U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BILLY L. KOLODZIEJCZAK and U.S. POSTAL SERVICE,
POST OFFICE, Long Beach, CA

Docket No. 98-556 and No. 98-1099; Submitted on the Record;
Issued December 18, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated compensation benefits effective January 29, 1996 in appeal No. 98-1099; (2) whether the Office properly found that appellant was not disabled from June 1 to August 8, 1996 due to his March 19, 1996 employment injury in appeal No. 98-556; and (3) whether the Office's refusal to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion in appeal No. 98-556.

The Office accepted appellant's claim for a lumbar strain and contusion occurring on January 12, 1994. The Office accepted appellant's claim for a recurrence of disability on June 20, 1994. These two claims come under appeal No. 98-1099. Appellant had a preexisting lumbar strain, degenerative spondylosis and radiculopathy from a July 23, 1993 nonfederal employment injury he sustained at Sears. He also sustained a nonfederal employment back injury in 1977. At the time of the January 12, 1994 employment injury, appellant had been working light duty because of his nonfederal employment back injury. He returned to regular duty on February 7, 1994. After the June 20, 1994 recurrence of disability, appellant was totally disabled from June 21 through August 4, 1994 and partially disabled after August 5, 1994. Appellant received appropriate compensation benefits.

By decision dated January 29, 1996, the Office terminated benefits, finding that the medical evidence established that appellant had no condition, residual, or disability causally related to his accepted lumbar back strain.

The Office subsequently denied appellant's requests for modification on May 22 and October 10, 1996, March 6 and November 18, 1997.

On March 19, 1996 appellant sustained another work-related back injury, which comes under appeal No. 98-556.[1] The Office accepted the claim for a lumbar strain. Claimant subsequently sought continuing compensation, Form CA-8, from May 2 through August 8, 1996.

By decisions dated October 15 and December 11, 1996, the Office denied appellant's claim, finding that the evidence failed to establish that appellant's disability was causally related to the March 19, 1996 employment injury.

By decision dated November 19, 1997, the Office denied appellant's request for reconsideration.

In terminating benefits in appeal No. 98-1099, the Office relied upon the medical report of the referral physician, Dr. Lewis B. Newman, a Board-certified orthopedic surgeon, that there was no objective evidence establishing that appellant had a work-related injury. Appellant's treating physician, Dr. Stuart M. Gold, a Board-certified orthopedic surgeon, found that appellant was partially disabled due to the June 20, 1994 recurrence of disability and Dr. James M. Loddengaard, a Board-certified orthopedic surgeon with a specialty in emergency medicine, agreed that appellant was partially disabled due to the June 20, 1994 employment injury.

In his report dated May 17, 1995, Dr. Newman considered appellant's history of injury, performed a physical examination, reviewed the medical reports of record at length and the results of a magnetic resonance imaging (MRI) scan which showed spondylolisthesis and a bulging disc. X-rays showed lateral spots, spot "A-P"s of the L5-S1 area, Grade I spondylolisthesis of L5 on S1 with bilateral spondylolysis at L5-S1 and slightly to moderately decreased L5-S1 disc space in its posterior half. He diagnosed congenital Grade I spondylolisthesis at L5-S1 and slight to moderate invertebral disc degeneration at L5-S1. Dr. Newman stated that appellant was not disabled, could work without restrictions, and did not require further treatment.

In explaining his conclusions, Dr. Newman stated that the Grade I spondylolisthesis and the lateral defects in the pars intra-articularis at L5-S1 were congenital and there was no evidence that they were aggravated by appellant's federal employment. He stated that the degenerative change to the L5-S1 disc was secondary to the congenital spondylolisthesis and the general wear and tear of life through living 40 years prior to his employment injuries. Dr. Newman stated that this preexisted appellant's employment injuries and was not aggravated by them.

