U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CARL L. BROWN and TENNESSEE VALLEY AUTHORITY, HARTSVILLE NUCLEAR PLANT, Chattanooga, TN

Docket No. 98-1639; Submitted on the Record;
Issued May 16, 2000

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM, BRADLEY T. KNOTT

The issues are: (1) whether appellant had any disability on or after January 31, 1998, causally related to his September 14, 1978 accepted right elbow medial epicondylitis; and (2) whether the Office of Workers' Compensation Programs abused its discretion by denying appellant's request for further review of his case on its merits under 5 U.S.C. § 8128(a).

On September 14, 1978 appellant, then a 24-year-old ironworker, sustained medial epicondylitis of the right elbow due to a slip and fall on the floor. Appellant returned to light duty for about one year, underwent surgery on March 7, 1980,[1] was placed on the periodic roll for receipt of compensation and was terminated from the employing establishment effective April 7, 1981 due to unavailability for work. Appellant ultimately moved to Hardin, Montana in 1991.

On June 21, 1993 appellant was seen by Dr. William S. Shaw, Board-certified in occupational and general preventive medicine, who conducted a complete and thorough physical examination and opined that the only abnormal objective medical evidence was a 10-degree lack of full extension in the right elbow. Dr. Shaw noted that testing for active epicondylitis was negative,[2] and opined that appellant did not require any medical intervention such as surgery, injections or medications. He recommended that a functional capacity evaluation be performed in order to complete a Form OWCP-5 work restriction evaluation.

On June 11, 1997 Dr. Paul M. Melvin, a Board-certified orthopedic surgeon, reviewed appellant's history of injury and treatment, performed a second opinion evaluation and noted that

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[1] A successful release of the extensor carpus radialus brevis laterally and release of the flexor carpi radialus medially were performed.

[2] Resisted pronation and supination of the forearm and resisted flexion and extension of the wrist did not cause the expected pain in the appropriate elbow region.

appellant's examination revealed only a 10 to 15 degree flexion contracture of his right elbow, indicating he could not completely extend his elbow. Dr. Melvin noted that appellant did not seem to experience exacerbation of elbow pain from resisted extension or flexion of the wrist, or pronation or supination of the wrist, and that he had full flexion, pronation and supination of the elbow. He opined that appellant's only objective findings were crepitus in the distal radial humeral joint and the flexion contracture and that appellant "[did] not have any objective findings to substantiate the diagnosis of medial or lateral epicondylitis." Dr. Melvin recommended work hardening and an evaluation by a hand and wrist specialist of appellant's distal radial humeral joint because of a finding of crepitus.[3]

On September 9, 1997 appellant was evaluated by Dr. Curtis R. Settergren, a Board-certified orthopedic surgeon and hand specialist, who found very symmetric arms, no atrophy, no trophic changes, equal callusing, cracks and fissures in the skin of the right palm as compared to the left and a right forearm circumference, which was one centimeter larger than the left, with full range of motion in all joints of his upper extremity. Dr. Settergren opined that "[t]here is no objective evidence for anything to limit [appellant's] use of his arm, only some subjective complaints and by the J-Mar dynamometer [appellant] was not giving a good effort on the right." He noted that he did not find anything objective to limit or restrict appellant's use of his upper extremities.

On a work capacity evaluation form dated September 9, 1997, Dr. Settergren opined that appellant could work eight hours per day with no restrictions.

Dr. Settergren referred appellant for occupational therapy evaluation and testing. By analysis dated September 10, 1997, Karla Carr, the occupational therapist, reported her objective findings of a "slight right elbow flexion contracture [and] symmetrical muscle strength with right greater than left in circumferences" to Dr. Settergren, concluding: "If all of [appellant's] reports of pain and inability to use the right hand were a daily reality for him, his right upper extremity would be severely atrophied rather than slightly more muscular than the left upper extremity. There are signs of manual labor with moderate callusing of the right palm and excellent muscle tone of the thenar and hypothenar eminences of the right side."

By report dated October 7, 1997, the results of the October 2, 1997 functional capacity evaluation performed for Dr. Settergren were noted as follows:

> "[D]uring this evaluation [appellant] did not appear to give his best effort, and at this time it appears that his functional abilities are much greater that what [he] perceives his abilities to be…. [I]n reviewing the job description of a reinforcing ironworker, it lists the physical demands between 25 to 100 pounds occasionally, which at this time due to the inconsistencies in [appellant's] physical abilities during this evaluation and with the lack of pain behaviors, he would be functionally capable of returning to work as an iron worker without any restrictions. During this evaluation, it did not appear that [appellant] is a danger

[3] This was a nonwork-related condition.

to himself or any other employees with the work that he might be doing, as there does not appear to be any physical restriction due to his right elbow injury.

"[Appellant] perceives himself as being totally disabled and his capacities are actually much greater. He is functionally capable of returning to work as soon as possible."

