U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALFRED T. WILLIAMS, JR. and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Dublin, GA

Docket No. 96-1302; Submitted on the Record;
Issued May 9, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether appellant has met his burden of proof to establish that he sustained a back injury in the performance of duty; (2) whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a); and (3) whether the Office properly denied appellant's request for a hearing under 5 U.S.C. § 8124(b) on the grounds that appellant previously requested reconsideration.

On July 12, 1994 appellant, then a 41-year-old engineering technician, filed a traumatic injury claim (Form CA-1) assigned number A6-606811 alleging that on November 16, 1993 he strained his lower back while lifting a blueprint machine. He stopped work on April 25, 1994. Appellant's claim was accompanied by factual and medical evidence.

By letter dated September 29, 1994, the Office advised appellant to submit additional factual and medical evidence supportive of his claim. By letter of the same date, the Office advised the employing establishment to submit factual evidence. In response, appellant submitted factual and medical evidence.

By decision dated December 9, 1994, the Office found the evidence of record insufficient to establish a causal relationship between the November 16, 1993 injury and the claimed condition or disability. In an accompanying memorandum, the Office found the evidence of record sufficient to establish that the claimed incident occurred at the time, place and in the manner alleged, but insufficient to establish that appellant's herniated disc was caused by this incident. In a January 5, 1995 letter, appellant requested a review of the written record by an Office representative.

In a February 5, 1995 decision, the Office found the medical evidence of record insufficient to establish a causal relationship between appellant's back condition and the

November 16, 1993 injury. By letter dated March 2, 1995, appellant, through his counsel, requested reconsideration of the Office's decision.

By decision dated May 8, 1995, the Office denied appellant's request for reconsideration without a review of the merits of the claim on the grounds that appellant's request neither raised substantive legal questions nor included new and relevant evidence, and thus; it was insufficient to warrant review of the prior decision. Appellant, through his counsel, requested reconsideration of the Office's decision by letter dated July 6, 1995 which was accompanied by factual and medical evidence.

In a decision dated November 7, 1995, the Office denied appellant's request for modification based on a merit review. In a February 7, 1996 letter, appellant, through his counsel, requested that the Branch of Hearings and Review set his case for immediate review.

In a March 5, 1996 decision, the Office denied appellant's request for a hearing under section 8124 of the Federal Employees' Compensation Act on the grounds that appellant was not entitled to a hearing as a matter of right inasmuch as he had previously made a request for reconsideration. The Office further stated that the issue in this case could be addressed through a reconsideration request.

The Board has duly reviewed the case record in this appeal and finds that appellant has failed to meet his burden of proof to establish that he sustained a back injury in the performance of duty.

An employee seeking benefits under the Act[1] has the burden of establishing the essential elements of his or her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitations period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[2] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[3]

In order to determine whether an employee actually sustained an injury in the performance of duty, the Office begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.[4] In this case,

[1] 5 U.S.C. §§ 8101-8193.

[2] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[3] *Daniel J. Overfield*, 42 ECAB 718 (1991).

[4] *Elaine Pendleton*, *supra* note 2.

the Office accepted that the incident occurred at the time, place and in the manner alleged. The Board finds that the evidence of record supports this incident.

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence. To establish a causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence based on a complete factual and medical background, supporting such a causal relationship.[5] In the present case, appellant has failed to submit rationalized medical evidence establishing that his back condition was caused by the November 16, 1993 employment incident.

In support of his claim, appellant submitted medical notes from the employing establishment covering intermittent periods between October 19, 1973 and August 16, 1977 regarding the treatment of his chest and back pain. Appellant also submitted the March 10, 1988 medical treatment notes of a physician whose signature is illegible regarding his back pain and possible kidney infection. Medical notes covering the period November 18, 1988 through January 16, 1995 reveal appellant's treatment for conditions involving his chest, stomach, right and left legs, right ear, burns to the right face and arm, left hand, right elbow, back, sinus and kidney.

In further support of his claim, appellant submitted the April 29, 1994 medical treatment notes of Dr. Roberts indicating that he had marked pain with straight leg raising on the left and that his urine was negative. In his May 4, 1994 medical treatment notes, Dr. Roberts stated that appellant had a central herniation of L5-S1 disc and referred appellant to another physician.

Additionally, appellant submitted a May 3, 1994 magnetic resonance imaging (MRI) report of Dr. Ridley M. Glover, a Board-certified radiologist, revealing a central disc herniation at L5-S1.

The May 6 and 18 and June 3, 1994 medical treatment notes of Dr. Lawrence P. Hartman, a Board-certified neurosurgeon, revealed that appellant had a lumbar strain. Dr. Hartman's June 3, 1994 treatment notes indicated that there was no evidence of surgical scar. His treatment notes also indicated that an MRI showed some degenerative disease in the lumbar spine, but no evidence of nerve root impingement radiographically and no clinical radiculopathy.