Dr. Newman also noted inconsistencies upon his physical examination of appellant. For instance, he found that appellant's reason for being unable to touch the floor with his fingertips in the Burns chair test due to increased pain in his low back pain and lower extremities was "spurious" in that the test did not put any stress on the sciatic nerves or their component roots. Dr. Newman found appellant's limitation of hip flexion due to pain in his lower back and lower

[1] By Order dated June 29, 2000, the Board reopened appeal No. 98-556 and combined it with appeal No. 98-1099.

extremities while appellant was supine "spurious" in that the flexion test he performed was suppose to relieve low back pain and pain due to sciatica. Further, he stated that the "cogwheeling phenomena" appellant exhibited in the testing of the flexion and extension of both knees were characteristic of malingering. Dr. Newman found the moderate hypesthesia and hypalgesia appellant exhibited in his sensory examination to be characteristic of hysteria and malingering. He found many of Dr. Gold's findings regarding the degree of appellant's sensory deficit were inconsistent. Dr. Newman stated that, in view of these inconsistencies and the absence of any motor or reflex changes on his physical examinations or any abnormalities in the electromyograms, he found no "real" objective evidence to support Dr. Gold's diagnoses of radiculopathy. He also found no "real" objective evidence to substantiate that appellant ever sustained an employment injury.

In his June 20, 1994 report, Dr. Gold considered appellant's history of injury, performed a physical examination, and diagnosed recurrent lumbar strain, history of work-related lumbar strain, L5 radiculopathy and spondylolisthesis from the 1993 Sears injury. He stated that appellant suffered a new straining injury that day but was still being treated for the Sears injury. Dr. Gold stated that the episode that day "flared-up" appellant's present active problem to a slight degree and should resolve over the next several weeks.

In his report dated February 10, 1995, Dr. Gold stated that appellant had not returned to his preinjury status from the June 20, 1994 employment injury. He stated that appellant "will have slight increased disability" as a result of the June 20, 1994 employment injury superimposed upon his injury with Sears. Dr. Gold stated that appellant could work only six hours a day and the two-hour difference from an eight-hour day was due to the June 20, 1994 increased disability.

In a report dated March 10, 1995, Dr. Gold performed a physical examination and diagnosed chronic lumbosacral strain and history of lumbar spondylosis and spondylolisthesis at L5-S1. He stated that appellant's condition was permanent from the June 20, 1994 employment injury and no further treatment was necessary. Dr. Gold stated that appellant should continue on light-duty working six hours a day. He stated that he would apportion 40 percent of appellant's current disability to his June 20, 1994 employment injury and 60 percent of appellant's disability to the July 23, 1993 Sears injury.

In a report dated March 11, 1995, Dr. Gold stated that he disagreed with Dr. Newman's findings. He stated that appellant had subjective complaints which were consistent with objective findings. Dr. Gold opined that the June 20, 1994 employment injury accelerated or exacerbated appellant's condition and that appellant had work-related residuals. He stated that appellant's symptoms were primarily due to his previous history of injury but appellant did not return to his preinjury status following the June 20, 1994 employment injury.

In an attending physician's report, Form CA-20a, dated July 5, 1995, Dr. Gold diagnosed spondylolisthesis at L5-S1 and lower extremity radiculopathy. He checked the "yes" box that appellant's conditions were work related, stated that appellant had permanent residuals and appellant should not lift more than 10 pounds and should not work more than 6 hours a day. In a September 28, 1995 report, Dr. Gold reiterated his diagnoses and restrictions.

