U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM F. DUFFY and U.S. POSTAL SERVICE,
POST OFFICE, Chicopee, MA

Docket No. 99-1158; Submitted on the Record;
Issued December 12, 2000

DECISION and ORDER

Before WILLIE T.C. THOMAS, PRISCILLA ANNE SCHWAB,
VALERIE D. EVANS-HARRELL

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation effective August 17, 1996; and (2) whether the Office abused its discretion in denying merit review pursuant to 5 U.S.C. § 8128.

On March 6, 1962 appellant filed a traumatic injury claim for a knee injury sustained on March 5, 1962 when he slipped on ice. The Office accepted the claim for a left knee condition.[1] He filed another claim for an injury sustained on September 28, 1962 which the Office accepted for left leg phlebitis.[2] On February 26, 1972 appellant filed a claim for pain in his left leg sustained on February 25, 1972, which the Office accepted for sprain of the hamstring muscle in the left leg, degenerative changes in the left knee and aggravation.[3] On February 28, 1973 appellant alleged that he injured his right leg when he was attacked by a dog on February 27, 1973. The Office accepted the claim for right knee sprain and paid appropriate compensation.[4]

Appellant retired in June 1973. He was placed on the periodic rolls for temporary total disability by the Office effective July 24, 1975.[5]

In a letter dated June 19, 1990, the Office requested that appellant submit a detailed narrative report from his treating physician providing an opinion, supported by medical rationale,

[1] This was assigned claim number A01-0026822.

[2] This was assigned claim number A01-0030598.

[3] This was assigned claim number A01-0094326 which is the master file number.

[4] This was assigned claim number A01-0151189.

[5] Appellant subsequently received a schedule award and was taken off the periodic rolls. He was put on again effective October 28, 1978.

explaining how appellant's current disability was causally related to his accepted employment injury. Appellant did not respond to the Office's request.

On November 28, 1995 Dr. Margaret M. Landy, a Board-certified orthopedic surgeon, examined appellant at the Office's request. Dr. Laney reviewed a statement of accepted facts, the employment injury and medical histories, the medical record and a list of questions. She diagnosed bilateral degenerative arthritis of the knees, probable bilateral degenerative arthritis of the hips and lumbosacral arthritis. Dr. Laney noted that appellant walked with a slow gait and found that both right and left knee extensions were 15 degrees and flexion was 140 degrees with normal dorsiflexion and plantar flexion in the ankle.

A neurological examination revealed negative cross straight leg raising and Laseque's test in both legs, a negative Babinski's sign, normal bilateral sensation to pinprick, deep tendon reflexes of the Achilles and patellar at 2+, normal bilateral extensor and flexor muscle strength, normal extensor and flexor ankle muscle strength, normal bilateral subtalar invertor and evertor muscle strength, and normal bilateral hip abductors, adductors, extensors, flexors, internal rotators and external rotators. Dr. Landy concluded that appellant's underlying arthritic and lateral discoid meniscus conditions were the cause of his current complaints and disability and that none of his current disability was related to his employment injuries in 1972 or 1973. The physician noted that appellant:

> "Most likely had underlying degenerative arthritis problems in the knees, with a loose body on one side and a discoid meniscus on the other side and he suffered incidents where he was symptomatic following a minor incident at work. In my opinion, [appellant] has an underlying arthritic condition which has suffered the normal expected progression and, in my opinion, none of his current symptoms are related to a workplace injury occurring in either 1972 or 1973."

Furthermore, Dr. Landy noted that appellant had "not been employed at the [employing establishment] since 1973 and any subsequent worsening of his symptoms" were "not due to exacerbation of the original injury but due to the underlying condition."

On June 24, 1996 the Office issued a proposed notice to terminate benefits on the grounds that appellant no longer had any residuals or disability due to his accepted employment injury.

By decision dated August 12, 1996, the Office terminated benefits effective August 17, 1996.

In a letter dated August 20, 1996, appellant requested an oral hearing.

In a February 27, 1997 letter, Dr. Victor Panitch, a Board-certified orthopedic surgeon, and appellant's attending physician, opined that appellant "has severe traumatic arthritis of the right knee which by history is secondary to an injury as a letter carrier many years ago."

At the April 29, 1997 hearing, appellant was advised to submit evidence from his treating physician that his current disability was causally related to his accepted employment injury.

Dr. Panitch, in a letter dated May 16, 1997, opined that appellant "has severe traumatic arthritis of the right knee," which was secondary to a work-incurred injury in the 1970s. He added that the injury had gotten progressively worse and resulted in a 30 percent permanent impairment. Appellant would eventually require a total knee replacement.

In a decision dated July 10, 1997, the Office hearing representative affirmed the Office's decision to terminate benefits. The hearing representative found that the evidence of record, as represented by the well-rationalized opinion of Dr. Landy, established that appellant no longer had any residuals or disability due to his accepted left knee strain, right knee strain and left ankle sprain and that the Office therefore met its burden of proof in terminating benefits. The hearing representative also found that the February 27 and May 16, 1997 reports by Dr. Panitch were insufficient to establish a conflict with Dr. Landy's opinion because neither report explained how or why appellant's current disability was causally related to his accepted employment injuries.

Appellant requested reconsideration and detailed what he believed were inaccuracies in Dr. Landy's report. In a letter dated July 31, 1998 appellant enclosed information which he believed would clear up the misunderstanding regarding whether he had any preexisting conditions in his legs prior to his accepted employment injuries.

