain. On November 18, 1974 appellant filed a notice of recurrence of disability alleging that he sustained a recurrence on that same date. Appellant subsequently received compensation for total temporary disability.

By decision dated August 19, 1982, the Office terminated compensation benefits based on its finding that the medical evidence established that appellant was fit for full duty. Pursuant to appellant's request, the Office held a hearing on January 24, 1983. By decision dated May 19, 1983, the Office hearing representative vacated the August 19, 1982 decision and remanded the case for further development of the evidence. Appellant, consequently, continued receiving compensation benefits. Moreover, the subsequently developed medical evidence reestablished appellant's entitlement to compensation benefits.

On April 14, 1992 Dr. Harvey R. Grable, appellant's treating physician and a Board-certified orthopedic surgeon, indicated that appellant remained disabled from work. Dr. Grable, however, indicated that appellant could intermittently sit for six hours per day, intermittently walk for two hours per day, intermittently stand for two hours per day, but that he was precluded from lifting, bending, squatting, climbing, kneeling, and twisting. He also checked a box indicating that appellant could lift zero to ten pounds and wrote "none" to indicate the hours per day appellant was capable of working.

The Office subsequently requested Dr. Grable to clarify his opinion on whether appellant could return to light duty. The employing establishment offered to return appellant to work in a modified clerk position for six hours a day in a sedentary position. On May 27, 1992 Dr. Barry S. Gloger, a Board-certified orthopedic surgeon, reviewed the case record, the objective evidence, and conducted a physical examination. He found that appellant was capable of performing the sedentary duties of the job offered.

On June 2, 1992 Dr. Grable reviewed the physical requirements of the job offer and indicated that appellant could perform the modified clerk duties.

On October 7, 1992 the employing establishment offered appellant the limited-duty position as a modified clerk. The position consisted of answering telephones, processing paperwork, and sorting mail in a sedentary position with no lifting over 10 pounds, no bending, and no twisting. The position was for six hours per day.

On October 15, 1992 Dr. Grable reported that appellant remained disabled from work. Dr. Grable, however, indicated that appellant could intermittently sit for one hour per day, intermittently walk for two hours per day, intermittently stand for two hours per day, but that he was precluded from lifting, bending, squatting, climbing, kneeling, and twisting. He also checked a box indicating that appellant could lift zero to ten pounds.

Appellant declined the position on October 16, 1992.

Pursuant to the Office's request for clarification, Dr. Grable stated on January 21, 1993 that all the objective evidence indicated that appellant was capable of performing the requirements of the limited-duty position. He stated that all of appellant's pain was subjective. He indicated that he had no disagreement with the Office's finding that appellant could perform the work described with the qualification that the subjective complaints could impede even this type of work.

On February 2, 1993 the employing establishment submitted an updated job offer for the limited-duty position as a modified clerk. The position again consisted of answering telephones, processing paperwork, and sorting mail in a sedentary position with no lifting over 10 pounds, no bending and no twisting. The position was also for six hours per day, but included regular breaks.

On February 16, 1993 appellant declined the position and requested disability retirement benefits.

On March 10, 1993 the Office informed appellant that pursuant to 5 U.S.C. § 8106 (c)(2) a partially disabled employee who refuses or neglects to work after suitable employment is offered to, procured by, or secured for him is not entitled to compensation. It stated that, therefore, appellant's compensation would be terminated on March 7, 1993. Appellant was given 30 days to accept the job offer and to submit any explanations documenting his reasons for refusing the position.

By decision dated March 15, 1993, the Office terminated appellant's benefits effective March 7, 1993 because a suitable job offer within appellant's medical restrictions was made and rejected. In an accompanying memorandum, the Office noted that the weight of the medical opinion evidence rested with Dr. Gloger, who offered a well-rationalized medical opinion indicating that appellant could perform the duties of the limited-duty position offered. It also noted that Dr. Grable's opinion was entitled to less weight as he failed to offer an explanation for his conclusions and his conclusions were not supported by objective evidence.

On March 30, 1993 Dr. Grable reported that appellant remained disabled from work. Dr. Grable, however, indicated that appellant could intermittently sit for one hour per day, intermittently walk for two hours per day, intermittently stand for two hours per day, but that he was precluded from lifting, bending, squatting, climbing, kneeling and twisting. He also checked a box indicating that appellant could lift zero to ten pounds.

On April 2, 1993 appellant indicated that he changed his mind regarding the acceptance of Office of Personnel and Management benefits in lieu of the Office's benefits. On April 26, 1993 the Office allowed appellant 30 days to submit additional objections to the limited-duty job offer.

On April 20, 1993 appellant requested a hearing which was held on December 28, 1993. At the hearing, appellant's representative indicated that the reports from Dr. Grable and Dr. Alexander Schick, a Board-certified neurologist, established appellant's total disability. Appellant also testified that he was totally disabled based on the opinions of his doctors.

On December 31, 1993 appellant submitted a report from Dr. Schick. He reviewed the history of appellant's injury and its treatment prior to conducting a neurological examination. He stated that he did not have a computerized axial tomography to review, but that appellant suffered from chronic lower back pain with secondary radiculopathy, most likely in the L5-S1 distribution of the left side. He noted a mild left-sided foot drop with sensory deficit and indicated that the neurological examination was abnormal. Dr. Schick concluded that appellant was disabled because of chronic low back syndrome.