In a report dated December 4, 1995, Dr. Loddengaard considered appellant's history of injury, performed a physical examination and reviewed x-rays and an MRI scan taken in 1993. He stated that appellant's lumbosacral strain from the January 12, 1994 employment injury had resolved, that appellant had a low back injury on June 20, 1994 and preexisting isthmic spondylolisthesis at L5-S1. Dr. Loddengaard disagreed with Dr. Newman's findings and stated:

> "[Appellant] did not have any cogwheeling with his manual muscle testing. His straight leg raise findings were consistent, both sitting and supine. He is not able to tolerate stretching of his hamstrings, since doing that in sitting or supine position causes increased low back pain. [He] did not appear to be exaggerating and appeared to have a reasonable exam[ination] for someone who has an isthmic spondylolisthesis and has pain referable to that. The only other decreased sensation in the L5 distribution on the right and no where else. This is certainly not a stocking glove type distribution consistent with hysteria, but rather something which is unsurprising, given his foraminal narrowing at L5 and the standard problem of L5 root compression from isthmic spondylolisthesis.
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> "I think it is also fair to say that appellant has demonstrated his desire to work in spite of pain in the past, rather than to wallow in it and be on total disability. He has continued to work and prior to his injury of June 20, 1994, was in fact doing heavier work than he knew he should have, because he was able to. Since the injury of June 20, 1994, he has, in fact, not been able to do the type of bending and lifting he was able to do before that."

He stated that appellant had a disability restricting him to semi-sedentary work, and the disability apportioned to the June 20, 1994 employment injury would be the difference between "this restriction" and that which he was assigned from his injury in 1993.

In a report dated December 8, 1995, Dr. Gold stated that he disagreed with a significant portion of Dr. Newman's findings regarding appellant's symptoms. He stated that appellant was asymptomatic prior to the July 23, 1993 injury at Sears and had an exacerbation at the employing establishment. Dr. Gold stated that appellant had significant symptomatic spondylolisthesis. He stated that appellant was not faking his symptoms and was not a malingerer.

The Office terminated benefits in its January 29, 1996 decision.

In a report dated February 1, 1996, Dr. Gold stated that appellant's physical examination was essentially the same as on September 28, 1995 and he should continue with his light-duty work restrictions.

On March 21, 1996 Dr. Gold performed a physical examination and stated that appellant continued to have objective findings consistent with the lumbar spondylosis. He stated that appellant had x-ray evidence of lumbar spondylolisthesis as well as degenerative spondylitic changes. Dr. Gold stated that appellant also had tenderness in the low back as well as neurologic deficit in the L5 and S1 distribution on both the right and left sides. He stated that the June 20, 1994 employment injury had a component in exacerbating and accelerating the July 23, 1993

Sears injury and that appellant's current injury continued to be progressive. Dr. Gold stated that appellant should continue on modified duty.

On May 9, 1996 Dr. Gold noted that he saw appellant on March 21, 1996 for an exacerbation of his back problem, which occurred on March 19, 1996 when he was lifting a case at work. He diagnosed lumbar strain resulting from the March 19, 1996 injury and a history of spondylolisthesis at L5-S1.

The Office denied appellant's request for reconsideration on May 22, 1996 after merit review.

In a report dated July 18, 1996, Dr. Gold stated that a new MRI scan reconfirmed the spondylolisthesis and a herniated disc at L4-5. He stated that appellant's preexisting condition was exacerbated by his current strain. Dr. Gold stated that appellant had a long history of lumbar problems including spondylolisthesis, which had been attributed to his work injury at Sears.

On August 8, 1996 Dr. Gold performed a physical examination and diagnosed lumbar strain, with reference to the March 19, 1996 employment injury, history of lumbar spondylolisthesis at L5-S1 and herniated disc at L4-5. He stated that appellant was permanent and stationary regarding his March 19, 1996 injury and required no further active treatment. Dr. Gold stated that appellant had a disability after the 1993 Sears injury in that appellant could not perform heavy work, and the January 12, 1994 employment injury increased his limitation to light work and that appellant currently had "a limitation to semi-sedentary work." He stated that he based "the issue of apportionment on these limitation of work and restrictions."

The Office denied appellant's request for reconsideration on October 10, 1996, following a merit review.

