U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAUL A. GREENFIELD and DEPARTMENT OF THE AIR FORCE, ANDREWS AIR FORCE BASE, Camp Springs, Md.

Docket No. 98-2105; Submitted on the Record;
Issued March 5, 1999

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits as of October 31, 1997.

On December 12, 1996 appellant, a 38-year-old tractor operator, sustained an injury to his lower back and left knee when he slipped on a concrete floor. Appellant filed a Form CA-1 claim for benefits based on traumatic injury on the date of injury.

Appellant was examined on December 20, 1996 by Dr. Hampton J. Jackson, a Board-certified orthopedic surgeon, who diagnosed an acute, severe cervical strain, an acute, severe dorsal strain, with bilateral anterior scalene syndrome with C8 radiculopathy and reactive dorsal strain, in addition to a lumbosacral strain with radiculitis. He placed appellant on a program of physical therapy and advised that he was unfit for any employment.

Dr. Jackson reexamined appellant on January 10, 1997, at which time he advised that appellant was "minimally better," with a significant amount of spasm in the cervical, dorsal and lumbar paraspinals. He further noted that appellant also complained that his left knee buckled and gave out and that he could be harboring a lumbar disc injury. Dr. Jackson reiterated that appellant was "certainly" unfit for any employment.

In a follow-up report dated January 31, 1997, Dr. Jackson stated that appellant still complained about the left knee, giving way and that examination of the knee indicated hypersubluxability of the patella on the left side. He stated again that appellant was not fit to return to work. Dr. Jackson subsequently submitted several periodic treatment notes and reports pertaining to appellant's condition, in which he repeatedly advised that appellant was unfit to return to work.

By letter dated March 4, 1997, the Office accepted appellant's claim for left knee strain, lumbar strain and physical therapy.

In a report dated April 11, 1997, Dr. Jackson scheduled appellant to undergo a magnetic resonance imaging (MRI) test for his left knee, which was performed on April 28, 1997. The MRI results indicated a tiny effusion, a marked deformity of the tibial tubercle with lack of organization of the accessory ossification centers compatible with old Osgood-Schlatter disease. The MRI results also revealed evidence of marked thickening of the infrapatellar tendon prior to the attachment to the tibial tubercle with increased signal consistent with chronic tendinitis, with evidence of deep infrapatellar bursitis. In addition, the MRI results indicated that appellant had chondomalacia patella which was rather advanced and mild lateral patellar subluxation.

Dr. Jackson subsequently referred appellant to his associate, Dr. William Dorn, a Board-certified orthopedic surgeon, for a second opinion. In a report dated May 5, 1997, Dr. Dorn concurred with Dr. Jackson's diagnosis of a chronic Osgood-Schlatter's condition and also diagnosed an internal derangement of the left knee.

By letter dated May 27, 1997, the Office scheduled appellant for a second opinion evaluation with Dr. Louis Levitt, a Board-certified orthopedic surgeon, for June 5, 1997, for the purpose of clarifying appellant's current medical condition. He stated in a report dated June 5, 1997:

> "[Appellant's] physical examination is most impressive for a lack of objective pathology. What is most glaring about the assessment is [appellant's] frank malingering behaviors. He exaggerates all of his symptomatology and displays responses to the exam[ination] which are compatible with functional rather than organic disease. Other than mild tenderness to the left tibial tubercle, I can find no other pathology to explain his disability. According to [appellant] he has been virtually incapacitated by his back pain and his left leg pain. There is no sign of any diffuse atrophy to the limb, which verifies that he uses his lower extremities and performs in a manner to maintain adequate muscle tone and strength. Based on his examination in my office today, he has more than reached maximum medical improvement following the work trauma of [December] 12[,] [19]96. Additional treatment and diagnostic testing is unnecessary ... based on what I understand to be [appellant's] work responsibilities, it is my opinion that he has the capacity to return to work as a landscaper immediately.… [Appellant's] walking, ladder climbing, lifting and bending activities do not need to be limited in any manner. [Appellant] has no permanent impairment that resulted from the [December] 12[,] [19]96 work trauma."

