U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THOMAS LEE and DEPARTMENT OF THE NAVY, MARINE CORPS AIR STATION, MIRAMAR, San Diego, CA

Docket No. 03-1679; Submitted on the Record;
Issued November 21, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON, MICHAEL E. GROOM

The issues are: (1) whether appellant has met his burden of proof in establishing that he sustained a recurrence of disability causally related to his March 16, 2001 employment injury; and (2) whether the Office of Workers' Compensation Programs properly declined to reopen appellant's claim for consideration of the merits.

Appellant, a 54-year-old motor vehicle operator, filed a notice of traumatic injury on March 16, 2001 alleging that on March 6, 2001 he injured his low back and left foot in the performance of duty. The Office accepted his claim for contusion of the low back and right ankle. Appellant's attending physician, Dr. Christopher T. Behr, a Board-certified orthopedic surgeon, released him to return to fully duty on August 6, 2001.

Appellant filed a notice of recurrence of disability on August 1, 2002 alleging that, on July 18, 2002 he experienced additional symptoms due to his March 6, 2001 employment injury. He did not stop work. By decision dated December 9, 2002, the Office denied appellant's claim. He requested reconsideration in an undated letter and March 28, 2003 the Office declined to reopen appellant's claim for consideration of the merits.[1]

The Board finds that appellant has failed to meet his burden of proof in establishing that he sustained a recurrence of disability causally related to his March 16, 2001 employment injury.

Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between his recurrence of disability commencing July 18, 2002 and his March 6, 2001 employment injury.[2] This burden includes the necessity of

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[1] Appellant submitted additional new evidence before the Office after the March 28, 2003 decision. As the Office did not consider this evidence in reaching a final decision, the Board may not review the evidence for the first time on appeal. 20 C.F.R. § 501.2(c).

[2] *Dominic M. DeScala*, 37 ECAB 369, 372 (1986); *Bobby Melton*, 33 ECAB 1305, 1308-09 (1982).

furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.[3]

The initial medical evidence in this case established that appellant sustained contusions to his buttocks and right ankle as a result of the March 6, 2001 fall. The Office accepted a low back contusion and right ankle contusion as causally related to appellant's employment injury. In a report dated August 6, 2001, Dr. Behr, a Board-certified orthopedic surgeon, diagnosed lumbosacral sprain/strain, superimposed on preexisting degenerative disc disease and foramina stenosis and right foot contusion. He found that appellant's condition was permanent and stationary and that he had no work restrictions. Dr. Behr stated that appellant experienced occasional minimal to slight subjective complaints of pain which are those, that constitute an annoyance, but do not preclude the patient from performing any activities which precipitate the pain. He concluded: "[Appellant] should be afforded future medical care if he has a flare-up of symptoms in his low back or right foot. He may require nonsteroidal anti-inflammatory medications and/or muscle relaxing medications, if this is felt to be indicated. Appellant may also require a series of epidural steroid injections, if this treatment is felt to be indicated."

In his August 5, 2002 report, Dr. Behr noted appellant's complaints of increased pain and denial of new injuries. He provided findings on physical examination and diagnosed flare-up of lumbosacral sprain/strain superimposed on preexisting degenerative disc disease and foramina stenosis and stated: "[Appellant] has reasonably sustained a flare-up of his industrial injury of March 6, 2001." Dr. Behr concluded: "It is my medical opinion, based within reasonable medical probability, that [appellant's] symptoms are causally related to the industrial injury of March 6, 2001."

Dr. Behr's August 5, 2002 report is insufficient to meet appellant's burden of proof in establishing a recurrence of disability causally related to his March 16, 2001 employment injury. Although he opined that appellant's current condition was a "flare-up" of his accepted employment injury, he failed to provide the necessary rationalized medical opinion evidence explaining how and why he reached this conclusion. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment activity. Such an opinion of the physician must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment activity identified by the claimant.[4] Dr. Behr did not offer any reasoning explaining the nature of the relationship between appellant's current condition and his accepted employment injury and also failed to explain how or why he reached his conclusion. There is no bridging medical evidence indicating that appellant sought treatment between August 2001 and August 2002 and Dr. Behr has not explained how appellant's condition could worsen with no intervening cause after one year with no treatment. Due to these defects in the medical evidence, appellant has failed to meet his burden of proof and the Office properly denied his claim.

[3] *See Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

[4] *Leslie C. Moore*, 52 ECAB 132, 134 (2000).

The Board finds that the Office properly declined to reopen appellant's claim for reconsideration of the merits.

The Office's regulations provide that a timely request for reconsideration in writing may be reviewed on its merits if the employee has submitted evidence or argument which shows that the Office erroneously applied or interpreted a specific point of law; advances a relevant legal argument not previously considered by the Office; or constitutes relevant and pertinent new evidence not previously considered by the Office.[5]

Appellant requested reconsideration of the Office's December 9, 2002 decision on January 13, 2003. He stated that he would have his physician submit additional medical evidence in the reconsideration request. However, at the time of the Office's March 28, 2003 decision denying appellant's request for reconsideration, there was no additional evidence submitted. As appellant's request for reconsideration contained neither new evidence, new legal argument nor evidence that the Office erroneously applied or interpreted a specific point of law, the request was insufficient to require the Office to reopen appellant' s claim for consideration of the merits.

The March 28, 2003 and December 9, 2002 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
November 21, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[5] 5 U.S.C. §§ 10.609(a) and 10.606(b).