U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD L. MINOR and U.S. POSTAL SERVICE,
POST OFFICE, Cincinnati, OH

Docket No. 99-2405; Submitted on the Record;
Issued December 14, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation benefits effective January 19, 1999; and (2) whether the Office properly denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

On September 6, 1997 appellant, then a 45-year-old custodian, injured his low back while lifting the back end of a tractor. He did not stop work.

In a September 26, 1997 report, Dr. Edward J. Berghausen, a Board-certified orthopedic surgeon, noted that appellant had pain off and on for some time but had sudden severe pain beginning on September 6, 1997. Dr. Berghausen indicated that appellant had lifted a lawnmower resulting in low back and left leg pain. He reviewed x-rays which revealed that appellant had significant degenerative arthritis at the L4-5 level with marginal osteophytes, narrowing greater than 75 percent and some retropulsion of L4 on L5. Dr. Berghausen diagnosed degenerative disc disease at L4-5 with L5 radiculopathy and sciatica.

In an October 1, 1997 report, Dr. Berghausen noted that appellant's back was better but his left leg continued to be very painful. He recommended a magnetic resonance image (MRI) scan.

On October 28, 1997 the Office accepted the claim for lumbar strain and authorized an MRI scan to rule out a herniated disc.

In a November 20, 1997 MRI scan report, Dr. Timothy Miller, a Board-certified radiologist, noted that appellant had a disc bulge at L3-4, disc bulge and right paracentral focal disc protrusion at L4-5, with mild impingement on the right L4-5 nerve root and degenerative changes in the lumbar discs.

In reports dated December 12, 1997, Dr. Berghausen noted that the MRI scan showed a disc bulge at L3-4, minimal disc bulge at L4-5 with mild impingement to the right L5 nerve root and degenerative changes seen in the lumbar discs, moderate at L3-4, severe at L4-5 and mild at L5-S1. He noted there was no evidence of left side nerve root impingement. Dr. Berghausen opined that appellant had significant degenerative disc disease at multiple levels. He noted that appellant's symptoms were all left sided but that the MRI scan results did not correlate with the physical findings. Dr. Berghausen also noted that appellant had significant L5 radiculopathy. He noted that appellant's claim needed to be amended to include degenerative disc at multiple levels L3-4, L4-5 and L5-S1 with right paracentral focal disc protrusion at the L4-5 level.

On February 4, 1998 appellant asked that his claim be accepted for degenerative disc disease and protrusion of disc.

On February 5, 1998 the Office informed Dr. Berghausen that it was unclear as to how appellant's degenerative disc disease with protruding disc at L3-4 was medically connected to his injury of September 6, 1997. The Office requested that Dr. Berghausen provide a well-reasoned opinion as to how the claimant's injury of September 6, 1997 contributed to his degenerative disc disease with disc protrusion at L3-4, either through direct cause, aggravation, precipitation or acceleration. The Office also inquired that if the degenerative disc disease was aggravated by the injury of September 6, 1997, was it temporary or permanent. The Office requested a projected time period, if the aggravation was temporary and his recommendations for continuing conservative treatment.

In a report dated February 18, 1998, Dr. Berghausen replied to the Office's letter of February 5, 1998. He indicated that appellant informed him that he injured himself in the course of his occupation while lifting a heavy tractor on September 6, 1997. Dr. Berghausen stated that the MRI scan showed a degenerative disc with protrusion at L3-4. He opined that the injury was related to the lifting injury occurring at work and was therefore causally related. Dr. Berghausen stated that it was a direct cause rather than an aggravation.

In a March 4, 1998 report, Dr. Richard T. Sheridan, an Office referral physician and a Board-certified orthopedic surgeon, reviewed a statement of accepted facts, the medical record and examined appellant. Dr. Sheridan noted that appellant had findings consistent with a resolved acute low back strain. He did not believe that appellant had any continuing residuals of his work-related back injury of September 6, 1997. Dr. Sheridan noted that appellant's work injury contributed to his degenerative disc disease by way of aggravation. He noted that the aggravation was temporary and ceased as of March 4, 1998.

On April 23, 1998 the Office sent a letter to Dr. Sheridan requesting clarification of his March 4, 1998 report. The Office specifically requested that Dr. Sheridan provide a more definitive statement regarding a ruptured disc at L4-5 on the left and a well-reasoned opinion as to how appellant's injury contributed to this condition and the treatment status.