On December 19, 1996 appellant submitted additional evidence. In a report dated May 24, 1995, Dr. Raphael T. Nussdorf, a Board-certified orthopedic surgeon, considered appellant's history of injury, performed a physical examination and reviewed the 1993 x-rays and MRI scan. He stated that the spondylolisthesis and the retrolisthesis present in appellant's spin antedated the July 1993 injury at Sears and the June 20, 1994 employment injury. Dr. Nussdorf stated that appellant had increased disability due to the June 20, 1994 employment injury. He also stated that the June 20, 1994 employment injury "lit up a silent preexisting pathology…."

An MRI scan dated September 16, 1993 showed, in part, spondylolisthesis at L5-S1 with associated degenerative disc disease. An MRI scan dated June 11, 1996 showed, in part, spondylolisthesis of L5-S1 associated with bilateral moderate nerve root canal stenosis and degenerative disc disease.

In a report dated October 22, 1996, Dr. Loddengaard stated that, on physical examination, appellant's straight leg raising findings were consistent in that his straight leg raising was positive in both the sitting and standing positions, indicating sciatic irritation. He stated that he documented acceleration of appellant's preexisting condition by noting that

appellant had no sciatic symptoms prior to his "work-related injury" and following the injury, had signs of sciatic irritation.

By decision dated March 6, 1997, the Office denied appellant's request for reconsideration, following a merit review.

By letter dated October 28, 1997, appellant requested reconsideration and resubmitted Dr. Gold's reports dated March 10 and 11, 1996 and the 1993 and 1996 MRI scans. He submitted the medical report of Dr. Robert B. Fenton, a Board-certified orthopedic surgeon, dated March 5, 1997, certificates of medical examination, PS Form 2485, dated March 29, 1973, and compensation regulations.

In his March 5, 1997 report, Dr. Fenton considered appellant's history of injury, performed a physical examination and reviewed the 1993 and 1996 MRI scans and normal electrodiagnostic studies. He diagnosed spondylolisthesis Grade 1 and lumbosacral instability. Dr. Fenton stated that appellant had agreed to undergo fusion surgery and in the meantime, was subject to numerous restrictions including lifting, bending and twisting.

By decision dated November 18, 1997, the Office denied appellant's request for reconsideration, following a merit review.

The Board finds that the case in appeal No. 98-1099 is not in posture for decision.

Since the Office was paying appellant compensation benefits based upon the ongoing submission of documentation that he was disabled following his June 20, 1994 employment injury, appellant maintained the burden of establishing continuing disability related to the accepted employment injury.[2]

The Board finds that a conflict in medical opinion exists between appellant's treating physicians, Drs. Gold and Loddengaard, who found that appellant was partially disabled due to the June 20, 1994 employment injury, and the opinion of the referral physician, Dr. Newman, who found that appellant never sustained a work-related injury and was not disabled. In his June 20, 1994 report, Dr. Gold stated that appellant had a flare-up of his preexisting lumbar strain and the Office accepted appellant's claim for a recurrence of disability. In his subsequent reports dated through March 10, 1995, Dr. Gold diagnosed chronic lumbosacral strain as well as a history of lumbar spondylosis and spondylolisthesis at L5-S1. In his March 10, 1995 report, he stated that appellant's condition was permanent due to the June 20, 1994 employment injury, that appellant continued to require light-duty restrictions working 6 hours a day and that 40 percent of appellant's current disability was causally related to the June 20, 1994 employment injury. Drs. Gold and Loddengaard opined that appellant was not malingering or showing signs of hysteria. In his May 17, 1995 report, Dr. Newman opined that appellant's current condition was due solely to his preexisting condition of congenital spondylolisthesis and that several of appellant's symptoms were consistent with hysteria and malingering. He found that appellant did not sustain any work-related injury in 1994.

[2] *Donald Leroy Ballard*, 43 ECAB 876, 882 (1992).

Section 8123(a) of Act provides that "[i]f there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary of Labor shall appoint a third physician who shall make an examination."[3] Therefore, the case will be remanded for the Office to resolve the conflict in medical evidence. On remand, the Office should refer appellant together with a statement of accepted facts to an appropriate medical specialist pursuant to section 8123(a) of the Act. Following this and such further development as the Office deems necessary, it shall issue a *de novo* decision.

