U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BILLY C. BARBARY and DEPARTMENT OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO & FIREARMS, Gainsville, GA

Docket No. 03-1826; Submitted on the Record;
Issued September 25, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON, WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits effective August 12, 2000; (2) whether appellant met his burden of proof, following the Office's termination of compensation, to establish that he had any residuals of his accepted February 24, 1977 low back strain on or after August 12, 2000; and (3) whether the Office abused its discretion on April 7, 2003 in refusing to reopen appellant's claim for a further review of the merits of his claim under 5 U.S.C. § 8128(a).

On March 3, 1977 appellant, then a 41-year-old resident agent in charge, filed a claim for traumatic injury alleging that, on February 24, 1977, he sustained an injury to his low back when he picked up a heavy box in the performance of duty. The Office accepted his claim for a low back strain.[1] Appellant stopped work on March 4, 1977 and did not return. Appellant was paid appropriate compensation benefits.

In a letter dated June 22, 2000, the Office proposed to terminate appellant's compensation benefits. After reviewing his response, by decision dated July 31, 2000, the Office terminated appellant's compensation and medical benefits effective August 12, 2000. Appellant requested an oral hearing before an Office representative and submitted additional evidence in support of his claim. In a decision dated April 10, 2001, an Office hearing representative affirmed the Office's prior termination of compensation benefits. By letter dated July 4, 2001, appellant requested reconsideration and submitted additional evidence in support of his claim. In a decision dated September 12, 2002, the Office found that the additional evidence and arguments submitted by appellant were insufficient to warrant modification of its prior decision terminating compensation benefits. By letter dated October 31, 2002, he requested reconsideration and submitted additional evidence in support of his claim. In a decision dated

[1] The Office subsequently accepted appellant's claim for the additional condition of herniated nucleus pulposus, lumbosacral spine, but this acceptance was rescinded on August 26, 1986.

January 8, 2003, the Office found the additional evidence and arguments submitted by appellant insufficient to warrant modification of the prior decision terminating compensation benefits. By letter dated January 18, 2003, appellant requested reconsideration and submitted additional evidence in support of his claim. In a decision dated April 7, 2003, the Office found that the evidence submitted by appellant to be duplicative and, therefore, insufficient to warrant reopening his claim for further merit review.

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[2] 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.[3] Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.[4] To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which would require further medical treatment.[5]

On April 17, 2000 the Office referred appellant, together with a statement of accepted facts, the medical opinions of record and a list of issues to be addressed, to Dr. E. Neal Powell, Jr., a Board-certified orthopedic surgeon, for a second opinion evaluation. In his narrative report dated May 31, 2000, Dr. Powell noted appellant's history with respect to his back injury, reviewed the medical records and the results of recent x-rays. He performed a complete physical examination, noting that appellant was able to sit comfortably and get on and off of the table without difficulty. Appellant was able to toe and heel walk and did not use assistive devices, but had difficulty squatting and had some mild pitting edema in both lower extremities. Dr. Powell noted that straight leg raising produced back pain, reflexes were 2+, motor groups appeared to be 5/5 and sensation was intact. Appellant had no pulsatile masses or bruits noted in the abdomen and no abdominal tenderness. Examination of the lumbar spine showed limitation of motion, though no real spasm. Extension was uncomfortable and appellant allowed flexion to about 45 degrees with mild reversal of spinal rhythm. Side-to-side bending was also slightly uncomfortable, as were extension and rotation to either side. Hips, knees and ankles showed full range of motion and no thigh atrophy was detected in direct measurements. Dr. Powell further noted that x-rays showed significant degenerative change with narrowing at

[2] *Gloria J. Godfrey*, 52 ECAB 484 (2001); *Mohammed Yunis*, 42 ECAB 325, 334 (1991).

[3] *Id.*

[4] *Franklin D. Haislah*, 52 ECAB 457 (2001); *Furman G. Peake*, 41 ECAB 361, 364 (1990).

