U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EDWARD L. HAISLAH and U.S. POSTAL SERVICE,
POST OFFICE, Cleveland, OH

Docket No. 00-2720; Submitted on the Record;
Issued March 6, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective March 14, 2000; and (2) whether the Office properly denied appellant's request for a merit review under 5 U.S.C. § 8128.

On March 15, 1995 appellant was injured in the performance of duty when he lifted some mail and experienced pain in his back that radiated to his left leg. The Office accepted the claim for herniated discs at levels L2-3 and L4-5.[1] Appellant underwent a lumbar laminectomy with disc incision on October 5, 1995. Following surgery he enrolled in a pain management program on an outpatient basis. Appellant has not worked since March 15, 1995.

In April 1997, appellant came under the care of Dr. Mark Allen, a Board-certified orthopedic surgeon, for treatment of his work-related back condition. Dr. Allen started appellant on a series of medication, opioids and epidural blocks.

On June 5, 1997 the Office referred appellant for a second opinion evaluation with Dr. Daniel Mazanec, a Board-certified spinal surgeon, to further assess the nature of appellant's work-related back condition and his disability for work. In a report dated July 10, 1997, Dr. Mazanec noted appellant's history of injury and medical treatment. He documented on physical examination that appellant complained of weakness and was tender to light touch over the entire back. Dr. Mazanec noted that three of five Waddell signs were inappropriate; and that appellant's pain behavior far exceeded any organic findings on examination. He nonetheless opined that appellant was totally disabled from all work due to his "unwillingness/inability to perform at any level due to pain."

---

[1] Appellant was previously injured at work on December 27, 1993 when he fell while delivering mail. He stopped work on December 28, 1993 and sought medical treatment. The Office accepted the claim for low back and cervical strains and fracture to the right wrist. Appellant returned to restricted duty on March 7, 1994.

Based upon the recommendation of both Drs. Mazanec and Allen, appellant was enrolled in a multidisciplinary rehabilitation program, including psychological intervention and epidural blocks. However, because appellant would not fully cooperate with the prescribed treatment, Dr. Allen subsequently refused to be provided any further services for appellant's work-related back condition.

In a November 25, 1997 letter, the Office requested that appellant identify the name, address and telephone number of his new attending physician. Appellant, however, did not reply to the request.

Appellant was next referred by the Office for vocational rehabilitation services on March 26, 1998. Treatment was to include possible detoxification for a narcotic addiction.

In an April 17, 1998 letter, appellant was advised that his participation in the vocational rehabilitation program was mandatory and that he was required to select an attending physician to followup with his treatment. He was told that his failure to select a physician would demonstrate his noncompliance with vocational rehabilitation services and would thus result in reduction of his compensation benefits to zero.

In a decision dated September 23, 1998, the Office reduced appellant's monetary compensation to zero for the reason that he failed to obtain treatment for his work-related condition from an appropriate physician and he failed to participate in rehabilitation.

The record indicates that appellant next went to see Dr. Susan Stephens, a general practitioner, in October 1998. Although Dr. Stephens wanted appellant to have a magnetic resonance imaging scan to evaluate his herniated disc, he complained of pain and would not have the test performed. She ultimately referred appellant to Dr. Edward Covington, a Board-certified psychiatrist, for pain management.

In a report dated January 25, 1999, Dr. Covington provided a comprehensive account of appellant's work injury and the medical record. Following his interview with appellant, Dr. Covington stated that appellant's symptoms and dysfunction were clearly exaggerated to the point where he could not determine whether appellant's behavior was psychogenic in nature, or due to malingering. Dr. Covington noted, however, that appellant's refusal to cooperate with prior treatment was indicative of malingering. He also recommended an inpatient chronic pain management program, but stated that the prognosis was poor.

The Office approved an inpatient pain management program, which appellant began at Cleveland Clinic on March 1, 1999 under the guidance of Dr. Covington. In a March 24, 1999 discharge summary, he discussed appellant's hospitalization, noting that he tested positive for opioids and that psychological testing revealed evidence of somatization with depression and possible psychosis. On physical examination, Dr. Covington reported that appellant showed four out of four positive Waddell signs. He indicated that a full examination was not completed due to appellant's complaints of pain and his failure to cooperate. Dr. Covington stated:

> "When he 'tried' to stand he was actually pulling down with hip flexors. He was 'unable' to extend his back to lie supine or prone [but RNs documented that he sleeps supine and prone, fully extended]. RNs were asked to document sleep

positions and he slept prone and supine fully extended, also sleep with his right arm up under the pillow, showing better shoulder range of motion than in the OT evaluation. He did not walk on the treadmill. It was apparent that his strength was good, based on his ability to maintain positions of partial flexion upright for 15 min. In OT he actively resisted passive range of motion assessment."

Dr. Covington reported over the next several weeks of appellant's treatment that appellant was not making any effort at physical or occupational therapy. He noted that appellant would often magnify his symptoms when he knew he was being observed but had no complaints when he thought he was alone. Upon discharge, Dr. Covington recommended that appellant followup with home exercise. He stated that there was restriction on appellant's activity level and that he could return to work if he so desired.

In a May 17, 1999 report, Dr. Covington indicated that he had agreed to continue to treat appellant for residuals of his work-related back condition. Dr. Covington recommended that appellant attend a chronic pain rehabilitation aftercare program.