Appellant submitted evidence to support his claim in appeal No. 98-556. In a report dated March 21, 1996, Dr. Gold stated that appellant continued to have objective findings as shown, in part, on x-ray of lumbar spondylolisthesis as well as degenerative disc changes. He stated that appellant's "current injury continues to be progressive as expected." Dr. Gold stated that appellant's June 20, 1994 employment injury had a component in exacerbating and accelerating his July 23, 1993 Sears injury. He stated that appellant continued on the same modified duty as previously noted.

In his report dated May 9, 1996, Dr. Gold diagnosed lumbar strain with a history of spondylolisthesis at L5-S1. He stated that appellant was initially seen on March 21, 1996 after he "apparently suffered an exacerbation of his back problem" when lifting a case at work on March 19, 1996. Dr. Gold stated that appellant's current examination and findings were consistent with a lumbar strain with no evidence of any new neurologic deficit. He further stated that "there were no other specific changes from previous evaluations related to his prior lumbar strains and spondylolisthesis, but [appellant] did have increased spasm and discomfort without any new tension and without any new evidence of any sensory or motor changes. Dr. Gold opined that appellant's current exacerbation was the result of the March 19, 1996 injury "to the lumbar strain, but [appellant's] current spondylolisthesis [was] not related to the March 19, 1996 condition as there [was] a previously well-documented history of problems which had been under treatment." He opined that appellant could continue to work in a light-duty capacity with no lifting greater than 11 pounds.

In a report dated August 8, 1996, Dr. Gold reiterated his diagnosis and additionally diagnosed a herniated disc at L4-5. He stated that appellant had a significant injury while working for Sears and that he had work restrictions after the Sears injury in 1993 and his employing establishment injury on January 12, 1994, which increased his limitation to light work. Dr. Gold stated that he would "base the issue of apportionment on these limitations of work and restrictions." He reiterated that appellant had clinical evidence of spondylolisthesis at L5-S1, a herniated disc at L4-5 and limited motion of his lumbar spine. Dr. Gold opined that appellant could work in a part-time position with some standing or walking, but no standing for more than one to two hours a day, no lifting greater than five pounds and no stooping or bending. He stated that appellant's condition was permanent and stationary and that he required no further active treatment for his March 19, 1996 employment injury.

[3] 5 U.S.C. § 8123(a).

By decision dated October 15, 1996, the Office denied appellant's claim from May 2 through 31, 1996, stating that the evidence of record did not establish that the time lost was due to the March 19, 1996 employment injury.

In work status reports dated May 30, June 20 and July 18, 1996, Dr. Gold diagnosed severe lumbosacral strain and released appellant to return to modified duty from May 30 to June 17, from June 24 to July 18 and from July 22 to August 8, 1996, but also stated that appellant was disabled from June 18 to 20, 1996, from June 17 to 27 and from July 16 to 21, 1996.

By letter dated October 15, 1996, the Office stated that it received appellant's claim for continuing compensation from June 1 through July 14, 1996. The Office informed appellant that he must either submit evidence showing that he sustained a recurrence of disability as of June 17, 1996 when he was placed on total disability or submit a claim for a new injury, if applicable.

By decision dated December 11, 1996, the Office denied appellant's claim for disability from June 1 through August 8, 1996, stating that the evidence of record did not establish that the time lost from work was due to the March 19, 1996 employment injury.

By letter dated October 28, 1997, appellant requested reconsideration of the Office's decision and submitted additional evidence consisting of the June 20 and July 18, 1996 work status reports from Dr. Gold, Dr. Gold's March 10, 1996 report and the September 16, 1993 and June 11, 1996 MRI scans.

By decision dated November 19, 1997, the Office denied appellant's reconsideration request.

