U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAUL L. FONTENOT and U.S. POSTAL SERVICE,
POST OFFICE, Baton Rouge, La.

Docket No. 97-148; Submitted on the Record;
Issued April 28, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant met his burden of proof to establish that he sustained a recurrence of disability on or after March 20, 1995 due to his March 18, 1992 employment injury; and (2) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

The Board finds that appellant did not meet his burden of proof to establish that he sustained a recurrence of disability on or after March 20, 1995 due to his March 18, 1992 employment injury.

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he cannot perform such light duty. As part of this burden the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.[1]

In the present case, the Office accepted that on March 18, 1992 appellant sustained an employment-related lumbar sprain and herniated nucleus pulposus at L4-5 and authorized the performance of a laminectomy at L4-5.[2] Appellant returned to work in a light-duty position for four hours per day. The position involved the performance of essentially sedentary clerical duties. He stopped work on March 20, 1995 and claimed that he sustained a recurrence of total

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[1] *Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

[2] The Office had previously accepted that appellant sustained a lumbar sprain on November 12, 1985. Appellant returned to full duty after this injury.

disability on that date due to his March 18, 1992 employment injury. By decision dated October 31, 1995, the Office denied appellant's claim on the grounds he did not submit sufficient medical evidence to establish that he sustained a recurrence of disability on or after March 20, 1995 due to his March 18, 1992 employment injury and, by decisions dated November 30, 1995, March 15 and September 6, 1996, the Office denied modification of its October 31, 1995 decision.

The Board finds that appellant did not submit sufficient medical evidence to establish that he sustained a recurrence of disability on or after March 20, 1995 due to his March 18, 1992 employment injury. Appellant submitted a May 25, 1995 report in which Dr. Warren Williams, Sr., an attending Board-certified neurosurgeon, indicated that his symptoms were due to his November 12, 1985 and March 18, 1992 employment injuries, that his herniated disc at L4-5 necessitated surgery and that his severe pain prevented him from engaging in "active daily living." Dr. Williams stated, "All these factors contribute to my conclusion and convince me that surgery was first indicated and now that he is impaired from maintaining gainful employment and can no longer perform his duties that are being described to me and that he requires bed rest to eliminate pain and reduce numbness in his lower limbs." In a report dated November 9, 1995, he indicated that he recommended complete retirement for appellant based on abnormal findings at L4-5 found upon magnetic resonance imaging (MRI) scan. Dr. Williams stated, "It is my opinion that his present pain and suffering and my request to stop the light[-] duty work as of March 20, 1995 was based upon the original work[-]related injury." These reports, however, are of limited probative value on the relevant issue of the present case in that they do not contain adequate medical rationale in support of their opinions on causal relationship.[3] He did not explain the medical process through which appellant's employment-related condition would have worsened such that he could not perform the essentially sedentary duties of his light-duty position.

Although Dr. Williams suggested that appellant's diagnostic testing demonstrated his total disability, in other reports he noted the equivocal nature of appellant's diagnostic testing findings. For example, in a report dated February 21, 1996, he stated that, upon x-ray testing, appellant exhibited a left filling defect at L4-5 suggestive of a herniated disc problem, but that he did not have any pain or numbness on the left. In a report dated April 25, 1996, Dr. Williams indicated that appellant had a diagnosis of "fail back syndrome" and recommended surgery, but he did not further describe this condition or elaborate on its cause. In reports dated April 16 and July 16, 1996, Dr. Rand M. Voorhies, a Board-certified neurosurgeon, to whom Dr. Williams referred appellant, indicated that appellant was a candidate for surgery, but he did not clearly

[3] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (finding that a medical opinion not fortified by medical rationale is of little probative value).

discuss the cause of appellant's condition. These reports are of limited probative value on the relevant issue of the present case in that it they do not contain an opinion on causal relationship.[4]

The Board further finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[5] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.[6] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[7] When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.[8]

In support of his several reconsideration requests, appellant submitted additional medical evidence. In a report dated December 12, 1995 report, Dr. Williams indicated that appellant's subjective symptoms did not parallel the objective findings of his MRI scan and stated, "I feel that this is possible." In a report dated March 28, 1996, Dr. Williams noted that appellant experienced persistent back pain and stated, "His present condition is related to the original injury of March 18, 1992." These reports, however, are similar to other reports of Dr. Williams which had already been considered by the Office. The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[9] Appellant also submitted an analysis of his leave use and argued that his symptoms showed he was totally disabled. However, this evidence and argument is not relevant to the main issue of the present case in that this issue is medical in nature and should be resolved by the submission of pertinent medical evidence. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[10]

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[4] *See Charles H. Tomaszewski*, 39 ECAB 461, 467-68 (1988) (finding that medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

[5] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

[6] 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

[7] 20 C.F.R. § 10.138(b)(2).

[8] *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

[9] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

[10] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

In the present case, appellant has not established that the Office abused its discretion in its January 11, 25 and April 4, 1996 decisions by denying his request for a review on the merits of its prior merit decisions under section 8128(a) of the Act, because he has failed to show that the Office erroneously applied or interpreted a point of law, that he advanced a point of law or a fact not previously considered by the Office or that he submitted relevant and pertinent evidence not previously considered by the Office.

The decisions of the Office of Workers' Compensation Programs dated September 6, April 4, March 15, January 25 and 11, 1996, November 30 and October 31, 1995 are affirmed.

Dated, Washington, D.C.
April 28, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member