U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GEORGE TRUJILLO and DEPARTMENT OF THE AIR FORCE, KIRTLAND AIR FORCE BASE, N.M.

Docket No. 95-2651; Submitted on the Record;
Issued May 1, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs abused its discretion under section 8128(a) of the Federal Employees' Compensation Act by refusing to reopen appellant's case for a merit review.

The Office accepted that appellant, then a 42-year-old motor vehicle operator sustained a herniated nucleus pulposus at L4-5 on September 18, 1986. His case was placed on the periodic rolls as of November 23, 1986. Appellant returned to full-time light-duty work on May 28, 1991, as a file clerk, reduced his schedule to four hours per day as of June 11, 1991[1] and to three hours per day as of September 3, 1991.[2] Upon expiration of his light-duty appointment on May 28, 1992 appellant went into leave without pay status, and did not return to work.[3]

Dr. Clifford Stoller, a Board-certified physiatrist and second opinion physician, submitted an August 25, 1992 report, that appellant was capable of full-time light-duty work, but that due to

[1] By August 15, 1991 decision, the Office denied appellant's requests for physical therapy after September 1990, with reconsideration denied by October 25, 1991 decision. These decisions are not before the Board on the present appeal.

[2] In a May 15, 1991 note, Dr. Ronald W. Racca, appellant's attending Board-certified orthopedic surgeon, released him to a trial of light duty as of May 20, 1991. Dr. Racca restricted appellant to four hours of work per day as of June 11, 1991 and three hours per day as of August 28, 1991.

[3] The record indicates that by June 1 and 8, 1992 decisions, the Office found an overpayment of compensation in appellant's case as he received compensation for temporary total disability while working from May 28 through September 1991. This decision is not before the Board on the present appeal.

"his failure to do light duty as a file clerk he would probably fail at a light-duty job again." Dr. Stoller submitted a form report noting work limitations.[4]

Dr. Racca treated appellant on an approximately monthly basis beginning in September 1986. Dr. Racca submitted periodic form reports, diagnosing a herniated L4-5 disc with low back pain. In form reports dated June 1, July 14 and August 27, 1992 form reports, Dr. Racca released appellant to a trial of part-time light-duty work. The record indicates that appellant did not return to work. In a November 13, 1992 form report, Dr. Racca indicated that appellant continued to be totally disabled for work due to a herniated L4-5 disc.

In a December 23, 1992 work restriction evaluation form report (Form OWCP-5) Dr. Racca indicated that appellant could sit for four hours per day, walk and stand for two hours per day, lift, squat and kneel for one hour per day, with complete restrictions against bending, climbing and twisting. He noted that appellant reached maximum medical improvement as of December 8, 1992 and placed a check mark in between two boxes marked "yes" and "no" regarding whether appellant could work eight hours per day.

Dr. Racca submitted periodic reports from January 15 to June 15, 1993, indicating that appellant remained totally disabled for work with a poor prognosis. Dr. Racca retired on June 30, 1993. The Office authorized Dr. Racca's referral of appellant to Dr. Norman Moon, a Board-certified orthopedic surgeon.

When a vocational rehabilitation counselor assigned to appellant by the Office was unable to secure a position for appellant, she performed a labor market survey and additional research and selected the positions of laboratory tester and video store rental clerk as suitable for appellant as of September 17, 1993.

By November 15, 1993 notice, the Office proposed reducing appellant's compensation as the evidence of record established the selected position of video store rental clerk (Department of Labor, *Dictionary of Occupational Titles* #290.477-014), at a wage of $174.00 per week, fairly and reasonably represented his wage-earning capacity.[5]

Appellant disagreed with the proposed reduction and submitted a December 7, 1993 report from Dr. Moon, who provided a history of injury and treatment.[6] On examination, Dr. Moon noted that appellant was able to stand or walk for 10 minutes and sit for 5 to 10 minutes at a time, before developing "increased sharp pains in his left lumbar region," and could lift up to 20 pounds. Dr. Moon noted that appellant's chronic L4-5 herniated disc produced significant left lumbar pain with radicular symptoms into the left buttock and left leg. He stated

[4] Dr. Stoller noted that appellant could sit and walk for six hours a day intermittently, lift and stand for four hours a day intermittently, squat for up to half an hour per day intermittently, and could not kneel, twist or bend.