The physical evaluator noted that, although appellant complained of intense pain upon testing, he had no observable corresponding pain behaviors such as grimmacing, sweating or guarding, such that there appeared to be symptom magnification. The tester noted good right arm function and strength and the absence of right arm atrophy, which would be expected to occur after 19 years of nonuse due to pain. The occupational therapy tester noted: "It is difficult to comprehend the level of disabilities verbalized by this patient. He is quite adamant about not being able to return to work and believes he cannot resume his previous position as an ironworker. His behaviors are symptom and pain focused and evidently his current lifestyle is sedentary in nature. This individual should be able to resume some gainful employment and perhaps re-exploration of work as an iron worker would be of benefit."

On October 28, 1997 the Office issued appellant a notice of proposed termination of compensation and medical benefits finding that the medical evidence of record established that he was no longer disabled from his date-of-injury job nor did he have any disabling residuals from his accepted condition which required further medical care. The Office noted that evaluations by Drs. Shaw, Melvin and Settergren found no objective evidence of any right arm medical condition or evidence to support continuing disability. The Office also noted that therapists' reports of September and October 1997 all find that he was physically able to return to his date-of-injury job. The Office advised appellant that he had 30 days within which to submit further evidence or argument, if he disagreed with the proposed termination.

By letter dated December 4, 1997, appellant requested that the Office reconsider its decision to terminate his compensation and reiterated that his doctors had opined that his condition was permanent and stationary, that he had been on disability for 19 years with no work history, no job skills, no medical benefits, no Social Security benefits and no retirement, that terminating disability would cause him to lose everything as it was the only income he had for his family, that he thought that he would be retrained for a lighter-duty job and that there was "something wrong" with his arm which made it impossible to use consistently or in certain positions.

In support appellant submitted two December 10, 1997 letters from Dr. William S. Rosen, a Board-certified physiatrist, which presented his medical qualifications and stated that he "found no objective evidence which would suggest that [appellant] is permanently disabled. In fact, I feel [appellant] could perform either sedentary or light-duty work." Dr. Rosen recommended assistance in finding appropriate employment for appellant, which should begin immediately.

By decision dated January 5, 1998, the Office finalized its termination decision. The Office found that Dr. Rosen opined that there was no objective evidence that would suggest that [appellant] was permanently disabled and that Dr. Rosen's reports did not dispute the other

physicians' findings of no objective evidence which established disability. The Office found appellant's further arguments unpersuasive.

By letter dated January 15, 1998, appellant requested reconsideration, and in support he submitted a January 14, 1998 report from Dr. Rosen, a Board-certified physiatrist, which opined that "no objective evidence can be provided to support [appellant's] complaints." He, however, noted that appellant had subjective complaints, but that, "[d]espite his musculoskeletal complaints, I do feel [appellant] can return to work."[4]

By decision dated February 27, 1998, appellant's request for further review of his case on its merits was denied. The Office found that the evidence submitted in support of the request was irrelevant, as it merely supported what the Office had already established,[5] and was, therefore, insufficient to require reopening of appellant's case for further review on its merits.

The Board finds that appellant had no disability on or after January 31, 1998, causally related to his September 14, 1978 accepted right elbow medial epicondylitis.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[6] After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[7] Further, the right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for wage loss.[8] To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition that require further medical treatment.[9] The Office met its burden of proof to terminate both monetary compensation and entitlement to medical benefits in this case.

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[4] Dr. Rosen diagnosed employment-related medial and lateral epicondylitis based only upon appellant's subjective complaints and he opined that, in all likelihood ironwork would not be compatible with appellant's capabilities, but that he could perform sedentary to light-duty work without right upper extremity repetitive motion. However, the Board notes that no medical rationale supporting this diagnosis was provided, which is particularly necessary as appellant had not worked or used his right elbow occupationally in 19 years and that Dr. Rosen's opinion as to appellant's employment capabilities was not only unrationalized and unsupported by any functional capacity testing results, but was couched in speculative terms. In a separate January 14, 1998 report to appellant's attending physician, Dr. Rosen noted that appellant had full ranges of motion of his neck, shoulders and upper extremities and was within normal limits bilaterally in elbow flexion. He noted full and equal strength testing throughout, intact sensation bilaterally, and normal and symmetrical deep tendon reflexes bilaterally, but he diagnosed a right upper extremity chronic pain syndrome "as a result of the 1978 injury." Dr. Rosen recommended daily strengthening and stretching exercises and that appellant "pursue work of some type."

[5] The Office found that Dr. Rosen's report failed to establish any continuing injury-related disability.

[6] *Harold S. McGough*, 36 ECAB 332 (1984).

[7] *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

[8] *Marlene G. Owens*, 39 ECAB 1320 (1988).

