U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EDWARD J. GREEN, JR. and DEPARTMENT OF COMMERCE, NATIONAL WEATHER SERVICE, Suitland, MD

Docket No. 98-2168; Submitted on the Record;
Issued May 17, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation effective August 17, 1997; (2) whether appellant met his burden of proof to establish that he had any disability after August 17, 1997 causally related to his employment injury; and (3) whether 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) constituted an abuse of discretion.

On November 3, 1986 appellant, then a 35-year-old computer clerk, sustained an employment-related acute lumbosacral strain while lifting boxes of computer paper. He stopped work that day, received appropriate compensation and returned to limited duty on June 6, 1988. On November 28, 1988 he filed a recurrence claim, alleging that on October 17, 1988 he sustained a recurrence of disability, stating that his condition worsened after his return to work in June 1988. Following further development of the record, in December 1989 he was returned to the periodic rolls. On February 6, 1996 the Office referred appellant to Dr. Gary C. Dennis, a Board-certified neurosurgeon, for a second-opinion evaluation. Finding that a conflict in the medical opinion existed between the opinions of Dr. Dennis and Dr. Daniel R. Ignacio, appellant's treating Board-certified physiatrist, on May 14, 1997 the Office referred him to Dr. H.S. Pabla, a Board-certified orthopedic surgeon, to resolve the conflict.[1]

By letter dated July 14, 1997, the Office informed appellant that it proposed to terminate his compensation, based on the opinions of Drs. Dennis and Pabla. Appellant submitted no additional medical evidence and, by decision dated August 14, 1997, the Office terminated his benefits, effective August 17, 1997, on the grounds that the work-related disability had ceased.[2]

[1] Both Dr. Dennis and Dr. Pabla were provided with the medical record, a statement of accepted facts and a set of questions.

[2] The Board notes that both the notice dated July 14, 1997 and the decision dated August 14, 1997 misidentify Dr. Dennis as Dr. Gary Williams.

On August 26, 1997 appellant requested reconsideration, and submitted additional medical evidence. In a November 21, 1997 decision, the Office denied modification of the prior decision. On January 5, 1998 appellant again requested reconsideration and submitted additional medical evidence. By decision dated March 26, 1998, the Office denied appellant's reconsideration request on the grounds that the evidence submitted was repetitious. The instant appeal follows.

Initially, the Board finds that the Office met its burden of proof to terminate appellant's compensation.

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation. After it has determined that an employee has disability causally related to his or her employment, the Office may not terminate compensation without establishing that the disability has ceased or that it was no longer related to the employment.[3] Furthermore, in situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[4]

The medical evidence relevant to the termination of appellant's compensation includes reports of magnetic resonance imaging (MRI) scans of the lumbar spine dated September 18, 1988 and October 12, 1990 that were normal. Appellant's treating Board-certified physiatrist, Dr. Daniel R. Ignacio, submitted a number of reports in which he advised that appellant continued to be disabled and a July 7, 1995 electromyographic (EMG) study that revealed evidence of chronic left L5 radiculopathy. In a report dated January 29, 1996, Dr. Ignacio noted findings on examination and diagnosed cervical strain syndrome, thoracic strain syndrome, lumbar strain syndrome and bilateral carpal tunnel syndrome.

In a report dated March 28, 1996, Dr. Gary C. Dennis, a Board-certified neurosurgeon who provided a second opinion for the Office, advised:

> "Based on my examination and copies of medical records and reports of diagnostic studies, it is felt that the acute low back strain, which occurred as a result of the injury of November 3, 1986 has resolved. [Appellant] although has chronic low back pain, which worsened on November 3, 1986 and is most likely the basis for the propensity to develop back pain.
>
> "Enough information is not available to determine whether his condition has returned to his preinjury status because records of his degree of injury and state of resolution of his 1974 injury are not available."[5]

[3] *See Patricia A. Keller*, 45 ECAB 278 (1993).

[4] *See Kathryn Haggerty*, 45 ECAB 383 (1994); *Edward E. Wright*, 43 ECAB 702 (1992).

[5] The record indicates that appellant sustained a back injury in Viet Nam in 1974 for which he received a 10 percent disability.

* * *

> "There is no conclusive evidence that [he] has a compressive lesion resulting in a radiculopathy, rather he has a chronic pain syndrome due to myofascial pain, which should not prevent him from performing his duties as a computer clerk...."

