

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of REMBERT SEAWARD and U.S. POSTAL SERVICE,
POST OFFICE, Washington, D.C.

*Docket No. 95-2397; Submitted on the Record;
Issued March 2, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
MICHAEL E. GROOM

The issues are: (1) whether appellant has any condition or disability causally related to his May 8, 1973, October 21, 1977 and November 20, 1979 employment injuries; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for merit review of his claim pursuant to 5 U.S.C. § 8128.

The Board has duly reviewed the case record and finds that appellant has not established that he has any current condition or disability causally related to his May 8, 1973, October 21, 1977 and November 20, 1979 employment injuries.

The Office accepted that appellant sustained a left ankle sprain due to a traumatic injury on May 8, 1973, a wrist sprain resulting in no time lost from work due to a traumatic injury on October 21, 1977 and a continuing temporary aggravation of a contusion of the left leg and chondromalacia of the left patella with cartiligious damage due to a traumatic injury on November 20, 1979.¹ The Office further accepted that appellant sustained traumatic osteoarthritis and authorized a bilateral arthroscopy on June 20, 1984. The Office paid appellant the appropriate compensation and on December 5, 1986 referred him for vocational rehabilitation. Appellant returned to a full-time suitable position with the employing establishment on March 13, 1988.

¹ The Office, by decision dated September 28, 1982, found that appellant had no disability due to his October 21, 1977 employment injury and no disability after December 3, 1979 due to his November 20, 1979 employment injury. In a decision finalized August 11, 1983, an Office hearing representative affirmed the Office's September 28, 1982 decision but remanded the case for a determination of whether appellant had any disability causally related to his May 8, 1973 left ankle injury. By decisions dated October 12, 1984, and January 29, 1985, the Office denied modification of the hearing representative's decision, finding that appellant had no continuing disability due to his May 8, 1973, October 21, 1977 or November 20, 1979 employment injuries. By decision dated October 24, 1985, the Office vacated its January 15, 1985 decision and accepted appellant's claim for continuing disability causally related to his November 20, 1979 employment injury. In a decision dated August 11, 1988, the Office granted appellant a schedule award for a 20 percent permanent loss of use of his right and left legs.

On December 18, 1991 appellant filed a claim for compensation on account of traumatic injury or occupational disease (Form CA-7) requesting compensation from August 9, 1990 onward. By decision dated November 26, 1993, the Office denied appellant's claim on the grounds that the evidence failed to establish that his current ankle and bilateral knee conditions were due to his May 8, 1973, October 21, 1977 or November 20, 1979 employment injuries. By decisions dated October 24, 1994 and March 24, 1995, the Office denied modification of its November 26, 1993 decision and, by decision dated June 9, 1995, the Office found that the evidence submitted was insufficient to warrant review of its prior decision.

In a form report dated January 19, 1991, Dr. Fred Nelson, appellant's attending physician, diagnosed degenerative arthritis of the left ankle and both knees and checked "yes" that the condition was caused or aggravated by an employment activity. Dr. Nelson provided as a rationale that for "each injury there is clear evidence of traumatic injury and progressive increase in degenerative symptoms." Dr. Nelson found that appellant was totally disabled from December 17, 1979 to the present. In a report dated April 21, 1991, Dr. Nelson diagnosed progressive degenerative arthritis of the left ankle and of both knees. Dr. Nelson found that each diagnosed condition was totally disabling.

In a report dated June 9, 1993, Dr. John B. Cohen, a Board-certified orthopedic surgeon and Office referral physician, discussed appellant's history of employment injuries, findings on examination and his review of the records. Dr. Cohen found that x-rays taken on the date of examination revealed "marked bilateral knee arthritis, with minimal arthritis of the left ankle." Dr. Cohen opined that appellant's arthritis was due to degenerative changes rather than to his employment injuries based on the comparatively minor nature of the employment injuries and the fact that x-rays taken contemporaneously with the employment injuries revealed preexisting degenerative changes. Dr. Cohen found that appellant could perform sedentary employment.

The Federal Employees' Compensation Act, at 5 U.S.C. § 8123(a) provides, in pertinent part: "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 existed between the opinions of Drs. Nelson and Cohen and referred appellant, together with the case record and a statement of accepted facts, to Dr. Robert O. Gordon, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated June 4, 1993, Dr. Gordon reviewed the medical records and discussed his findings on examination. Dr. Gordon found that none of appellant's employment injuries would "predispose him to post-traumatic arthritis" and further noted that appellant had evidence of mild degenerative changes around the time of the injuries supporting a predisposition to osteoarthritis. He diagnosed "degenerative arthritis of both knees unrelated to any of [appellant's] work[-]related injuries," and further found some spurring of the left ankle joint without true arthritic changes and minimal symptoms. Dr. Gordon opined that appellant could perform his usual employment.

It is well established that when opposing medical reports of virtually equal weight and rationale exist and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist will be given special weight if sufficiently well rationalized and based upon a proper factual background.² Dr. Gordon's reports are based upon a complete and detailed factual and medical history and contain sufficient rationale addressing the issue of causal relationship. Thus, the Office properly found that Dr. Gordon's opinion represented the weight of the medical evidence and established that appellant had no condition or disability due to his accepted employment injuries.