In an addendum report dated May 4, 1998, Dr. Sheridan indicated that he had reviewed the MRI scan of the lumbar spine dated November 20, 1997 which he thought reflected a ruptured disc at L4-5 on the left. He noted that the patient reflected no objective findings that were expressive of an L4-5 ruptured disc. Dr. Sheridan also opined that appellant's injury of

September 6, 1997 caused an aggravation of the underlying ruptured disc condition, which was temporary and ceased. He found that appellant did not require any treatment or work restrictions because appellant had no objective findings indicative or expressive of the ruptured disc at L4-5.

In a treatment note dated May 7, 1998, Dr. Berghausen indicated that appellant continued to experience pain and was not feeling any better.

In a letter dated May 11, 1998, the Office sent appellant's treating physician, Dr. Berghausen, a copy of the February 5, 1998 statement of accepted facts, Dr. Sheridan's March 4, 1998 report and his May 4, 1998 addendum. The Office requested that Dr. Berghausen review these reports and provide his response to the findings.

In a reply dated May 18, 1998, Dr. Berghausen stated that he had reviewed his office records and appellant had low back pain as well as left leg pain, present since his work-related injury. Appellant had continuing symptoms over the last nine months which were identical across all of the treatment dates. Dr. Berghausen opined that he could find no reason to explain Dr. Sheridan's conclusions that appellant had no residuals of his low back pain, particularly since the patient "clearly" had a radicular component to the pain. He asserted that appellant continued to have residuals since the date of his industrial accident and they continued to be active.

In an October 15, 1998 letter, the Office informed appellant that a conflict of medical opinion had arisen and referred appellant for an impartial evaluation by Dr. Jerry B. Magone, a Board-certified orthopedic surgeon.

In a November 9, 1998 report, Dr. Magone noted that on November 3, 1998, he had examined appellant and the accompanying medical records. He indicated that Dr. Berghausen's initial assessment and x-ray interpretation of degenerative disc disease, facet arthritis at L4-5 with 75 percent narrowing of the L4-5 disc with a retrolisthesis, was not incorrect; however, Dr. Magone noted that Dr. Berghausen, did not address appellant's acute lumbar strain. Dr. Magone stated that the degenerative findings predated the incident of September 6, 1997. He opined that at the time of the September 19, 1997 office visit, appellant had two diagnoses: (1) an acute lumbar strain that would have been attributable to the industrial event; and (2) possible aggravation of his preexisting, severe lumbar disc degeneration which would need to be prospectively determined. Dr. Magone noted that he would attribute the acute lumbar strain to the industrial event and also a temporary aggravation of the preexisting degenerative disc disease, since the frequency with which the symptoms existed increased as compared to before the event. He also opined that appellant did not have any continued residuals and his back was in the same condition as it was prior to the incident of September 6, 1997. Dr. Magone placed a three-month date on the extent of the aggravation placing it to mid-December 1997. He indicated that the only medical condition needing to be addressed was the chronic degenerative disc disease whose temporary aggravation from the industrial incident had ceased. Dr. Magone found that there were no attributable industrial residuals. He opined that appellant needed to make active efforts to return to his former level of employment and he would recommend the functional capacity evaluation in an effort to define the limits of activity that would be necessary for his return to full duty ability.

On December 15, 1998 the Office issued a notice of proposed termination of compensation and medical benefits. Appellant was allotted 30 days to submit evidence if he disagreed with the proposed action.

In a decision dated January 19, 1999, the Office terminated appellant's entitlement to compensation benefits on the grounds that his back disability and residuals had ceased.

In a letter received by the Office on March 3, 1999, appellant's representative requested reconsideration. Additional medical records were subsequently submitted, some of which were previously provided.

In a January 6, 1999 treatment note, Dr. Berghausen asserted that appellant's pain was clinically consistent with sciatica and a herniated lumbar disc and noted that he was in need of epidural steroid injections and did not show any improvement. He noted that appellant continued to suffer pain on a constant and unrelenting basis. Dr. Berghausen also noted that appellant's current condition was related to his work injury and not to any prior accident. In his March 11, 1999 treatment note, he indicated that appellant's aggravation was an ongoing problem rather than a new one.