[5] The position was classified as light, with lifting up to 20 pounds, with duties of making change, stocking shelves, arranging merchandise on counters or in displays, marking and tagging merchandise, accepting customer payments, and keeping sales records.

[6] Dr. Moon also noted findings in appellant's right lower extremity referable to nonoccupational post-poliomyelitis syndrome first diagnosed when appellant was 10 years old.

that appellant could not perform the duties of a video store rental clerk, as his symptoms rendered him "totally incapacitated from consideration of gainful employment in any capacity."

By December 22, 1993 decision, the Office reduced appellant's compensation based upon his ability to perform the selected position of video store rental clerk. The Office found that Dr. Racca's December 23, 1992 report and Dr. Stoller both opined that appellant was capable of working eight hours per day, five days per week with restrictions, noting that the position of video store rental clerk was within those restrictions.

In a January 10, 1994 letter, appellant, through his authorized attorney representative, contended that the Office ignored Dr. Moon's findings of total disability for work. He asserted that Dr. Racca's December 23, 1992 report, was based on an inaccurate statement of accepted facts. He argued that although Dr. Racca and Dr. Stoller each indicated in a form report that appellant could work, their narrative reports found total disability.

In response, the Office prepared a new statement of accepted facts and referred it, appellant and the medical record to Dr. John Allen, whom the Office characterized as a Board-certified orthopedist, for an impartial medical opinion to resolve an unspecified conflict in medical evidence.

In a March 4, 1994 report, Dr. Moon noted findings on July 15, 1993 through March 4, 1994 examinations of markedly restricted lumbar motion, left lumbar pain radiating into the left buttock, positive left straight leg raising test, severe dorsal kyphosis, with left dorsal curvature and lumbar straightening. He noted that appellant used prescribed lumbar and orthotic supports and walked with a cane. Dr. Moon diagnosed a chronic L4-5 herniated disc with left radiculitis, slight diminution of the L5-S1 disc and spina bifida occulta of the L5 with a large left L5 transverse process. He opined that the September 18, 1986 injury caused the objective lumbar findings and a "post-traumatic muscular strain problem superimposed on the structural orthopedic diagnoses previously mentioned." Dr. Moon concluded that appellant had reached maximum medical improvement and was permanently disabled for work as he was unable to stand, walk or sit "with comfort with any protract[ed] period of time," and was unable to lift objects.

Dr. Allen submitted an undated March 1994 report, diagnosing nonrehabilitation from a remote back strain, lumbar degenerative joint disease, marked deconditioning, symptom magnification and anxiety/depression by history. Dr. Allen noted that appellant showed no consistent signs of nerve root irritation or a herniated nucleus pulposus. He opined that appellant's September 1986 injury was a low back strain, that should have healed within six months and that appellant's present condition was due to failure to rehabilitate from that back strain. Dr. Allen noted that a functional capacity assessment performed on March 19, 1994 was only conditionally valid, as appellant did not participate fully in the entire test and was deconditioned. Dr. Allen commented that based on the functional capacity assessment, appellant could possibly work as a video store rental clerk eight hours per day, five days per week, perhaps progressing to an eight-hour day.

In an April 21, 1994 supplemental report,[7] Dr. Allen stated that the herniated nucleus pulposus at L4-5 was "radiologically documented" but "not the cause of his problems. His problem is that he had a back strain and failed to rehabilitate from it." Dr. Allen noted that the September 18, 1986 work injury triggered a pain focused behavioral pattern, exacerbating his anxiety, depression and nightmares. Dr. Allen opined that absent psychological symptoms, appellant's "physical capabilities would enable him to perform the job of video store rental clerk eight hours a day for five days a week."

