U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RONALD E. JENKINS and DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Oklahoma City, OK

Docket No. 99-690; Submitted on the Record;
Issued March 26, 2001

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant had any disability or medical residuals requiring further treatment on or after November 9, 1997, causally related to his November 23, 1976 employment injury; and (2) whether the Office of Workers' Compensation Programs abused its discretion in denying further review of appellant's case on its merits under 5 U.S.C. § 8128(a).

The Board has given careful consideration to the issues involved, the contentions of the parties on appeal and the entire case record. The Board finds that the September 3, 1998 decision of the Office hearing representative is in accordance with the facts and the law in this case and hereby adopts the findings and conclusions of the hearing representative.[1]

By letter dated September 22, 1998, appellant, through his representative, requested reconsideration and submitted a July 18, 1998 discharge summary, an operative report, a consultation report and a deposition of Dr. Douglas J. Weiland, a Board-certified orthopedic surgeon. On July 15, 1998 appellant underwent L4-5 and L5-S1 anterior discectomies, L4, L5 and S1 partial vertebrectomies, L4-5 and L5-S1 anterior interbody fusions with placement of hardware, and a left iliac crest bone graft, without complications.

Dr. Weiland testified that appellant and his referring physician told him that appellant had spondylolisthesis which was symptomatic from a fall in 1976 and a continuing problem and that he experienced back pain secondary to an unstable L5-S1 spondylolisthesis and leg pain secondary to foraminal stenosis at L4-5 and L5-S1. He opined that appellant's problems were clearly related to his 1976 fall.[2] Dr. Weiland stated that the 1976 fall broke the fiber tissue

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[1] The hearing representative found that the Office had properly terminated monetary compensation and medical benefits on the basis that the report of the impartial medical specialist constituted the weight of the medical evidence.

[2] Appellant's representative deposing Dr. Weiland instructed him to assume that appellant was healthy before the 1976 fall and that his history as he gave it since that time was accurate.

healing of the spondylolisthesis, which never rehealed and that without any previous x-rays it was impossible to say whether the spondylolisthesis was preexisting. He added that the fall itself possibly caused the initial spondylolisthesis.

By decision dated November 24, 1998, the Office denied appellant's request, finding that the evidence submitted in support was repetitious and therefore not sufficient to warrant review of its prior decision.

The Board finds that appellant had no disability or medical residuals requiring further treatment on or after November 9, 1997, causally related to his November 23, 1976 employment injury.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[3] 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.[4] Further, the right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for wage loss.[5] To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition that require further medical treatment.[6]

In this case, appellant's physicians, Drs. Schlicke, Winters and Spray, continued to treat appellant for a right S1 radiculopathy with epidural steroid injections and opined that referral to a pain clinic was indicated.[7]

A second opinion specialist, Dr. John Fraser, examined appellant and noted that his findings were nonobjective, apart from the L5 spondylolysis which preexisted his injury from the 1960s onward as documented by appellant's previous treating physician. Dr. Fraser stated that he had no idea why appellant continued to be symptomatic, no neurovascular deficit was evident, MRI scans were unremarkable for nerve pressure, there was no evidence of a traumatic lesion on the lumbar or thoracic spine, and appellant's right elbow showed no abnormality. He opined that referral to a pain clinic would be of little use and recommended no specific treatment.

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[3] *Harold S. McGough*, 36 ECAB 332 (1984).

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

[5] *Marlene G. Owens*, 39 ECAB 1320 (1988).

[6] *See Calvin S. Mays*, 39 ECAB 993 (1988); *Patricia Brazzell*, 38 ECAB 299 (1986); *Amy R. Rogers*, 32 ECAB 1429 (1981).

