U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GARY C. HANSEN and DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, Bremerton, Wash.

Docket No. 95-2402; Submitted on the Record;
Issued January 13, 1998

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM, BRADLEY T. KNOTT

The issues are: (1) whether appellant has a permanent impairment of the right arm entitling him to a schedule award; (2) whether the Office of Workers' Compensation Programs properly determined that residuals of appellant's June 1, 1989 employment injury had ceased by November 19, 1992; (3) whether the Office properly refused to reopen appellant's claim for merit review in a January 23, 1995 decision; and (4) whether the Office properly determined that appellant's March 21, 1995 reconsideration request was untimely and failed to show clear evidence of error.

In the present case appellant, a shipfitter, filed a claim for head and neck injuries on June 1, 1989, alleging that as he was stepping up to his work area he struck his head on a ship structure.[1] The Office accepted the claim for a cervical sprain and contusion to the head. The record indicates that appellant was off work until July 5, 1989, returning to a light-duty position.

By decision dated November 19, 1992, the Office found that residuals of the employment injury had ceased and that appellant was not entitled to a schedule award for permanent impairment causally related to the June 1, 1989 employment injury. This decision was affirmed by an Office hearing representative in a decision dated March 16, 1994. Appellant requested reconsideration and the Office denied modification in an October 27, 1994 decision. By decision dated January 23, 1995, the Office denied appellant's request for reconsideration without merit review of the claim. In a decision dated April 4, 1995, the Office determined that a March 21, 1995 request for reconsideration was untimely and failed to show clear evidence of error.

[1] The record indicates appellant had prior employment injuries, including: low back strain, cervical, thoracic and lumbar subluxations on March 14, 1984, cervical, thoracic and lumbar subluxations on December 13, 1985, a lumbar subluxation on February 2, 1988, gluteal contusion and low back strain on March 1, 1988 and a thoracic strain on October 6, 1988.

The Board has reviewed the record and finds that the Office properly found that appellant was not entitled to a schedule award in this case.

Section 8107 of the Federal Employees' Compensation Act provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.[2] Neither the Act nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants the Office has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the uniform standard applicable to all claimants.[3]

In a February 21, 1991 report, Dr. Sander E. Bergman, a neurologist, diagnosed a cervical joint strain, thoracic outlet syndrome and left carpal tunnel syndrome. In a report dated April 19, 1991, Dr. Bergman opined that appellant had "legitimate limitations developing out of his industrial accident." Dr. Bergman completed a form report (EN-1303) indicating that appellant had a 10 percent impairment of the upper extremity from sensory deficit, pain, or discomfort, identifying the fourth and fifth finger. In a December 23, 1991 report, Dr. Bergman stated that appellant had a 12 percent impairment of the right arm, based on sensory involvement of the third through fifth fingers. The Office referred appellant to Dr. Michael Bidgood, a Board-certified orthopedic surgeon, for evaluation. In a report dated March 14, 1992, Dr. Bidgood provided a history and results on examination. Dr. Bidgood stated that he found no evidence of thoracic outlet syndrome, noting the absence of neurocirculatory abnormalities on Adson's maneuvers. With regard to permanent impairment, Dr. Bidgood stated that he found "no measurable or objective impairments, other than the patient's subjective complaints and would therefore recommend him as no impairment of the right upper extremity because of absence of objective neuromuscular measurements." Dr. Bidgood also stated, however, that if the Office wished to consider sensory, or purely subjective complaints then he would agree with Dr. Bergman that appellant had a 10 percent impairment.

The Board notes that the A.M.A., *Guides* do provide for sensory impairments, provided that the nerves are properly identified and the impairment graded.[4] Dr. Bidgood does not provide additional explanation as to his opinion on the degree of permanent impairment. The record does contain, however, an unequivocal opinion from an Office medical adviser in a memorandum dated May 18, 1992. The medical adviser noted that the findings were normal, that there was no diagnosis of a condition with any permanent residuals and opined that there was no permanent impairment.

[2] 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.304(b).

[3] *A. George Lampo*, 45 ECAB 441 (1994).

[4] *See* A.M.A., *Guides*, 42 (3d ed., rev. 1990).

The record therefore indicates that a conflict existed as to the diagnosis of thoracic outlet syndrome and whether appellant had an employment-related permanent impairment to the right arm. The Office properly referred the case for an impartial medical examination.