In a report dated August 13, 1997, Dr. Dorn reiterated the earlier diagnosis of patellar tendinitis and noted a fragmentation of the patellar tendon insertion at the tibial tubercle. He noted that appellant remained disabled.

In a notice of proposed termination finalized on August 25, 1997, the Office, based on the opinion of Dr. Levittt, found that any residual disability appellant sustained as a result of the December 12, 1996 employment injury had resolved. The Office found that the weight of the medical evidence rested with the opinion of Dr. Levitt, who provided a well-rationalized medical opinion regarding the question of continuing disability. The Office allowed appellant 30 days to submit additional evidence or legal argument in opposition to the proposed termination.

In response to the Office's request for additional medical evidence, appellant submitted an August 15, 1997 report from Dr. Jackson and a September 13, 1997 report from Dr. Dorn, plus numerous other medical reports and treatment notes which were dated months prior to the Office's proposed termination notice. Dr. Jackson stated in his August 15, 1997 report that appellant still had symptoms in his knee and lower back, that his resting from lifting, pushing and pulling had not helped significantly, and that he still had significant damage to his knee and back. He advised that he had explained to appellant that unless there was a sedentary job available for him at his work, he was certainly not fit to return to his previous job. In his September 30, 1997 report, Dr. Dorn essentially reiterated the findings he made in his August 13, 1997 report.

By decision dated September 24, 1997, the Office terminated appellant's compensation. In the memorandum incorporated by reference in the decision, the Office noted that appellant had submitted several medical reports, treatment notes, and physical therapy summaries, but had failed to submit any rationalized, probative medical evidence bearing on the issue of whether appellant currently had any disability causally related to the accepted December 12, 1996 employment injury.

In an inter-office memorandum dated October 1, 1997, the Office indicated that it had received a telephone call from appellant dated October 1, 1997 in which he claimed that the Office had not considered all of the evidence from his attending physician. The Office further indicated that it had advised appellant it was reviewing his case and was requesting additional information from Dr. Levitt. The Office advised appellant that, based on its current review of the previous decision, he was entitled to compensation through the date of its next decision. On the same date, October 1, 1997, the Office submitted a letter to appellant stating it had rescinded its previous decision, and that further review of his case had revealed that the Office required clarifying information prior to making a decision concerning his entitlement to compensation.

By letter dated October 6, 1997, the Office recontacted Dr. Levitt and requested that he review an attached statement of accepted facts and indicate whether appellant had a medical condition causally related to the December 12, 1996 employment injury and whether he could perform the normal duties of the position of gardener/motor vehicle operator.

In a supplemental report dated October 13, 1997, Dr. Levitt advised that appellant, at the time of his June 5, 1997 examination, had little active pathology that could be linked to his original December 12, 1996 employment injury. He indicated that, based on his June 5, 1997 evaluation, appellant had the capacity to immediately return to work full time as a landscaper without limitations on his work activities, including performing his normal duties as a gardener and motor vehicle operator, plus ladder climbing, lifting and bending activities. Dr. Levitt further stated that appellant's clinical complaints clinically correlated to his original work trauma of December 12, 1996.

By decision finalized October 31, 1997, the Office terminated appellant's compensation effective October 31, 1997, finding that the weight of the medical evidence was sufficient to establish that appellant was no longer disabled from performing his regular duties. In an October 30, 1997 memorandum incorporated by reference in the decision, the Office noted that Dr. Levitt, in his supplemental report, had indicated that appellant had little active pathology

which could be linked to his original employment injury, which, the Office stated, there was still some active residuals from appellant's employment injury. The Office further stated that Dr. Levitt opined that appellant's current clinical complaints correlated to the original work trauma. It therefore found that although appellant was no longer entitled to disability compensation, he remained entitled to continuing medical coverage for his employment-related medical condition.[1]

By letter dated November 21, 1997, appellant requested reconsideration of the Office's previous decision.

By letters dated February 27, 1998, the Office informed appellant that it had scheduled an appointment for him with Dr. John B. Cohen, a Board-certified orthopedic surgeon, for an independent medical examination on March 25, 1998.