[5] *Id.*

L4-5 and L5-S1 and the posterior end plates appeared to be almost in contact. He diagnosed degenerative disc disease with facet arthritis at L4-5 and L5, S1. With respect to appellant's accepted low back strain, Dr. Powell stated, in pertinent part:

> "A low back strain by definition is a self[-]limited problem and it is my opinion that the original work[-]related low back strain should have resolved. I am unable to comment as to the impact of the low back strain on [appellant's] current condition as again it is my feeling that this is resolved.
>
> "The objective findings are those of degenerative dis[c] disease and facet arthritis and not specifically those of [a] lumbar strain.
>
> "It is again my opinion that the normally self[-]related lumbar strain should have resolved. This does not normally lead to a degenerative lumbar condition and I feel that [appellant's] current conditions are due to the progression of underlying degenerative dis[c] disease and facet arthritis."

Dr. Powell added that appellant could perform part-time, light-duty work, with restrictions and stated that these restrictions were "based only on [appellant's] degenerative lumbar condition and not due to the previous work[-]related lumbar strain." He concluded that appellant had received appropriate treatment and that he did not have any specific recommendations for treatment that would resolve appellant's condition, as it was a progressive degenerative condition. On an accompanying work restriction evaluation form, Dr. Powell stated that appellant had significant ambulatory back pain that precluded prolonged walking, noted that appellant could work four hours a day, with restrictions and indicated that his condition was unlikely to improve.

The Board finds that the weight of the medical opinion evidence rests with Dr. Powell's well-rationalized narrative report. He provided a history of injury and appellant's medical history, reviewed the results of early tests and performed a complete physical examination. Dr. Powell noted that there were no objective signs of appellant's accepted low back strain and added that the accepted condition had resolved. While he noted that appellant had additional back problems, these were due to the progression of underlying degenerative disc disease and facet arthritis. Dr. Powell specifically stated that, while appellant had work restrictions, these were based only on appellant's degenerative lumbar condition and were not due to appellant's accepted lumbar strain. Therefore, the Office properly relied on Dr. Powell's report in terminating appellant's benefits. Furthermore, the record contains no contrary probative medical evidence to indicate that, at the time of the Office's termination of benefits, appellant had any residual disability or need for medical treatment due to his accepted lumbar strain. The last medical evidence submitted prior to Dr. Powell's report was dated May 23, 1996 and appellant did not submit any new medical evidence in response to the Office's June 22, 2000 notice of proposed termination.[6] As Dr. Powell stated that appellant had no objective signs of his accepted condition and further stated that his current disability was not due to his accepted low back

[6] In a report dated May 23, 1996, Dr. William K. Manning, appellant's treating Board-certified orthopedic surgeon, diagnosed degenerative disc disease of the lumbosacral spine and chronic lumbar strain. Dr. Manning indicated that appellant could perform some light duty, with restrictions.

strain, but was due to a separate, degenerative back condition, the Office met its burden of proof to terminate appellant's compensation benefits effective August 12, 2000.

The Board further finds that appellant did not meet his burden of proof, following the Office's termination of compensation, to establish that he had continuing work-related disability or the need for medical treatment on or after August 12, 2000, causally related to his accepted February 24, 1977 low back strain.