In a May 26, 1999 letter, appellant was informed that his compensation had been reinstated retroactive to February 28, 1999 because he had obtained an attending physician.

In letters dated June 11 and August 6, 1999, the Office requested that Dr. Covington provide a comprehensive medical report, including his recommendations for appellant's work restrictions, due to both his work-related back condition and any nonwork-related medical conditions.

When no response was received from Dr. Covington, appellant was referred to Dr. Sheldon Kaffen, a Board-certified orthopedic surgeon, for a second opinion evaluation. Dr. Kaffen was provided a copy of a revised statement of accepted facts dated August 6, 1999 and a copy of the medical record. In his report dated October 13, 1999, Dr. Kaffen discussed appellant's history of injury and medical treatment. He noted appellant's subjective complaints of pain in his lower back with radiation into the lower extremities. Dr. Kaffen related that appellant exhibited marked pain behaviors and felt it was not possible to perform a physical examination since appellant could not stand with his back erect with the walker. He noted that appellant had marked tenderness over the back to the slightest touch and deep tendon reflexes were hyperactive, bilaterally. Dr. Kaffen diagnosed remote herniated disc at L2-3 and L4-5 with status postlaminectomy, both levels. He advised that appellant's observed pain behaviors and disability grossly exceeded the objective physical findings on examination. Dr. Kaffen concluded that there was no continuing objective residuals of appellant's work-related conditions of herniated disc at levels L2-3 and L4-5 and surgery. He opined that appellant could not return to work in his date-of-injury job due to perceived pain. Dr. Covington specifically stated, however, that appellant's inability to work was not due to residuals of his work-related back injury.

The Office subsequently asked Dr. Kaffen to clarify his opinion as to whether appellant was capable of returning to his date-of-injury job.

In a report dated November 17, 1999, Dr. Kaffen stated that, "Based solely on the objective findings and review of medical records, it is my opinion that this claimant is medically capable of returning to his date-of-injury job as a letter carrier."

On February 9, 2000 the Office issued a notice of proposed termination of compensation, advising appellant that the medical evidence established that he was no longer disabled on account of his work-related herniated discs at L2-3 and L4-5.

In a March 14, 2000 decision, the Office terminated appellant's compensation on the grounds that he was no longer disabled due to the March 15, 1995 employment injury. The Office noted that appellant was still entitled to conservative medical treatment of his accepted work-related back condition.

Appellant subsequently wrote letters requesting reconsideration on May 23 and October 18, 2000, but he did not submit any further evidence or argument along with those requests.[2]

In decisions dated May 23 and October 18, 2000, the Office denied appellant's request for reconsideration on the merits.

The Board finds that the Office properly terminated appellant's compensation effective March 14, 2000.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.[3]

The weight of the medical evidence resides with the opinion of Dr. Kaffen who performed an evaluation of appellant after attempts by the Office to obtain a description of appellant's work restrictions was not forthcoming from Dr. Covington. Dr. Kaffen performed a comprehensive examination and opined that appellant could return to his job as a letter carrier since there was no objective evidence preventing appellant from returning to his letter carrier position. Dr. Kaffen explained that appellant's inability to work was only related to his perceived subjective complaints of pain that had no basis in the objective physical findings and appeared to be grossly exaggerated. There is no reasoned medical evidence of record that contradicts Dr. Kaffen's opinion. Based on Dr. Kaffen's medical opinion, the Office met its burden of proof to terminate appellant's compensation on the grounds that he was qualified to perform his date-of-injury job even though he remained entitled to medical benefits.

The Board further finds that the Office properly denied appellant's request for reconsideration on the merits under 5 U.S.C. § 8128.

[2] The Office properly noted that the record contained a functional capacity evaluation report dated August 10, 2000 that was signed by R. Lauren Hensley, a physical therapist. It stated that appellant could not perform the job of a mailhandler and should only perform sedentary work. Because a physical therapist is not a physician under 5 U.S.C. § 8101, this evidence is immaterial.

[3] *Roberto Rodriquez*, 50 ECAB 124 (1998).

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with the discretionary authority to determine whether it will review an award for or against compensation.[4] The regulations provide that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.[5] 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. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[6] Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.[7] Where a claimant fails to submit relevant evidence not previously of record or advance legal contentions not previously considered it is a matter of discretion on the part of the Office to reopen a case for further consideration under section 8128 of the Act.[8]

In this case, appellant's reconsideration request did not show that the Office erred in applying or interpreting a specific point of law. Appellant did not advance a relevant legal argument nor did he submit any new and relevant evidence. Because appellant did not satisfy one of the three requirements of section 8128, the Office properly refused to perform a merit review.

[4] 5 U.S.C. § 8128; *see Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[5] 20 C.F.R. § 10.606(b) (1999).

[6] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

[7] *Edward Matthew Diekemper*, 31 ECAB 224 (1979)

[8] *Gloria Scarpelli-Norman*, 41 ECAB 815 (1990); *Joseph W. Baxter*, 36 ECAB 228 (1984).

The October 18, May 23 and March 14, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
March 6, 2002

Michael J. Walsh
Chairman

Alec J. Koromilas
Member

Willie T.C. Thomas
Alternate Member