In a report dated March 25, 1998, Dr. Cohen advised that, as far as he could tell, appellant was fit to return to duty. He stated that appellant's complaints were completely subjective, and he indicated that although his examination was notable for marked inappropriate behavior, appellant was still able to drive a car and walk to and from his car without difficulty, as well as dress himself without difficulty. Dr. Cohen observed that appellant was a poor historian, advised that there was a significant disparity between his subjective complaints and the objective findings, and recommended that he return to work.

By decision dated April 21, 1998, the Office found that the evidence appellant submitted was not sufficient to warrant modification of its previous decision. The Office noted that the case had been referred to an independent medical examiner, Dr. Cohen, whose report indicated that there was no evidence that appellant continued to have residuals or remained disabled as a result of the accepted, December 12, 1996 employment injury.

In a handwritten letter received by the Office May 20, 1998, appellant requested reconsideration of the Office's previous decision. Appellant did not submit any additional medical evidence in support of this request.

By decision dated May 21, 1998, the Office found that the evidence appellant submitted was not sufficient to warrant modification of its previous decision.

The Board finds the Office met its burden of proof in terminating 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

[1] The Office also stated that appellant was not entitled to any compensation for an injury to his right knee, as he had neither filed a claim nor reported an employment injury based on this alleged condition.

[2] *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

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]

In the present case, the Office based its October 31, 1997 decision to terminate appellant's compensation on the June 25 and October 6, 1987 medical reports of Dr. Levitt, who stated in his June 5, 1997 report that appellant had little active pathology that could be linked to his original December 12, 1996 employment injury, and that he had the capacity to immediately return to work full time as a landscaper without any limitations on his normal work duties as a gardener and motor vehicle operator. Subsequent to this decision, the Office, acting in response to appellant's request for reconsideration, found that there was a conflict in the medical evidence between Dr. Levitt's opinion and those of Drs. Jackson and Dorn, and it therefore referred appellant, a statement of accepted facts and his medical records to Dr. Cohen, an impartial medical examiner. In his March 25, 1998 medical report, Dr. Cohen rejected any causal relationship between factors of appellant's employment and his claimed current condition, and found that he was fit to return to full duty. The Office relied on Dr. Cohen's opinion in its April 21, 1998 decision, finding that all residuals of the previously accepted conditions had ceased and that appellant currently suffered from no condition or disability causally related to the December 12, 1996 accepted employment injury. Based on Dr. Cohen's report, the Office denied modification of its previous decision terminating compensation.

The Board finds that Dr. Cohen's opinion negating a causal relationship between appellant's claimed current condition and disability and his December 12, 1996 employment injury and that he no longer had any residuals from the employment injury is sufficiently probative, rationalized, and based upon a proper factual background, and that therefore, Dr. Cohen's March 25, 1998 report is accorded the special weight of an impartial medical examiner.[4] The Board therefore affirms the Office's October 31, 1997 and April 21, 1998 decisions.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for further review on the merits of his claim under 5 U.S.C. § 8128(a).

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a point of law; by advancing a point of law or fact not previously considered by the Office; or by submitting relevant and pertinent evidence not previously considered by the Office.[5] Section 10.138(b)(2) of the Federal Employees' Compensation Act 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.[6] Evidence that repeats or duplicates

[3] *Id.*

[4] *Gary R. Seiber*, 46 ECAB 215 (1994).

[5] 20 C.F.R. § 10.138(b)(1); *see generally* 5 U.S.C. § 8128(a).

[6] 20 C.F.R. § 10.138(b)(2).

evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[7]

In the present case, appellant has not shown that the Office erroneously applied or interpreted a point of law and has not advanced a point of law or fact not previously considered by the Office. Appellant generally contended in his May 20, 1998 letter that he still suffered from residuals of his December 12, 1996 employment injury, but failed to support this contention with new and relevant medical evidence. Therefore, the Office did not abuse its discretion in refusing to reopen appellant's claim for a review on the merits.

The decisions of the Office of Workers' Compensation Programs dated October 16, 1997, April 21 and May 21, 1998 are hereby affirmed.

Dated, Washington, D.C.
March 5, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

[7] *Howard A. Williams,* 45 ECAB 853 (1994).