By April 29, 1994 decision, the Office denied modification of the December 22, 1993 decision, on the grounds that the evidence submitted was insufficient to warrant modification. The Office found that the weight of the medical evidence rested with Dr. Allen, the impartial medical examiner, who noted no objective findings and opined that appellant was able to work eight hours per day, five days per week as a video store rental clerk. The Office reasoned that Dr. Moon's finding of total disability for work was "based solely upon [appellant's] subjective and magnified pain complaint."

Appellant disagreed with this decision and in a January 23, 1995 letter requested reconsideration through his attorney. Appellant's attorney argued that the Office gave Dr. Allen's opinion improper weight as he was not Board-certified in any specialty, but was in fact a general practitioner. He enclosed copies of a national directory of medical specialists, showing that Dr. Allen was not included. He also noted that Dr. Allen had admitted that he was not a specialist pursuant to a federal lawsuit, in which he was accused of violating the False Claims Act "by falsely representing himself to be a specialist." Appellant's attorney asserted that the Office should have appointed another impartial medical specialist, instead of relying on Dr. Allen's opinion. He noted that Dr. Stoller's August 1992 report, was equivocal as the form report indicated appellant was capable of full-time light duty, while his narrative stated appellant would "probably fail at a light-duty job," and was written 16 months prior to the December 1993 decision. The attorney asserted that Dr. Racca's December 23, 1992 form report, was far outweighed by his reports from 1988 to 1993 finding appellant totally disabled for work.

Appellant also submitted new medical evidence. In a December 3, 1994 report, Dr. Racca stated that his December 23, 1992 form report "was in error. I was referring to another patient of mine who was also named George Trujillo. *** When I retired in June 1993, I believed that George M. Trujillo was disabled. *** I still believe that Mr. George M. Trujillo, is totally disabled."

By decision dated May 10, 1995, the Office denied reconsideration on the grounds that the evidence submitted was insufficient to warrant a merit review. The Office noted appellant's attorney's argument that the Office's April 29, 1994 decision, was in error as Dr. Allen was considered "as a Board-certified orthopedist and had inappropriately weighed his medical opinion." The Office stated that, to avoid bias or partiality, compensation claimants were

[7] In an April 14, 1994 letter, the Office requested that Dr. Allen clarify his March 1994 report, regarding whether the September 1986 low back strain caused appellant's present condition or any permanent residual disability, why he opined that appellant did not have a herniated nucleus pulposus as one had been documented and accepted, and whether appellant could perform the duties of a video store rental clerk.

referred to specialists by using an alphabetical roster of specialized physicians within set geographic areas, "repeating the process when the list is exhausted."[8] The Office noted that a non-Board-certified specialist, "may be used if he has special qualifications for performing the examination. Subsequent to issuance of the April 29, 1994 decision, our Office had acknowledged that Dr. Allen is not recognized as a Board-certified specialist." The Office noted that Dr. Allen's report was reviewed after the April 29, 1994 decision, when it was learned he was not Board-certified and was found to be well rationalized, "comprehensive, clear and definite." The Office noted that the weight of the medical evidence was represented not only by Dr. Allen, "but also by the reasoned opinions" of Dr. Stoller and Dr. Racca.

Appellant disagreed with this decision and in a May 26, 1995 letter requested reconsideration through his attorney. Appellant contended that the Office erred in its May 10, 1995 decision, in applying section 3.500.4.b(1) of the Office's procedure manual, as any special qualifications Dr. Allen may have had for performing an impartial medical examination when not Board-certified were not set forth in the record as the Office's procedures required.[9]

By decision dated July 20, 1995, the Office denied appellant's request for a merit review on the grounds that the evidence submitted was cumulative and, therefore, insufficient to warrant a merit review. The Office found appellant's attorney merely repeated the arguments of his January 23, 1995 letter in his May 26, 1995 letter.

