U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JESS J. BUZZUTTO and U.S. POSTAL SERVICE,
MAIN STATION, Yonkers, NY

Docket No. 99-779; Submitted on the Record;
Issued January 31, 2000

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration.

On August 16, 1962 appellant, then a 21-year-old substitute clerk, was lifting sacks of flat mail when he developed back pain. On January 25, 1965 appellant was bending down to pick up mail from skids when he again felt back pain. An October 10, 1974 report on a myelogram showed herniated lumbar discs at several levels. Appellant underwent a laminectomy with disc excision on October 18, 1974. The Office accepted appellant's claim for a herniated L4-5 disc. On February 19, 1980 appellant underwent additional surgery, consisting of decompressive laminectomy at L3-4 and L4-5 with bilateral foramenotomies and removal of calcified extruded disc at L4-5. The Office paid temporary total disability compensation for intermittent periods beginning January 29, 1965 and for the period after December 19, 1979.

In an April 24, 1981 report, Dr. Robert W. Schick, a Board-certified neurosurgeon, stated that appellant had intractable pain, probably due to an arachnoiditis of the cauda equina. Dr. Schick noted that the pain was quite severe and appellant had disability because of it. He recommended further testing, possibly followed by further surgery. In a July 9, 1981 report, Dr. Peter C. Rizzo, a Board-certified orthopedic surgeon, indicated that appellant had atrophy of the right buttock and right calf with dorsiflexor weakness on the right when compared to the left. Dr. Rizzo noted appellant complained of numbness over the great toe on the right as well as the medial border of the foot and the outer aspect of the right calf. He concluded that appellant had radiculitis with evidence of neurological deficit of the L4-5 nerve root. Dr. Rizzo stated that appellant was totally disabled. He noted that appellant did not want to undergo additional surgery. In subsequent reports, Dr. Rizzo and Dr. Nicholas DePalma, a Board-certified neurosurgeon, who had performed the operations on appellant's back, indicated that appellant remained totally disabled. In an August 18, 1995 report, Dr. DePalma stated that appellant had spinal stenosis with marked radiculitis and reported that he required narcotic medication and

muscle relaxants on an almost continual basis. He continued to state that appellant was totally disabled for work and commented that he did not anticipate any improvement in the future.

The Office referred appellant, together with the statement of accepted facts and the case record, to Dr. John Mazella, a Board-certified orthopedic surgeon, for an examination and second opinion on appellant's ability to work. In a May 15, 1996 report, Dr. Mazella indicated that appellant walked with a cane and a limp with a list to the left side. He noted that straight leg raising was positive on the right. Dr. Mazella reported appellant had an L5 hypesthesia over the foot. He found that appellant had a limited range of motion of the back. Dr. Mazella diagnosed status post laminectomy and unresolved bilateral sciatic radiculopathy. He also noted that appellant had carpal tunnel syndrome and status post knee surgery, both unrelated to his employment injury. Dr. Mazella concluded appellant was permanently, totally disabled and was unable to return to work in any capacity.

In an August 15, 1996 letter to Dr. Mazella, the Office indicated that the employing establishment had been keeping appellant under surveillance before and after Dr. Mazella's examination. The Office asked the doctor to review parts of videotapes which it showed appellant performing yard work without the use of a cane or braces for the neck, back or knee. It then asked for his opinion on whether appellant might be able to perform some work and whether there remained any objective findings to indicate that the accepted conditions were still active. In an October 31, 1996 report, Dr. Mazella stated that if appellant could do general gardening such as planting plants, pruning trees, repetitive bending and lifting over the head movements, driving and normal ambulation without a cane, then he had a partial disability and was capable of working with restrictions of no lifting over 20 to 40 pounds.