The June 8, 1994 medical report of Dr. Reade A. Ballenger, a neurologist, revealed appellant's complaints, social history, his findings on physical examination and an assessment of notable muscle spasm and herniated nucleus pulposus by history. Dr. Ballenger's June 22, 24 and 29, 1994 and July 6 and 13, 1994 notes addressed appellant's treatment for his back condition, neck, shoulder and leg pain. His July 8, 1994 electromyography/nerve conduction study report revealed tibial nerve slowing bilaterally with paraspinal findings which would recommend ruling out radiculopathy as the etiology, but that a polyneuropathy or mononeuropathy was not excluded. An x-ray of the lumbar spine of the same date from Dr. Barry M. Parker, a Board-certified radiologist, revealed minimal disc space narrowing at

[5] 20 C.F.R. § 10.110(a); *see John M. Tornello*, 35 ECAB 234 (1983).

L5-S1 and an otherwise unremarkable examination. Dr. Parker's July 8, 1994 MRI report of the lumbar spine revealed no significant interval change in the appearance of the lumbar spine with evidence of a small central protrusion of nuclear material at L5-S1.

Dr. Stefanis' July 20, 1994 medical report revealed a history of appellant's back injury sustained three years ago while uncovering the pool at his home, the November 1993 employment incident and April 1994 back pain. Dr. Stefanis noted appellant's medical treatment and his findings on physical examination. Based on an MRI, Dr. Stefanis opined that appellant appeared to have an early disc protrusion at L5-S1 with degeneration and probably with subligamentous extension. In his July 22, 1994 medical report, Dr. Stefanis reiterated the history of appellant's back condition and his findings on physical examination. Dr. Stefanis ruled out a herniated disc and noted his plan to have appellant undergo a lumbar myelogram and a postmyelogram computerized tomography (CT) scan.

A July 25, 1994 CT of Dr. B. Richard Lennington, a Board-certified radiologist, revealed bilateral lateral recess encroachments accompanied by disc bulge across the midline and a congenitally small canal yielding lateral recess encroachment upon the L5 roots. Dr. Lennington's myelogram of the same date revealed a diagnosis of bilateral lateral recess encroachments at the L4-5 level on the L5 roots seeing definite root compressions.

Appellant submitted a July 26, 1994 disability certificate of Dr. George S. Stefanis, a Board-certified neurosurgeon, revealing that he had spinal stenosis due to disc protrusion with lateral recess encroachment. He noted that appellant was scheduled for a lumbar discectomy and fusion using instrumentation for spinal stabilization to correct this problem.

Appellant also submitted an August 3, 1994 duty status report (Form CA-17) from Dr. V. Kulkarni, Board-certified in emergency medicine, indicating a history of the November 16, 1993 employment incident, appellant's physical restrictions and a diagnosis of lumbar disc syndrome. Dr. Kulkarni opined that appellant was totally disabled.

In a hospital admission report dated August 26, 1994, Dr. Stefanis provided a history of appellant's pool injury, November 16, 1993 incident, April 1994 back pain and medical treatment. He also provided his findings on physical examination, a review of objective test results, and a diagnosis of lumbar spinal stenosis, disc bulge and lateral recess encroachment. Dr. Stefanis noted appellant's upcoming back surgery.

An August 26, 1994 x-ray report of Dr. Charles Kellum, a Board-certified radiologist, revealed a normal chest.

Dr. Lennington's August 31, 1994 x-ray report showed pedicular screws at L4-5 and dorsal soft tissue, and that the vertical bodies L3 through S1 were grossly in anatomic alignment.

In a September 1, 1994 medical report, Dr. Stefanis provided a description of appellant's back surgery which was performed on August 31, 1994.

A September 6, 1994 surgical pathology report of Dr. Gary K. Walker, a Board-certified pathologist, revealed a diagnosis of lumbar spinal stenosis, disc bulge and lateral recess encroachment.

Dr. Stefanis' September 19, 1994 hospital discharge summary report provided a history of appellant's back condition and medical treatment. Dr. Stefanis noted his findings on physical examination, a description of appellant's back condition and recovery from surgery, and medical treatment. Dr. Stefanis' September 27, November 1 and December 24, 1994 notes revealed appellant's treatment for his back and leg pain.

A November 16, 1994 electromyography (EMG) report of Dr. Mary Ellen Clinton, a Board-certified neurologist, regarding the evaluation of appellant's left lumbar radiculopathy and related conditions provided normal results. Dr. Clinton indicated that there was no denervation in the muscles representing the right L3 through S1 nerve roots and that there was no evidence of any other primary denervating disorder at that time.

Dr. Stefanis' February 9, 1995 hospital report ruled out a herniated disc. His February 7, 1995 treatment notes indicated appellant's postoperative condition. A February 13, 1995 lumbar myelogram report of Dr. Ericha R. Benshoff, a Board-certified radiologist, indicated that plates and screws at L4-5 were in satisfactory position. Dr. Benshoff's CT report of the same date indicated a mild bulge of disc at L3-4, interval surgery at L4-5 with placement of plates and screws, and no evidence of compromise of the neural elements. Dr. Stefanis' March 7, 1995 notes revealed appellant's treatment for his back and leg discomfort.

None of the above medical evidence submitted by appellant is sufficient to establish his burden in this case. Although the medical evidence addressed appellant's back condition and other conditions, it did not address a causal relationship between appellant's conditions and the November 16, 1993 employment incident.