[9] *See Calvin S. Mays*, 39 ECAB 993 (1988); *Patricia Brazzell*, 38 ECAB 299 (1986); *Amy R. Rogers*, 32 ECAB

In the instant case, appellant has submitted no probative medical evidence supporting continuing objective injury-related disability since the early 1980s. Although his treating physician from 1982 through 1992, Dr. Robert J. Bush, a Board-certified orthopedic surgeon, found his condition to be "a permanent and stationary recuperation," Dr. Bush also indicated that appellant could work eight hours per day with minor restrictions on lifting and climbing.

In contrast, in 1993 Dr. Shaw provided a thorough examination and evaluation and he found that appellant had no objective evidence of active epicondylitis. He opined that further medical intervention and medication was not required.

On June 11, 1997 Dr. Melvin performed a second opinion examination, noted that appellant did not manifest the expected exacerbation of elbow pain with resisted extension or flexion, or with wrist pronation or supination, which would indicate active epicondylitis and he opined after a complete work up that appellant did not have any objective findings to substantiate the diagnosis of medial or lateral epicondylitis. He recommended work hardening.

On September 9, 1997 Dr. Settergren performed a series of examinations and evaluations and found that there was no objective evidence for anything to limit appellant's use of his right arm. Testing order by Dr. Settergren disclosed no atrophy, no trophic changes, equal callusing of both hands indicating equal usage, symmetrical muscle strength with right greater than the left and excellent muscle tone on the thenar and hypothenar eminences on the right. Testing revealed that appellant's functional abilities were much greater than he perceived them to be, that appellant lacked the expected pain behaviors for the severe pain he claimed to be experiencing and that he would be functionally capable of returning to work as an ironworker without restrictions.

The Office, therefore, properly determined that the weight of the medical evidence and indeed the sum of the medical evidence of record to that point, indicated that appellant was no longer disabled due to his accepted condition of right elbow medial epicondylitis and could return to work without restrictions. It further determined that the evidence supported that no further medical intervention was required in appellant's case.

Appellant disagreed with the Office's determination to terminate compensation, but in support of his allegations of continued disability, the report he submitted from Dr. Rosen merely supported and concurred with the other medical evidence of record, noting that Dr. Rosen found no objective evidence which would suggest appellant was permanently disabled.

Therefore, relying on the current medical reports of record, the Office met its burden of proof to establish that appellant's disability had ceased. Further, the Office established, from the current medical evidence provided, that appellant no longer had residuals of his employment-related condition that required further medical treatment.

1429 (1981).

The Board further finds that the refusal of the Office to reopen appellant's case 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 Federal Employees' Compensation Act,[10] 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.[11] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his application for review within one year of the date of that decision.[12] When a claimant fails to meet one of the above-mentioned 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.[13] Evidence that repeats or duplicates evidence already in the case record has no new evidentiary value and does not constitute a basis for reopening a case.[14] Evidence that does not address the particular issue involved, in this case continuing objective injury-related disability, is irrelevant and, therefore, does not constitute a basis for reopening a case.[15]

By letter dated January 15, 1998, appellant requested reconsideration of the Office's January 5, 1998 decision finalizing the termination of his monetary compensation entitlement and medical benefits. In support of the request appellant submitted two January 14, 1998 reports from Dr. Rosen, which did not support continuing injury-related disability, but rather supported what the Office had already established, that appellant had no objective evidence of injury-related disability. As neither of these reports supported anything other than what the Office had already established, they were irrelevant and, therefore, they did not constitute the submission of new and relevant evidence not previously considered, nor did they constitute a basis for reopening appellant's claim for further consideration on its merits. Consequently, appellant has not presented relevant and pertinent evidence not previously considered by the Office.

In the present case, appellant has not established that the Office abused its discretion in its February 27, 1998 decision, by denying his request for a review on the merits of its January 5, 1998 decision under section 8128(a) of the Act, because he has failed to show that the Office erroneously applied or interpreted a point of law, failed to advanced a point of law or a fact not previously considered by the Office or failed to submitted relevant and pertinent evidence not previously considered by the Office.

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[10] 5 U.S.C. §§ 8101-8193.

[11] 20 C.F.R. § 10.138(b)(1), 10.138(b)(2).

[12] 20 C.F.R. § 10.138(b)(2).

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

[14] *Mary G. Allen*, 40 ECAB 190 (1988); *Eugene F. Butler*, 36 ECAB 393 (1984).

[15] *Jimmy O. Gilmore*, 37 ECAB 257 (1985); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

As the only limitation on the Office's authority is reasonableness, an abuse of discretion can generally only be shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.[16] Appellant has made no such showing here.

Consequently, the decisions of the Office of Workers' Compensation Programs dated February 27 and January 5, 1998 are hereby affirmed.

Dated, Washington, D.C.
May 16, 2000

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

[16] *Daniel J. Perea*, 42 ECAB 214 (1990).