In a January 2, 1997 letter, the Office sent Dr. Mazella's report to the employing establishment and requested that it formulate a job offer for appellant if it had a position that would accommodate appellant's restrictions. In a March 31, 1997 letter, the employing establishment offered appellant a position as a modified clerk effective April 12, 1997. The position required manually casing mail into required cases and processing delivery barcode sequence mail. The employing establishment stated that no lifting greater than 40 pounds was required to perform this position. It warned appellant that a negative response may result in an adverse status in regard to his compensation claim. In an April 4, 1997 letter, the Office indicated that it had reviewed the job offer and found it to be suitable for him. The Office gave appellant 30 days to accept the job offer or give a reasonable, acceptable rationale for refusing the offer. It warned appellant that if he refused the employment or failed to report to work when scheduled without a reasonable cause, his compensation benefits would be terminated.

In an April 11, 1997 letter, appellant rejected the position pending his physician's review of the offer. In an April 15, 1997 letter, the Office noted that the job offer had already been reviewed and was within the restrictions identified by the medical evidence of record. It stated that it had considered the evidence submitted and found it insufficient to change the determination previously made. The Office warned appellant that his compensation would be terminated in 15 days if he refused the employment or failed to report when scheduled. In an April 30, 1997 response, appellant rejected the job offer on the grounds that he could not

physically do the work. He submitted an April 24, 1997 note from Dr. DePalma who stated appellant could not do the requirements of the offered position.

In a June 20, 1997 decision, the Office terminated appellant's compensation for refusal to accept suitable work effective June 21, 1997.

On June 8, 1998 appellant, through his attorney, requested reconsideration, contending that there existed a conflict in the medical evidence, requiring the referral of appellant to an impartial medical specialist. The attorney stated that the Office cannot simply declare the report of a physician giving a second opinion as the weight of the medical evidence. He submitted a copy of Dr. DePalma's April 24, 1997 note.

In a September 21, 1998 decision, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was cumulative, repetitious, immaterial and irrelevant to the issue and therefore was insufficient to warrant review of the Office's June 20, 1997 decision.

The Board finds that the Office properly denied appellant's request for reconsideration.

Under section 8128 of the Federal Employees' Compensation Act[1] a claimant may obtain review of the merits of his claim by showing that the Office erroneously applied or interpreted a point of law, advancing a point of law or fact not previously considered by the Office, or submitting relevant and pertinent evidence not previously considered by the Office. Section 10.138(b)(2) of the Office's regulations provides that 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.[2] 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.[3] Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.[4]

The Office found that appellant had submitted repetitive evidence in the form of Dr. DePalma's April 24, 1997 note stating that appellant could not perform the offered position. Dr. DePalma had previously stated that appellant was totally disabled for work. His note was merely duplicative of that opinion. He did not submit any new, rationalized medical evidence demonstrating that appellant was disabled for the offered position due to the effects of appellant's accepted injury. The medical evidence therefore was insufficient to require review of the Office's decision to terminate appellant's compensation.

Appellant's attorney submitted a legal brief in support of appellant's request for reconsideration. He contended that the reports of Dr. DePalma and Dr. Mazella created a

[1] 5 U.S.C. § 8128.

[2] 20 C.F.R. § 10.138(b)(2).

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

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

conflict in the medical evidence, requiring a referral of appellant to an impartial medical specialist. The fact that the physicians presented different opinions on appellant's ability to work is not sufficient, in itself, to require referral of appellant to an impartial medical specialist. Such a referral occurs when the report of appellant's physician and the report of the physician acting on behalf of the Office are of relative equal weight. In this case, the reports were not of equal weight as Dr. DePalma gave perfunctory reports on appellant's ability to work with minimal medical rationale or description of findings and was of diminished probative value. Dr. Mazella gave a fully detailed report in support of his opinion that appellant could perform the duties of the offered position. The argument presented by appellant's attorney therefore presented a legal argument that had no color of validity and therefore failed to require the Office to perform a merit review of appellant's request for reconsideration.[5]

The decision of the Office of Workers' Compensation Programs, dated September 21, 1998, is hereby affirmed.

Dated, Washington, D.C.
January 31, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[5] *Constance G. Mills*, 40 ECAB 317 (1988).