Appellant submitted treatment notes from December 12, 1997 to August 26, 1998 in which, Dr. Berghausen stated that appellant was seen for low back pain and diagnosed worsening pain. He noted that appellant was in need of epidural injections and continued to have central low back pain.

In a nonmerit decision dated April 23, 1999, the Office denied appellant's request for reconsideration as the evidence submitted was found to be of a repetitious nature.

The Board finds that the Office properly terminated appellant's entitlement to compensation benefits after January 19, 1999.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[1] After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[2]

In this case, the Office accepted the claim for lumbar strain. Dr. Berghausen, appellant's treating physician, supported a continuing work-related condition. Dr. Sheridan, an Office referral physician opined that all employment-related residuals had ceased. Consequently, the Office properly referred the case to Dr. Magone for resolution of the conflict.

[1] *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

[2] *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

Where there exists such a conflict of medical opinion and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.[3]

In this case, the report of Dr. Magone, the impartial specialist, is well rationalized and based upon a proper factual background such that it is entitled to special weight. This report establishes that appellant's work-related disability has ceased. He provided a history of appellant's condition, noted examining appellant, that he had severe degenerative disc disease which predated appellant's work injury, noted that appellant's accepted lumbar strain had resolved and that appellant had no continuing work-related residuals. Dr. Magone further opined that appellant's small disc herniation was not made worse by the work injury and that the underlying back problems preexisted his work injury. He explained the process by which a back strain affects the different low back components and opined that appellant's condition was a temporary aggravation of the preexisting degenerative disc disease. Dr. Magone indicated that a tear or injury such as appellant's injury would place a higher expectation on the muscle ligament tendon of the lumbar spine. He noted that a higher expectation would be placed on the already compromised disc and joints until a point when the muscle, ligament and tendon would be expected to be healed. Dr. Magone also indicated that the aggravation would be temporary and would have ended by mid December 1997. He opined that appellant did not have any attributable industrial residuals from the injury of September 6, 1997 and that all residuals were due to his preexisting degenerative condition. Consequently, Dr. Magone's report is entitled to special weight to establish that appellant's disability and condition due to his September 1997 work injury had ceased.

Therefore, the Office properly terminated appellant's compensation benefits.

The Board further finds that the Office properly denied merit review of appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his or her own motion or on application. The Secretary in accordance with the facts found on review may--
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> (1) end, decrease or increase the compensation awarded; or
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> (2) award compensation previously refused or discontinued."

Under 20 C.F.R. § 10.606(b)(2) (1999), a claimant may obtain review of the merits of the claim by submitting evidence and argument: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously

[3] *Aubrey Belnavis*, 37 ECAB 206 (1985), 5 U.S.C. § 8123(a).

considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b) (1999) provides that where the request is timely but fails to meet at least one of the standards described in section 10.606(b)(2) (1999) the Office will deny the application for reconsideration without reopening the case for a review on the merits.[4]

In the present case, appellant's attorney filed a request for reconsideration in a March 1, 1999 letter.

Appellant's representative submitted numerous reports accompanying his request for reconsideration which were previously submitted.[5] He also submitted several additional reports from Dr. Berghausen. These reports addressed appellant's continuing low back pain and supported that his current condition was solely related to his work injury and not to any prior incident. The Board notes, however, that these reports did not provide new or relevant information regarding causal relationship as they repeated the doctor's previously considered opinion on the subject. Thus, these reports are repetitious of his stated opinion. Appellant did not submit relevant and pertinent new evidence not previously considered by the Office nor did he advance a relevant legal argument that had not been previously considered by the Office. Additionally, appellant did not argue that the Office erroneously applied or interpreted a specific point of law. Consequently, appellant is not entitled to a merit review of the merits of the claim based upon any of the above noted requirements under 10.606(b)(2) (1999). Accordingly, the Board finds that the Office properly denied appellant's request for reconsideration.

[4] 20 C.F.R. § 10.608(b) (1999).

[5] *See Eugene F. Butler*, 36 ECAB 393, 398 (1984) (where the Board held that material which is repetitious or duplicative of that already in the case record is of no evidentiary value in establishing a claim and does not constitute a basis for reopening a case).

The decisions of the Office of Workers' Compensation Programs dated April 23 and January 19, 1999 are hereby affirmed.

Dated, Washington, DC
December 14, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member