On March 8, 1994 Dr. Schick reviewed a magnetic resonance imaging (MRI) and indicated that it revealed a left-sided herniated disc at L4-5 and a bulging disc at L5-S on the left side. He stated that this finding and appellant's chronic back pain were related to his accepted employment injury in 1974 and that appellant was disabled.

By decision dated September 2, 1994, the Office hearing representative affirmed the April 13, 1993 Office decision terminating benefits. The hearing representative noted that "all the medical evidence submitted after the April 13, 1993 decision failed to offer rationalized medical opinion, based on a complete and accurate history (including knowledge of the duties of the restricted duty position in question), to demonstrate that the claimant was specifically unable to physically perform the duties of the restricted duty position."

On January 17, 1995 appellant requested reconsideration. In support, appellant submitted a November 8, 1994 opinion from Dr. Grable indicating that a July 5, 1989 MRI revealed a herniated nucleous pulposus at L4-5. Dr. Grable indicated that this condition was related to

appellant's August 12, 1974 injury and that it disabled him from all work. Dr. Grable further indicated that his assessment of appellant's disability was related to appellant's subjective complaints.

By decision dated April 18, 1995, the Office reviewed the case on its merits and found that the evidence submitted in support of reconsideration was insufficient to warrant modification. In an accompanying memorandum, the Office noted that Dr. Grable relied on appellant's subjective complaints in rendering his opinion and failed to account for his prior inconsistent opinion. It, therefore, found that the opinion of Dr. Gloger remained the weight of the medical evidence.

On December 22, 1995 appellant again requested reconsideration. In support, appellant submitted a November 10, 1995 from Dr. Arthur L. Eisenstein, a Board-certified orthopedic surgeon. Dr. Eisenstein indicated that appellant was injured in August 1974 when a carriage full of mail boxes fell on him. He noted that an MRI performed in 1989 revealed a moderate sized left-sided disc herniation at L4-5 with left anterior thecal sac impingement and left L4-5 neural foraminal encroachment. He also noted posterior bulging to the L5-S1 intervertebral disc and annulus fibrosis. He then found a small left paracentral disc herniation at L5-S1 with disc material extending into the epidural fat anterior to the thecal area. Dr. Eisenstein conducted a physical examination and ordered a new MRI. He then concluded that appellant's symptomatology was due to a herniated disc at L4-5 and that there would be no improvement without surgery. Because appellant was asymptomatic prior to his injury in August 1974, Dr. Eisenstein found that appellant's condition was related to the traumatic event in August 1974. He concluded "with a medical degree of reasoning, that this condition renders the patient unable to perform the duties of the light job which has been offered to him" by the employing establishment.

By decision dated February 27, 1996, the Office denied appellant's application for review because the evidence submitted in its support was repetitious of previously submitted evidence and, therefore, insufficient to warrant review of the prior decision. In an accompanying memorandum, the Office noted that the opinion of Dr. Eisenstein merely restated the conclusions of other physicians, failed to explain his conclusion, and was based on an inaccurate history.

Initially, the Board notes that the only decision before it on this appeal is that of the Office dated February 27, 1996, in which the Office declined to reopen appellant's case on the merits because he failed to submit new relevant and pertinent evidence. Since more than one year elapsed from the date of issuance of the Office's March 15, 1993, September 2, 1994, and April 18, 1995 decisions to the date of the filing of appellant's appeal on May 24, 1996, the Board lacks jurisdiction to review those decisions.[1]

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for a merit review on February 27, 1996.

[1] *See* 20 C.F.R. § 501.3(d).

Under section 8128(a) of the Federal Employees' Compensation Act,[2] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.138(b)(1) of the implementing federal regulations,[3] which provides that a claimant may obtain review of the merits of the claim by:

"(i) Showing that the Office erroneously applied or interpreted a point of law; or

"(ii) Advancing a point of law or a fact not previously considered by the Office; or

"(iii) Submitting relevant and pertinent evidence not previously considered by the Office."

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.[4]

In the instant case, appellant's request for reconsideration rested solely upon the opinion of Dr. Eisenstein, a Board-certified orthopedic surgeon. Dr. Eisenstein diagnosed a herniated disc at L4-5 causally related to appellant's employment injury in August 1974. He concluded that "with a medical degree of reasoning, that this condition renders the patient unable to perform the duties of the light job which has been offered to him" by the employing establishment. Dr. Eisenstein, however, failed to provide an explanation describing how appellant's diagnosed condition in 1995 prohibited him from performing the duties specified in the employing establishment's 1993 limited-duty job offer. Consequently, his opinion is neither relevant nor is it well rationalized. Accordingly it is entitled to little weight.[5] This evidence, therefore, failed to constitute new and relevant evidence sufficient to warrant a review of the merits pursuant to section 10.138(b)(1)(iii) of the implementing federal regulations.[6]

[2] 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.138(b)(1).

[4] 20 C.F.R. § 10.138(b)(2).

[5] *Nicolea Bruso*, 33 ECAB 1138 (1982).

[6] 20 C.F.R. § 10.138(b)(1)(iii).

The decision of the Office of Workers' Compensation dated February 27, 1996 is affirmed.

Dated, Washington, D.C.
September 16, 1998

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member