In an August 14, 1998 merit decision, the Office denied appellant's request for reconsideration on the grounds that the evidence was insufficient to warrant modification of the prior decision. Appellant's January 27, 1999 request for reconsideration was denied on February 4, 1999, on the grounds that he submitted no new evidence or presented any new legal arguments.

The Board finds that the Office met its burden of proof in terminating appellant's compensation effective August 17, 1996.

Under the Act,[6] once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of compensation.[7] Thus, after the Office determines that an employee has disability causally related to his or her employment, the Office may not terminate compensation without establishing either that its original determination was erroneous or that the disability has ceased or is no longer related to the employment injury.[8] The Office's burden includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[9]

In this case, the Office accepted that appellant sustained left and right knee strains and a left ankle sprain due to injuries sustained in 1962, 1972 and 1973 and terminated appellant's

[6] 5 U.S.C. §§ 8101-8193.

[7] *William Kandel*, 43 ECAB 1011 (1992).

[8] *Carl D. Johnson*, 46 ECAB 824 (1993).

[9] *Mary Lou Barragy*, 46 ECAB 781 (1995).

compensation on the grounds that residuals of his accepted employment injuries had ceased by August 17, 1996.

In her November 28, 1995 report, Dr. Landy concluded that appellant's current condition was due to his underlying arthritis, not to his employment injuries in 1972 or 1973. She stated that as appellant had not performed his usual employment duties or worked since 1973, any subsequent worsening of his symptoms was "not due to exacerbation of the original injury but due to the underlying condition."

The physician conducted a thorough examination of appellant, reviewed his history, and found no basis on which to attribute his disability and current medical condition to his employment injuries of 1972 and 1973. Dr. Landy's comprehensive report is well rationalized and based on a through review of the medical evidence of record, physical examination, objective tests and statement of accepted facts. As such, her report is sufficient to meet the Office's burden of proof in terminating appellant's compensation.[10]

As the Office met its burden of proof to terminate appellant's compensation benefits, the burden shifts to appellant to establish that he has a disability causally related to his accepted employment injury.[11] To establish a causal relationship between the condition as well as any disability claimed and the employment injury, the employee must submit rationalized medical opinion evidence, based on a complete factual background, supporting such a causal relationship.

Subsequent to the termination of his benefits, appellant submitted reports dated February 27 and May 16, 1997 from Dr. Panitch, who attributed appellant's severe traumatic arthritis of the right knee to his 1973 employment injury without providing any rationale. He failed to explain how appellant's current disability is causally related to his accepted employment injury, particularly in view of the fact that appellant has not worked at the employing establishment since 1973. A medical opinion consisting solely of a conclusory statement regarding disability, without supporting rationale, is of little probative value.[12] Dr. Panitch did not provide any objective basis for his opinion on causal relationship. The Board, therefore, finds that his reports are insufficient to establish that appellant continued to be disabled after August 17, 1996 due to his previous work-related injuries.

The Board further finds that the Office did not abuse its discretion in denying merit review pursuant to 5 U.S.C. § 8128.

Under section 8128(a) of the Act,[13] 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

[10] *See Samuel Theriault*, 45 ECAB 586, 590 (1994) (finding that a physician's opinion was thorough, well rationalized and based on an accurate factual background and thus constituted the weight of the medical evidence that appellant's accepted injury had resolved).

[11] *George Servetas*, 43 ECAB 424 (1992).

[12] *See Marilyn D. Polk*, 44 ECAB 673 (1993).

[13] 5 U.S.C § 8128(a).

set forth in section 10.606(b)(2) of the implementing federal regulations,[14] which provides that a claimant may obtain review of the merits if her written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that:

> "(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or
>
> "(ii) Advances a relevant legal argument not previously considered by [the Office]; or
>
> "(iii) Constitutes relevant and pertinent new evidence not previously considered by the [the Office]."

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[15]

In his request for reconsideration, appellant did not submit any evidence or specify any erroneous application of law or advance a point of law or fact not previously considered by the Office.[16] As the issue in this case is medical in nature, the submission of new medical evidence addressing whether employment factors caused or aggravated the claimed condition was necessary to require the Office to reopen the claim for a merit review. For these reasons, the Board finds that the Office properly denied appellant's request for reconsideration without conducting a merit review of the claim.

[14] 20 C.F.R. § 10.606(b) (1999).

[15] 20 C.F.R. § 10.608(b).

[16] Appellant did assert that Dr. Landy's report contained various inaccuracies. However, as the record does not indicate that any of these uncorroborated assertions have a reasonable color of validity, they are insufficient to require the Office to reopen the claim for a merit review. *See Constance G. Mills*, 40 ECAB 317 (1988) (legal premise not previously considered must have reasonable color of validity). *See generally Daniel O'Toole*, 1 ECAB 107 (1948) (that which is offered as an application should contain at least the assertion of an adequate legal premise, or the proffer of proof, or the attachment of a report or other form of written evidence, material to the kind of decision which the applicant expects to receive as the result of his application; if the proposition advanced should be one of law, it should have some reasonable color of validity to establish an application as *prima facie* sufficient).

The decisions of the Office of Workers' Compensation Programs dated February 4, 1999 and August 14, 1998 are hereby affirmed.

Dated, Washington, DC
December 12, 2000

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member

Valerie D. Evans-Harrell
Alternate Member