Subsequently, appellant requested reconsideration and submitted reports from Dr. Lorenzo Marcolin, a Board-certified orthopedic surgeon. In a report dated May 16, 1994, Dr. Marcolin reviewed appellant's history of employment injuries and found that recent x-rays revealed probable osteoarthritis of the knees and traumatic osteoarthritis of the ankles. He opined that appellant had "beginning preexistent asymptomatic osteoarthritis of his knees which was definitely made symptomatic by the trauma in 1979. It is also my opinion that the trauma in 1979 caused his osteoarthritic process to progress." Dr. Marcolin further found that appellant had traumatic osteoarthritis in his left ankle due to trauma experienced on May 8, 1973. However, Dr. Marcolin's report is not sufficiently rationalized with regard to the issue of causal relation to overcome the special weight accorded Dr. Gordon's opinion as the impartial medical specialist. Dr. Marcolin provided no explanation for finding that appellant's bilateral osteoarthritis of the knees was causally related to his 1979 employment injury, particularly in view of the fact that he did not find traumatic arthritis by x-ray but instead found osteoarthritis that preexisted the employment injury. Dr. Marcolin further provided only a conclusory statement regarding the relationship of appellant's left ankle arthritis to his May 1973 employment injury. A physician's opinion on causal relationship between a claimant's disability and an employment injury is not dispositive simply because it is rendered by a physician. To be of probative value, the physician must provide rationale for the opinion reached. Where no rationale is present, the medical opinion is of diminished probative value.³

In a report dated January 17, 1995, Dr. Marcolin related that appellant's "bilateral arthritis of the knees is secondary to repetitive trauma over the years which occurred in his job description." Dr. Marcolin stated that he had reviewed appellant's position description, which included repetitive jumping and determined that appellant's arthritis was due to repetitive trauma. However, the issue in the present case is whether appellant has any disability resulting from his traumatic employment injuries of May 8, 1973, October 21, 1977 and November 20, 1979. The question of whether appellant has a possible occupational disease claim due to factors of his federal employment is not relevant to the present case. Thus, Dr. Marcolin's report is insufficient to create a conflict with Dr. Gordon's opinion or to overcome the special weight accorded to Dr. Gordon's opinion. Consequently, Dr. Gordon's report represents the weight of the evidence in this case and establishes that appellant's ankle and bilateral knee conditions are not causally related to his accepted employment injuries.

² *Howard Y. Miyashiro*, 43 ECAB 1101 (1992); *Louis G. Psyras*, 39 ECAB 264 (1987).

³ *Lucrecia M. Nielsen*, 42 ECAB 583 (1991).

The Board further finds that the Office did not abuse its discretion in refusing to reopen appellant's case for merit review under section 8128.

The Office has issued regulations regarding its review of decisions under section 8128(a) of the Federal Employees' Compensation Act. Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his claim by written request to the Office identifying the decision and the specific issue(s) within the decision which claimant wishes the Office to reconsider and the reasons why the decision should be changed and by:

- “(i) Showing that the Office erroneously applied or interpreted a point of law, or
- “(ii) Advancing a point of law or fact not previously considered by the Office, or
- “(iii) Submitting relevant and pertinent evidence not previously considered by the Office.”⁴

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.⁵ Evidence that repeats or duplicates evidence already in the case record has no evidentiary values and does not constitute a basis for reopening a case.⁶ Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.⁷

In support for his request for reconsideration, appellant, through his attorney, submitted a statement arguing that the Office erred in relying on the opinion of Dr. Gordon, the impartial medical examiner, rather than the opinion of Dr. Marcolin, appellant's attending physician. Appellant contends that Dr. Gordon did not adequately explain his findings. However, appellant is not a physician and as such is not competent to render a medical opinion. Evidence regarding the nature of any disabling condition and its relation to appellant's employment injury can only be given by a physician fully acquainted with the relevant facts and the medical findings. As such, appellant's lay assertions have no probative value as medical evidence.⁸

Appellant further argues that neither Dr. Gordon, the impartial specialist, nor Dr. Cohen, the second opinion physician, considered whether the repetitive trauma he experienced during the course of his federal employment caused his arthritis. Appellant's allegation, however, does not address the particular issue in the instant case, which is whether he has any further disability due to his accepted traumatic employment injuries and thus does not constitute a basis for

⁴ 20 C.F.R. § 10.138(b)(1).

⁵ See 20 C.F.R. § 10.138(b)(2).

⁶ *Daniel Deparini*, 44 ECAB 657 (1993).

⁷ *Id.*

⁸ *James A. Long*, 40 ECAB 538 (1989).

reopening the case.⁹ The Office, therefore, did not abuse its discretion in refusing to reopen and review appellant's claim on the merits.

The decisions of the Office of Workers' Compensation Programs dated March 24, 1995 and October 24, 1994 are hereby affirmed.

Dated, Washington, D.C.
March 2, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

Michael E. Groom
Alternate Member

⁹ See *Dominic E. Coppo*, 44 ECAB 484 (1993).