U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLIE E. BROWN and DEPARTMENT OF THE NAVY, MARE ISLAND NAVAL SHIPYARD, Vallejo, CA

Docket No. 98-1824; Submitted on the Record;
Issued May 18, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, BRADLEY T. KNOTT

The issues are: (1) whether appellant has established entitlement to compensation after June 27, 1993; and (2) whether the Office of Workers' Compensation Programs properly refused to reopen appellant's claim for merit review.

The case has been before the Board on a prior appeal. In a decision dated June 2, 1997, the Board found that the Office had met its burden of proof in terminating appellant's compensation effective June 27, 1993.[1] The history of the case is contained in the Board's prior decision and is incorporated herein by reference.

In a decision dated July 30, 1997, the Office reviewed the case on its merits and denied modification. By decisions dated October 15, 1997 and March 9, 1998, the Office determined that appellant's requests for reconsideration were not sufficient to warrant reopening the case for merit review.

The Board has reviewed the record and finds that appellant has not established entitlement to compensation after June 27, 1993.

As the Board indicated in its prior decision, 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.[2]

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[1] Docket No. 95-755.

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

In this case, the medical evidence is not of sufficient probative value to meet appellant's burden of proof. In a report dated April 17, 1997, Dr. George Grossman, an internist, opined that appellant continued to be disabled for employment. Dr. Grossman noted that although he was not appellant's physician at the time of injury, there was ample documentation of a primary injury. He stated that even though there was no objective signs of sciatic nerve compression, appellant had chronic debilitating pain and "this persistent disability is related to the original injury." The Board notes that the record indicates that appellant had accepted claims for lumbar strains on January 15, 1980, May 2 and November 23, 1983. Dr. Grossman described a 1980 incident involving the lifting of heavy deck plates, without discussing the other employment incidents or providing a complete medical history. Moreover, he does not provide a clear diagnosis and a reasoned medical opinion relating the diagnosis to appellant's federal employment. He stated that there was documentation of a primary injury, but the issue is whether appellant had a disabling condition causally related to his employment injuries after June 27, 1993. Dr. Grossman does not provide a reasoned medical opinion, based on a complete and accurate background, on this issue.

The remainder of the medical evidence is also of diminished probative value on the issue presented. For example, in a report dated May 1, 1997, Dr. Alexander Reynoso, a family practitioner, provided results on examination and noted that a magnetic resonance imaging scan showed diffuse posterior disc bulging at all levels. He did not, however, provide a reasoned medical opinion on causal relationship with appellant's federal employment.

The Board accordingly finds that appellant has not submitted sufficient medical evidence to meet his burden of proof in this case.

The Board further finds that the Office abused its discretion in refusing to reopen the case for merit review.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[3] 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.[4] 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.[5]

In this case, appellant submitted a report dated February 11, 1998 from Dr. Lee C. Ballance, a family practitioner. The March 9, 1998 Office decision concludes that the report was of insufficient probative value to warrant merit review of the claim, asserting that it lacked

[3] 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").

[4] 20 C.F.R. § 10.138(b)(1).

[5] 20 C.F.R. § 10.138(b)(2); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

reasoning and a complete history. The issue, however, is whether the report constituted new and relevant evidence. Dr. Ballance had not previously submitted a report, and in the February 2, 1998 report he provides a history of a January 15, 1980 injury, results on examination, and states that appellant had a low back pain syndrome consistent with a mild radiculopathy since 1980. He stated that there was no other history of injury to account for his pain, and appellant was disabled for his date-of-injury job.

As noted above, the issue is not whether the report is sufficient to meet appellant's burden of proof, but whether it is new and relevant evidence. Dr. Ballance provided a new report that addresses the issue of an employment-related condition. It is clearly new and relevant evidence that is sufficient under section 10.138(b)(1)(iii) to require reopening the claim for merit review. The Board accordingly finds that the Office abused its discretion in this case.

The decision of the Office of Workers' Compensation Programs dated July 30, 1997 is affirmed. The decision dated March 9, 1998 is set aside and this case is remanded to the Office for an appropriate decision.

Dated, Washington, D.C.
May 18, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member