[7] Dr. Paul E. Spray, a Board-certified orthopedic surgeon, noted that he had first treated appellant for back pain in 1969 and that 1969 x-rays showed some spondylolysis of the fifth lumbar vertebra, which he opined was aggravated by his 1976 work-related injury. On October 23, 1982 he opined that appellant's back symptoms were due to rheumatoid fibromyositis, spondylolysis of the fifth lumbar vertebra and a psychophysiological musculoskeletal reaction, all of which were aggravated by his 1976 injury. Dr. Lutz H. Schlicke was another Board-certified orthopedic surgeon and Dr. Paul R. Winters was a Board-certified neurosurgeon.

The Federal Employees' Compensation Act, at 5 U.S.C. § 8123(a), in pertinent part, provides: "If there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

The Office determined that a conflict in medical opinion had arisen as to whether appellant continued to have residuals of his 1976 head injury, his chip fracture at T-12, his lumbar sprain and his acute right elbow contusion and if so, whether a pain clinic should be authorized. Therefore, the Office referred appellant, together with the statement of accepted facts and the complete case record, to Dr. Fred Ferderigos, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated March 27, 1996, Dr. Ferderigos reviewed appellant's factual and medical history, noted his current complaints, performed a physical examination and opined that he could not find objective evidence to explain appellant's subjective complaints. Dr. Ferderigos noted that x-rays he obtained at that time revealed that appellant had spondylolysis of L5 without any appreciable evidence of a spondylolisthesis and that an MRI scan on February 23, 1995 revealed some narrowing of L4-5 without any significant disc herniation. He opined that appellant's right lower extremity radicular symptomatology could not be explained by the MRI scan results, that the congenital spondylolysis had been present since 1965 and was not caused by the accident and that appellant did not appear to have any injury to the lumbosacral spine from his 1976 accidental fall. Dr. Ferderigos further opined that continuation of epidural spinal injections was not indicated as appellant had no neurological compromise.

Where there exists a conflict of medical opinion and the case is referred to an impartial 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.[8]

In this case, the report of Dr. Ferderigos was based on a complete and accurate factual and medical background. He provided a comprehensive physical examination, evaluation of objective testing results and sufficient medical rationale to support his conclusions. Thus, Dr. Ferderigos' report was entitled to that special weight, which results in it constituting the weight of the medical opinion evidence on the issues in question. Therefore, relying on his report, the Office met its burden of proof to establish that appellant had no disability or medical residuals requiring further treatment on or after November 9, 1997, causally related to his November 23, 1976 employment injury.

Under 20 C.F.R. § 10.138(b)(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) 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.[9] Evidence

[8] *Aubrey Belnavis*, 37 ECAB 206, 212 (1985).

[9] 20 C.F.R. § 10.138(b)(2).

that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[10] Evidence that does not address causation of the particular issue involved, in this case whether appellant had any disability or injury residuals of the 1976 injuries requiring further medical treatment, also does not constitute a basis for reopening a case.[11]

The subsequently submitted medical evidence in support of reconsideration from Dr. Constantine G. Bouchlas, a Board-certified physiatrist, Drs. Douglas J. Weiland and Gene A. Balis, Board-certified neurosurgeons, and Dr. Schlicke restated previous opinions, identified disabling conditions not previously accepted as causally related to appellant's 1976 fall injuries, or provided no medical rationale. These reports are of reduced probative value because they are unrationalized, do not address causal relation with appellant's 1976 injuries, identify disabling conditions not accepted as having occurred, and are not based on a complete and accurate factual and medical history of appellant. Further, as the reports of Dr. Weiland repeated evidence already in the case record and did not address the particular issue involved or provide any medical rationale. Therefore, these reports are insufficient not only to overcome the special weight accorded Dr. Ferderigos' report, but also to create another conflict with the impartial medical specialist.

As the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from known facts.[12] The Board finds no such manifest error or unreasonable exercise of judgment evident in this case. Therefore, the Office acted within its discretion in declining to reopen appellant's case for further merit review.

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

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

[12] *Daniel J. Perea*, 42 ECAB 214 (1990).

The November 24 and September 3, 1998 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
March 26, 2001

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member