Appellant submitted Dr. Stefanis' December 27, 1994 medical report indicating a history of his back condition. Dr. Stefanis opined that appellant may have strained his back three years ago, but he felt the disc herniation with the stenosis was either caused or aggravated by the lifting of the equipment in November 1993. He further opined that appellant could not have worked and functioned for three years having what he had in his back. Finally, Dr. Stefanis opined the problem that led to the surgery was related to the November 1993 injury described by appellant. He failed to provide any medical rationale explaining how or why appellant's back condition was caused by the November 1993 employment incident. Therefore, Dr. Stefanis' medical report is insufficient to establish appellant's burden.

In a June 3, 1995 medical report, Dr. Stefanis opined that, based on a review of appellant's medical records, his medical training and experience as a neurosurgeon, and his personal examination and treatment of appellant, appellant may have strained his back while moving the pool cover in April 1992, but that the disc herniation with stenosis was either accelerated or precipitated by the lifting of the equipment in November 1993. Dr. Stefanis further opined that appellant could not have worked and functioned in an engineering capacity from April 1992 with the disc bulges and L5 root compression that were found on the July 1994 myelogram. He also opined that the moving of tree limbs in April 1994 could not have been a

direct cause of the disc bulge and herniation, and nerve root compression he found during surgery. Dr. Stefanis then explained that it was significant that Dr. Hartman was the only physician who referred to appellant moving limbs while neither Dr. Adams nor Dr. Roberts, who saw appellant in late April 1994, documented any subjective complaints concerning the moving of tree limbs. Dr. Stefanis stated that any intervening injury to the lumbar spine might have been caused by moving tree limbs in April 1994 was related to the original injury in November 1993 and would not have been the direct cause of the conditions he saw which necessitated surgery. Dr. Stefanis, however, failed to provide any medical rationale to support his opinion. Therefore, his report is insufficient to establish appellant's burden.

Although the Office advised appellant of the type of medical evidence needed to establish his claim, appellant failed to submit medical evidence responsive to the request. Consequently, appellant has not established that his back condition was caused by the November 16, 1993 employment incident.

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

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; or (3) submit relevant and pertinent evidence not previously considered by the Office.[7] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[8] When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.[9]

In his March 2, 1995 letter, appellant, through his counsel, merely requested reconsideration of the Office's February 5, 1995 decision denying modification of its December 9, 1994 decision. He did not advance a point of law or a fact not previously considered by the Office. Although appellant indicated that he was going to submit additional evidence, he did not do so prior to the Office's decision denying his request for reconsideration. Inasmuch as he failed to show that the Office erroneously applied or interpreted a point of law, to advance a point of law or a fact not previously considered by the Office or to submit any or new and relevant evidence, the Office did not abuse its discretion in refusing to reopen appellant's case for a merit review under section 8128(a) of the Act.

[6] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[7] 20 C.F.R. §§ 10.138(b)(1)-(2).

[8] *Id*. at. § 10.138(b)(2).

[9] *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

The Board also finds that the Office properly denied appellant's request for a hearing under 5 U.S.C. § 8124(b) on the grounds that appellant previously requested reconsideration.

By decision dated March 5, 1996, the Office denied appellant's hearing request. The Office stated that appellant was not entitled to a hearing as a matter of right because he had previously requested reconsideration. The Office exercised its discretion to conduct a limited review of the case and indicated that appellant's request was also denied on the basis that the issue in this case could be addressed through a reconsideration application.

Section 8124(b)(1) of the Act, concerning a claimant's entitlement to a hearing before an Office representative, provides in pertinent part: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[10]

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[11] Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act, which provided the right to a hearing,[12] when the request is made after the 30-day period for requesting a hearing,[13] and when the request is for a second hearing on the same issue.[14] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.[15]

In the present case, appellant's February 7, 1996 hearing request was made after he had requested reconsideration in connection with his claim and, thus, appellant was not entitled to a hearing as a matter of right. On July 6, 1995 he, through his counsel, had requested reconsideration of the Office's May 8, 1995 decision. Hence, the Office was correct in stating in its March 5, 1996 decision that appellant was not entitled to a hearing as a matter of right because he made his hearing request after he had requested reconsideration.

While the Office also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, the Office, in its March 5, 1996 decision, properly

[10] *John T. Horrigan*, 47 ECAB 166 (1995).

[11] *Philip G. Feland*, 47 ECAB 418 (1996).

[12] *Frederick D. Richardson*, 45 ECAB 454 (1994).

[13] *Id.*

[14] *Id.*

[15] *Stephen C. Belcher*, 42 ECAB 696, 701-02 (1991).

exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's hearing request on the basis that the issue in the case could be resolved by submitting additional medical evidence to establish his claim. The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from established facts.[16] In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's hearing request which could be found to be an abuse of discretion.

For these reasons, the Office properly denied appellant's request for a hearing under section 8124 of the Act.

The March 5, 1996 and November 7 and May 8, 1995 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, D.C.
May 9, 2000

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

[16] *Frederick D. Richardson, supra* note 12; *Daniel J. Perea*, 42 ECAB 214, 221 (1990).