

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EUGENE SMALLS and DEPARTMENT OF THE ARMY,
Fort Shafter, HI

*Docket No. 98-1109; Submitted on the Record;
Issued May 17, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that residuals of appellant's employment injury had ceased by September 20, 1992; and (2) whether the Office properly determined that appellant's request for reconsideration was insufficient to warrant merit review of the claim.

In the present case, the Office accepted that appellant sustained a temporary aggravation of pes planus and plantar fasciitis. By letter dated July 28, 1992, the Office advised appellant that it proposed to terminate his compensation and afforded appellant the opportunity to submit additional evidence. By decision dated September 3, 1992, the Office terminated compensation effective September 20, 1992. In a decision dated May 28, 1993, an Office hearing representative affirmed the termination decision.

By decision dated September 28, 1994, the Office determined that appellant's request for reconsideration was not sufficient to warrant merit review of the claim. In an order dated September 11, 1997, the Board remanded the case and directed the Office to issue a decision on the merits of the claim.¹

In a decision dated October 17, 1997, the Office denied modification of its prior decision. In a decision dated January 28, 1998, the Office determined that appellant's request for reconsideration was not sufficient to warrant merit review of the claim.

The Board has reviewed the record and finds that the Office met its burden to terminate compensation effective September 20, 1992.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability

¹ Docket No. 95-722.

causally related to his employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.²

In this case, the Office referred appellant to Dr. Edward Gunderson, an orthopedic surgeon, for evaluation. In a report dated March 18, 1992, Dr. Gunderson opined that appellant had suffered a temporary aggravation due to prolonged standing and walking. He noted that appellant had not been working since January 1990 and he found no evidence of a continuing employment-related condition. Dr. Gunderson provided a reasoned medical opinion, based on a complete background, with respect to the accepted employment injuries. On the other hand, appellant did not submit probative and reliable medical evidence supporting a continuing employment-related foot condition. In a report dated December 5, 1991, Dr. V.G. Clark-Wismer, an osteopath, diagnosed traumatic systemic gouty arthritis and multi deficiency disease. These are not accepted employment injuries and Dr. Clark-Wismer does not provide a reasoned opinion on causal relationship with employment. The Board finds that Dr. Gunderson represented the weight of the evidence and the Office met its burden of proof in terminating compensation effective September 20, 1992.

After termination or modification of benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that he had an employment-related disability, which continued after termination of compensation benefits.³

In this case, the evidence submitted is of diminished probative value and is not sufficient to meet appellant's burden of proof. In a report dated October 7, 1992, Dr. James Deluze, an osteopath, stated that appellant's complaints were causally related to employment, without providing a complete history or medical reasoning to support his opinion. In a report dated August 18, 1992, Dr. W. Douglas Hiller, an orthopedic surgeon, reported that appellant had a permanent impairment to the legs, but did not provide a reasoned opinion on causal relationship with employment. In a report dated August 9, 1993, Dr. Clark-Wismer diagnosed pes planus, bilateral sciatic neuritis compounded by plantar neuritis, high uric acid, lumbago, unidentified shoulder and chest pain and post-traumatic stress disorder. Dr. Clark-Wismer did not provide a reasoned medical opinion on causal relationship with the identified employment factors.

At the February 18, 1993 hearing before an Office hearing representative, Dr. Michael Lee, a podiatrist, provided testimony regarding appellant's condition. Dr. Lee stated that appellant had severe chronic plantar fasciitis, and when asked to discuss the causes of such a condition, he stated "there are many reasons why it can happen, but one of the common reasons is standing or lifting weights without proper support on the feet." Dr. Lee then proceeded to discuss an alleged fall from a ladder at work, indicating that such a fall produced microscopic tears in the foot that contributed to a chronic condition. With respect to an alleged fall from a ladder at work, the Board notes that the record does not contain any reliable evidence to establish

² *Patricia A. Keller*, 45 ECAB 278 (1993).

³ *Talmadge Miller*, 47 ECAB 673, 679 (1996); *see also George Servetas*, 43 ECAB 424 (1992).

this incident. As noted by the hearing representative, there was confusion as to the date of the alleged incident, since Dr. Lee initially reported the incident as occurring in December 1988, while appellant stated that the incident occurred in February 1987. The hearing representative also noted that appellant's supervisor indicated that the employing establishment did not have any knowledge of a February 1987 employment incident. The accepted claim in this case was an occupational claim based on appellant's job duties, which included standing and walking while carrying supplies. Appellant has not submitted sufficient evidence to establish an employment incident in February 1987.

It is evident that Dr. Lee relies on the alleged incident to support his opinion on causal relationship. For example, in a report dated March 2, 1993, he opined that appellant remained in pain and that he had a permanent impairment "as a direct result of his fall from the ladder." Dr. Lee also submitted a May 23, 1994 report in which he reviewed the medical evidence and opined that appellant had a permanent condition "caused by his work-related injury," without clearly explaining how the accepted employment factors contributed to a permanent condition. The Board finds that Dr. Lee's reports do not contain a reasoned medical opinion, based on an accurate history, that appellant continued to have an employment-related condition after September 20, 1992.

In the absence of probative and reliable evidence, the Board finds that appellant has not met his burden of proof with respect entitlement to compensation after September 20, 1992.

The Board further finds that the Office properly refused to reopen the claim for merit review.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,⁴ the Office's regulations provides that a claimant may obtain review of the merits of the claim by (1) showing that the Office erroneously applied or interpreted a point of law, or (2) advancing a point of law or fact not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office.⁵ Section 10.138(b)(2) states that any application for review that does not meet at least one of the requirements listed in section 10.138(b)(1) will be denied by the Office without review of the merits of the claim.⁶

In this case, appellant submitted two medical reports that had not been previously considered; a report dated October 21, 1994 from Dr. Clifford Lau, an orthopedic surgeon and a report dated July 9, 1997 from Dr. Gary Okamura, an orthopedic surgeon. Neither of these reports is sufficient to warrant reopening the claim, since they do not address the relevant medical issue. Dr. Lau provides a history and results on examination, without discussing an

⁴ 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.")

⁵ 20 C.F.R. § 10.138(b)(1).

⁶ 20 C.F.R. § 10.138(b)(2); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

employment-related condition. Similarly, Dr. Okamura provides results on examination, but does not discuss causal relationship with appellant's federal employment.

The Board finds that appellant did not meet any of the requirements of section 10.138(b)(1) in this case. Accordingly, the Office properly refused to reopen the claim for merit review.

The decisions of the Office of Workers' Compensation Programs dated January 28, 1998 and October 17, 1997 are affirmed.

Dated, Washington, D.C.
May 17, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member