The Board finds that the Office abused its discretion under section 8128(a) of the Act by denying appellant's requests for merit review.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[10] As appellant filed his appeal with the Board on July 31, 1995, the only decisions properly before the Board on the present appeal are the May 10 and July 20, 1995 nonmerit denials of reconsideration.

To require the Office to open a case for reconsideration, section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides in relevant part that a claimant may obtain review of the merits of the claim by written request to the Office, identifying the decision and the specific

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[8] The Office appears to refer to the Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations* (section 3.500.4(b)(1)) (March 1994), governing selection of impartial medical examiners for performance of referee examinations. This section provides, in pertinent part, that the "services of all available and qualified *Board-certified* specialists will be used as far as possible to eliminate any inference of bias or partiality.… A physician who is not Board-certified may be used if he or she has *special qualifications* for performing the examination, but the OMA [Office medical adviser] *must document the reasons for the selection in the case record*." (Emphasis added.)

[9] The Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations* (section 3.500.4(b)(1)) (March 1994), governing selection of impartial medical examiners, provides, in pertinent part, that "[a] physician who is not Board-certified may be used if he or she has *special qualifications* for performing the examination, but the OMA *must document the reasons for the selection in the case record*." (Emphasis added.)

[10] 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

issue(s) within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed, by showing that the Office erroneously applied or interpreted a point of law, or 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.[11]

In this case, appellant submitted January 23 and May 26, 1995 letters, raising legal arguments not previously considered by the Office and submitted new, relevant medical evidence. Despite this, the Office issued May 10 and July 20, 1995 decisions, denying appellant's January 23 and May 26, 1995 requests for reconsideration.

In the January 23, 1995 letter, appellant's attorney newly asserted that Dr. Allen was not a Board-certified orthopedic surgeon, a fact admitted by the Office in its May 10, 1995 decision. The attorney, therefore, argued that the Office erred in relying on Dr. Allen as the weight of the medical evidence as he was not a Board-certified orthopedic surgeon. This new legal argument alleging Office error is directly relevant to the issues of continuing disability and causal relationship that were before the Office. Therefore, the Office abused its discretion in its May 10, 1995 decision, by refusing to reopen appellant's case for a merit review.

The Office's May 10, 1995 denial of reconsideration, also failed to mention Dr. Racca's December 3, 1994 report, in which he stated that his December 23, 1992 report was in error, as he had confused appellant with another patient with the same first and last name. Dr. Racca opined in the December 3, 1994 report that appellant had remained totally disabled for work throughout his treatment. This report is new and relevant to the critical issues of causal relationship and continuing disability, which were before the Office at the time of the May 10, 1995 decision, as it pertains to the one piece of evidence from Dr. Racca that the Office relied upon in finding that appellant was able to perform the duties of a video store rental clerk. Therefore, the Office's failure to recognize this report as new and relevant constitutes an abuse of discretion.

In his May 26, 1995 letter, appellant's attorney raised new arguments not contained in his January 23, 1995 letter. Appellant's attorney newly asserted that the Office improperly applied its procedures for selecting an impartial medical examiner, as Dr. Allen was not a Board-certified specialist, yet no special qualifications enabling him to perform such examination were set forth in the record as the Office's procedures require. This argument is new and relevant and the Office therefore erred in its July 20, 1995 decision, by failing to reopen appellant's case for a merit review and appropriate development.

Consequently, the case must be returned to the Office for appropriate further development, including reopening appellant's case for a merit review. Following such development, the Office shall issue an appropriate decision in appellant's case.

[11] 20 C.F.R. § 10.138(b)(1).

The decisions of the Office of Workers' Compensation Programs dated July 20 and May 10, 1995 are hereby set aside, and the case remanded for further development consistent with this decision and order.

Dated, Washington, D.C.
May 1, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member