In a report dated September 8, 1992, Dr. Scott Van Linder, a Board-certified orthopedic surgeon selected as an impartial medical specialist, provided a history and results on examination. In summarizing his findings, Dr. Van Linder stated that he found "a normal examination which does not support any present cervical strain or other cervical injury, nor does it presently support any significant nerve root or peripheral neuropathy to either upper extremity. Likewise, there is no vascular nor neurologic findings suggestive of thoracic outlet syndrome." Dr. Van Linder stated that there was no active condition found on examination and historically the relevant diagnosis would be a contusion to the skull, possibly associated with a transient cervical strain which presently had resolved. He concluded that, based on the A.M.A., *Guides*, appellant had no impairment resulting from the June 1, 1989 employment injury.

It is well established that when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[5] The Board finds that Dr. Van Linder represents the weight of the evidence in this case.[6] He provided a thorough and well-reasoned report indicating that appellant did not have thoracic outlet syndrome and that appellant did not have an employment-related permanent impairment causally related to the June 1, 1989 employment injury. Dr. Van Linder's opinion is entitled to special weight and the Office properly denied a schedule award in this case.

The Board further finds that the Office properly determined that residuals of the June 1, 1989 employment injury had ceased by November 19, 1992.

The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability. To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.[7]

In the present case, the Office accepted a cervical sprain and a contusion to the head. Appellant's attending physicians did not provide a reasoned opinion discussing continuation of an accepted condition. Dr. Bidgood diagnosed a cervical strain, although he also stated that "ample time had elapsed for resolution of all effects of the straining injury." Dr. Van Linder clearly stated in his September 8, 1992 report that any cervical strain had resolved and appellant had made a full recovery from the injury. The Board therefore finds that the weight of the evidence indicates that the accepted conditions had resolved and that appellant did not continue

[5] *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

[6] The Board notes that Dr. Van Linder provided testimony at a January 11, 1994 hearing before an Office hearing representative, reiterating his opinion that appellant did not have a ratable permanent impairment.

[7] *Furman G. Peake*, 41 ECAB 361 (1990).

to have residuals of the accepted June 1, 1989 employment injuries. Accordingly, the Board finds that the Office met its burden of proof in terminating medical benefits.

Once the Office meets its burden of proof, the burden shifts to the claimant to establish continuing employment-related residuals.[8] None of the evidence submitted after the November 19, 1992 decision and prior to the last merit decision on October 27, 1994, is relevant to the issue presented. An attending physician, Dr. A. Jeffrey Bialer, diagnosed chronic neck strain but does not provide a reasoned opinion as to causal relationship with employment.

The Board further finds that the Office did not abuse its discretion in refusing to reopen appellant's claim for merit review in its January 23, 1995 decision.

The Office has issued regulations regarding its review of decisions under section 8128(a) of the Act.[9] 20 C.F.R. § 10.138(b)(1) provides that the claimant may obtain review of the merits of the claim by showing that the Office erroneously applied or interpreted a point of law, by advancing a point of law or a 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 any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.[10]

As noted above, the issues in this case are whether appellant continued to have residuals of a June 1, 1989 employment injury and whether appellant had a ratable permanent impairment causally related to the employment injury. The medical evidence submitted with appellant's January 12, 1995 reconsideration request does not discuss the relevant issues. Dr. Bialer reported neck pain in a December 7, 1994 report, without discussing causal relationship. Appellant submitted a March 6, 1990 report from Dr. James D. Krueger, an employing establishment physician, and a May 17, 1993 report from Dr. S. Allan Kane, Jr., a surgeon. Neither of these reports discuss the relevant issues. In the absence of any new and relevant medical evidence, the Board finds that the Office properly refused to reopen appellant's claim for merit review in the January 23, 1995 decision.

The Board further finds, however, that the Office improperly found that appellant's March 21, 1995 request for reconsideration was untimely.

Appellant requested reconsideration by letter dated March 21, 1995 and submitted additional evidence. The Office found that the last merit review decision was March 16, 1994 and therefore appellant's request was made more than one year after the Office decision.[11] The record indicates, however, that the Office issued a merit review decision dated October 27,

[8] *See George Servetas*, 43 ECAB 424, 430 (1992).

[9] 5 U.S.C. § 8128(a).

[10] 20 C.F.R. § 10.138(b)(2).

[11] 20 C.F.R. § 10.138(b)(2) provides that the Office will not review a decision unless the application is filed within one year of the decision.

1994.[12] The March 21, 1995 request for reconsideration is therefore filed within one year of the last merit decision and is considered timely. On remand the Office should review the request for reconsideration and the evidence submitted under the appropriate standard for a timely reconsideration request. After such further development as it deems necessary, it should issue an appropriate decision.

The decisions of the Office of Workers' Compensation Programs dated January 23, 1995 and October 27, 1994 are affirmed. The decision dated April 4, 1995 is set aside and the case remanded for further action consistent with this decision of the Board.

Dated, Washington, D.C.
January 13, 1998

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

[12] A right to reconsideration within one year accompanies any merit decision on the issues. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1996).