Subsequent to the Office's July 31, 2000 termination of benefits, appellant submitted additional medical evidence from his treating physician, Dr. Manning. In a report dated January 4, 2001, Dr. Manning reviewed appellant's history, noted that recent x-rays performed that day showed marked narrowing of the L4-5 inner space with degenerative facets at L4-5 and L5-S1 and stated that appellant's condition had worsened. He diagnosed degenerative arthritis and degenerative lumbosacral disc disease and noted that appellant had significant work restrictions. Dr. Manning did not comment, however, on whether appellant still suffered from his accepted lumbosacral strain or whether the diagnosed conditions were causally related thereto. In a follow-up report dated June 21, 2001, he stated that appellant continued to suffer from the same symptoms as when he first started treating appellant in 1984, and noted that, upon physical examination, appellant's condition remained unchanged. With respect to the cause of appellant's diagnosed conditions, Dr. Manning stated: "I feel that the current back and leg pain is a direct result of his injury of 1977." He did not offer any explanation, however, for why he felt appellant's condition was due to his 1977 low back strain, and not to his underlying degenerative condition. In his final report and accompanying progress notes of record, dated October 10, 2002, Dr. Manning reiterated that he had been seeing appellant since 1984 and that a recent physical examination revealed marked tenderness, lumbar spasm, reduced range of motion, an inch of atrophy of the right calf and weakness of the right calf, foot and toes. He noted that repeat magnetic resonance imaging (MRI) scan performed on June 30, 2001 revealed spinal stenosis at L3-4 and severe degenerative disc disease at L4-5. With respect to the cause of appellant's condition, Dr. Manning stated, in relevant part: "It is my opinion that [appellant] most probably had increasing degenerative arthritis and degenerative disc disease secondary to his injury of 1977. I feel his complaints are legitimate and are substantiated by objective physical findings." While Dr. Manning clearly stated that appellant's current diagnosed conditions are causally related to his 1977 employment injury, he did not offer any explanation for how appellant's 1977 low back strain could have caused his degenerative disc disease or spinal arthritis. The medical evidence required to establish causal relationship, generally, is rationalized medical opinion evidence.[7] Rationalized medical opinion evidence is medical evidence that includes a physician's reasoned opinion on whether there is a causal relationship between the claimant's diagnosed condition and the established incident or factor of employment. The opinion of the physician must be based on a complete factual and medical background of the claimant, 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 established incident or factor of employment.[8] As Dr. Manning did not provide the necessary explanation for his conclusions and as appellant has submitted no other rationalized

[7] *Charles E. Evans*, 48 ECAB 692 (1997).

[8] *Charles E. Evans*, *supra*; *Earl D. Smith*, 48 ECAB 615 (1997).

medical evidence which establishes that he continues to suffer from the residual effects of his accepted 1977 low back strain, he has not met his burden of proof.

Subsequent to the Office's January 8, 2003 merit decision denying modification, in a January 18, 2003 letter, appellant requested reconsideration and submitted additional factual and medical evidence.

By decision dated April 7, 2003, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant review of its prior decision.

The Board finds that, with respect to the Office's April 7, 2003 decision denying reconsideration, the Office properly exercised its discretion in refusing to reopen appellant's case for merit review under 20 C.F.R. § 10.608.

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.[9] Section 10.608(b) provides that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[10]

Appellant's January 18, 2003 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. He merely asserted that the reports of Dr. Manning established that he continued to suffer from residuals of his 1977 work injury. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).

In further support of his reconsideration request, appellant submitted a September 7, 1978 report from Dr. J.C. Serrato, Jr., reports dated August 20, 1984 and January 9, 1986 from Dr. Manning, a November 15, 1985 report from Dr. Carol G. Trent, a report dated May 13, 1991 from Dr. Joseph M. Gallenberger and vocational rehabilitation reports dated October 19, 1992 and November 21, 1994. As the Office properly found, however, each of these reports was previously contained in the record and has been fully considered by the Office. The submission of evidence or legal argument which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[11] Consequently, this evidence is insufficient to warrant reopening the record for a merit review.

[9] 20 C.F.R. § 10.606(b)(2).

[10] 20 C.F.R. § 10.606(b).

[11] *Linda I. Sprague*, 48 ECAB 386 (1997).

As appellant has failed to show that the Office erroneously applied or interpreted a point of law, to advance a point of law not previously considered by the Office or to submit relevant and pertinent new evidence not previously considered by the Office, the Office properly refused to reopen appellant's claim for a review on the merits.

The decisions of the Office of Workers' Compensation Programs dated April 7 and January 8, 2003 and September 12, 2002 are affirmed.

Dated, Washington, DC
September 25, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member