Since in its order, the Board voided its June 29, 2000 Order remanding the case in appeal No. 98-556 for reconstruction, the Board has jurisdiction over the Office's December 11, 1996 decision as appellant filed his appeal of that decision on November 25, 1997, within a year of the decision's issuance.[4]

The Board finds that the Office properly determined that appellant was not disabled due to the March 19, 1996 employment injury from June 1 through August 8, 1996 in appeal No. 98-556.

Appellant was performing light-duty work at the time of the March 19, 1996 employment injury. The Board has held that when an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence, a recurrence of total disability and to show that he or she cannot perform such light

[4] *See Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.[5]

In this case, appellant did not present evidence which showed either that he sustained a recurrence of disability due to the March 19, 1996 employment injury or that the March 19, 1996 employment injury constituted in a new injury. In his reports dated May 9 and August 8, 1996, Dr. Gold diagnosed lumbar strain with a history of spondylolisthesis at L5-S1 and opined that appellant could perform light-duty work. In Dr. Gold's August 8, 1996 report, he additionally diagnosed a herniated disc at L4-5. Dr. Gold based his diagnoses on x-rays and his physical examination.

In his March 21, 1996 report, Dr. Gold stated that appellant's condition continued to be progressive and opined that the June 20, 1994 employment injury was a component in exacerbating and accelerating his preexisting back condition but found that appellant could perform light duty. He did not indicate that appellant was disabled. In his May 9, 1996 report, Dr. Gold specifically stated that there was no evidence of any new neurologic deficit or any sensory or motor changes and opined that appellant could continue to perform light duty. Dr. Gold did not indicate that appellant was disabled and did not relate any total disability to the March 19, 1996 employment injury.

Further, in his August 8, 1996 report, Dr. Gold merely stated that appellant's limitation to light work was due, in part, to the January 12, 1994 employment injury. He did not indicate that appellant was unable to work due to the March 19, 1996 employment injury. Dr. Gold did not provide any rationalized medical explanation in his reports as to how appellant's herniated disc resulted from his employment. Dr. Gold's work status reports provide no rationalized explanation as to how appellant became disabled from June 17 to 27 and from July 16 to 21, 1996 due to the March 19, 1996 employment injury. Because appellant has not shown that his work requirements changed or that he became disabled due to the March 19, 1996 employment injury, he has not shown that he sustained a recurrence of disability. He has also not shown that he sustained a new injury on March 19, 1996 as there is no rationalized medical explanation as to how he developed a herniated disc.

The Board finds that the refusal of the Office to reopen appellant's case in appeal No. 98-556 for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[6] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; and (3) submit relevant and pertinent evidence not previously considered by the Office.[7] Section 10.138(b)(2) provides that when an application for review of

[5] *Mary G. Allen*, 50 ECAB _____ (Docket No. 96-2021, issued October 7, 1998).

[6] 5 U.S.C. § 8181 *et seq.*

[7] 20 C.F.R. § 10.138(b)(1) and (2).

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.[8] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[9] Evidence that does not address the particular issue involved, in the present case whether appellant's disability was causally related to the March 19, 1996 employment injury, does not constitute a basis for reopening the case.[10]

The evidence appellant submitted in support of his October 28, 1997 request for reconsideration consisted of Dr. Gold's June 20 and July 18, 1996 work status reports, Dr. Gold's March 19, 1996 medical report and the 1993 and 1996 MRI scans, all of which had been previously submitted. Inasmuch as appellant submitted evidence which duplicated evidence already in the case record and was previously considered by the Office, the evidence does not constitute a basis for reopening the case. The Office, therefore, properly denied appellant's request for reconsideration.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated November 18 and March 6, 1997 for appeal No. 98-1099 are hereby reversed. The decisions of the Office dated November 19, 1997 and December 11, 1996 for appeal No. 98-556 are hereby affirmed.

Dated, Washington, DC
December 18, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[8] 20 C.F.R. § 10.138(b)(2).

[9] *Richard L. Ballard*, 44 ECAB 146, 150 (1992); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

[10] *Richard L. Ballard*, *supra* note 9; *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).