Dr. Dennis also provided a work capacity evaluation dated April 1, 1996 in which he advised that appellant could work eight hours per day with no kneeling, twisting or bending and no pushing, pulling or lifting over 20 pounds with 15 minutes breaks every 2 hours.

In a comprehensive report dated May 30, 1997, Dr. Pabla, the impartial medical examiner who is Board-certified in orthopedic surgery, diagnosed chronic low back pain, myofascial in origin. He advised:

> "[Appellant's] vague, subjective complaints are not associated with any objective physical findings. Specifically provocative tests are normal. There is no evidence of neurological impairment. Careful examination of the lower extremity did not show any evidence of muscle wasting or weakness. Above all, the radiographs of the lumbar spine did not show any evidence of degenerative arthritis.... I do not see any disabling residuals from his condition (lumbosacral strain). [He] is able to work and perform the duties of his normal occupation, computer clerk, without any limitation or restriction."

The Board notes that, Dr. Pabla provided a comprehensive report in which he advised that appellant had no disabling residuals due to the accepted employment injury. As a conflict of medical opinion was created between reports from Dr. Ignacio and Dr. Dennis the Board finds that the weight of medical opinion is represented by Dr. Pabla.[6] Thus, as appellant had no employment-related disability on or after August 17, 1997, the Office met its burden of proof to terminate his compensation benefits on that date.

The Board further finds that appellant failed to establish that he had an employment-related disability after August 17, 1997.

As the Office met is burden of proof to terminate appellant's compensation benefits, the burden shifted to appellant to establish that he had disability causally related to his accepted

[6] *See Harrison Combs, Jr.*, 45 ECAB 716 (1994).

injury.[7] To establish a causal relationship between the condition, as well as any attendant disability claimed and the employment injury, an employee must submit rationalized medical evidence, based on a complete factual and medical background, supporting such a causal relationship.[8] Causal relationship is a medical issue,[9] and the medical evidence required to establish a causal relationship is rationalized medical evidence. Rationalized medical evidence is medical evidence, which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[10]

The evidence submitted by appellant with his August 26, 1997 reconsideration request includes reports from Dr. Ignacio dated July 17, 23 and 30 and August 7, 1997, an electromyographic study from Dr. Ignacio dated July 23 and an August 22, 1997 report of an MRI of the lumbar spine, which demonstrated no evidence of disc herniation, spinal stenosis or significant foraminal narrowing with very mild facet arthropathy in the lower lumbar spine.

Dr. Ignacio merely reiterated his opinion and conclusions that appellant was totally disabled and the EMG revealed the same findings as that of July 7, 1995.[11] The MRI did not contain an opinion regarding the cause of appellant's condition. Appellant, therefore, failed to establish that he continued to be disabled after August 17, 1997.

Finally, the Board finds that the Office did not abuse its discretion in denying appellant's request for review.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[12] 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.[13] 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.[14] To be entitled to merit review of an

[7] *See George Servetas*, 43 ECAB 424 (1992).

[8] *See* 20 C.F.R. § 10.110(a); *Kathryn Haggerty*, *supra* note 4.

[9] *Mary J. Briggs*, 37 ECAB 578 (1986).

[10] *Gary L. Fowler*, 45 ECAB 365 (1994); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[11] *See Josephine L. Bass*, 43 ECAB 929 (1992).

[12] 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 his own motion or on application." 5 U.S.C. § 8128(a).

[13] 20 C.F.R. § 10.138(b)(1) and (2).

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

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.[15]

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 this case, appellant did not advance a point of law not previously considered, articulate any legal argument with a reasonable color of validity in support of his request, or submit relevant and pertinent medical evidence with his request. While he submitted reports dated October 21 and December 12, 1997 from Dr. Ignacio with his January 5, 1998 reconsideration request, Dr. Ignacio again reiterated his opinion that appellant could not work. The Office, therefore, properly denied appellant's application for reconsideration.[17]

The decisions of the Office of Workers' Compensation Programs dated March 26, 1998 and November 21 and August 14, 1997 are hereby affirmed.

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

Michael J. Walsh
Chairman

George E. Rivers
Member

Michael E. Groom
Alternate Member

[15] 20 C.F.R. § 10.138(b)(2).

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

[17] The Board notes that appellant submitted evidence subsequent to the March 26, 1998 decision of the Office. The Board cannot consider this evidence, however, as its review of the case is limited to the evidence of record which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).