U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROSALIO FLORES and DEPARTMENT OF HEALTH & HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION, Las Cruces, NM

Docket No. 00-1337; Submitted on the Record;
Issued August 30, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective December 5, 1999; and (2) whether the Office properly denied appellant's request for reconsideration.

On June 15, 1987 appellant, then a 35-year-old file clerk, was pulling on a stuck file drawer when the drawer came out and nearly fell. Appellant caught the drawer and felt a burning pain in his low back region and groin. He stopped working that day and filed a compensation claim for a low back condition and inguinal hernia. Appellant received continuation of pay for the period June 16 through July 30, 1987. He underwent surgery on June 24, 1987 for a left inguinal herniorrhaphy. On January 12, 1988 appellant filed a claim for compensation for the period beginning October 15, 1987. The Office accepted appellant's claim for low back strain and left inguinal hernia and began payment of temporary total disability compensation effective October 15, 1987.

In an October 26, 1999 decision, the Office terminated appellant's compensation effective December 5, 1999 on the grounds that he had no continuing disability causally related to the June 15, 1987 employment injury. In a November 17, 1999 letter, appellant requested reconsideration. In a December 2, 1999 decision, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was repetitious and, therefore, insufficient to require review of the prior decision.

The Board finds that the Office properly terminated appellant's compensation.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. 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.[1]

In a July 21, 1987 report, Dr. Gerald A. Halaby, an orthopedic surgeon, indicated that appellant showed tenderness on palpation of the lumbar region and decreased sensation in the S1 and L4 dermatomes. He noted x-rays of the thoracic and lumbar spine were essentially normal with no evidence of fracture or subluxation. Dr. Halaby diagnosed post-traumatic lumbar syndrome, post-status herniorrhaphy and functional overlay.

In an August 17, 1987 report, Dr. Randolph Whitworth, a psychologist, indicated that psychological testing showed appellant, in addition to his back and arm pain, had an enormous number of other somatic complaints, many of which were the vague and diffuse variety associated with hysteric conversion and hypochondria. He commented that the tests suggested at least some functional or psychological overlay to appellant's symptoms.

In a February 6, 1998 report, Dr. J. Hoogerbeets, a Board-certified radiologist, stated that a computerized tomography scan of the lumbar spine was normal. He indicated that a magnetic resonance imaging (MRI) scan of the lumbar spine was normal except for early degenerative changes in the L4-5 and L5-S1 disc. In a February 8, 1998 report, Dr. Arthur C. Bieganowski, a Board-certified neurologist, stated that a lumbar thermogram was abnormal, showing findings consistent with L5 nerve fiber irritation.

In a March 30, 1999 report, Dr. Juan A. Rodriguez, a surgeon, indicated that he had first seen appellant on February 3, 1988 with a history of injury from pulling a heavy drawer and falling. Dr. Rodriguez noted the findings of lumbar radiculitis from the lumbar thermogram and early degenerative changes seen in the MRI scan. He reported that appellant currently was walking with a cane and appeared to be unable to sit for any length of time or get up without a great deal of difficulty. Dr. Rodriguez concluded that appellant was totally disabled on a permanent basis. Over the next few years, he continued to find appellant totally disabled for work.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Randy J. Pollet, a Board-certified orthopedic surgeon, for an examination and second opinion on whether appellant remained disabled due to the employment injury.[2] In a July 20, 1999 report, Dr. Pollet stated that appellant's reflexes and sensation were normal in examination. He noted overexaggeration in the examination. Dr. Pollet indicated that appellant was neurologically intact and his muscle motor power was normal. He concluded that appellant had no current objective findings of the work-related accepted condition. Dr. Pollet commented that appellant had significant functional overlay. He stated that appellant's current clinical condition had nothing to do with the injuries he sustained. Dr. Pollet estimated appellant should have recovered from the employment injury within 6 to 12 weeks. He pointed out that all of appellant's tests, including the MRI scan, were normal. Dr. Pollet concluded appellant was not

[1] *Jason C. Armstrong*, 40 ECAB 907 (1989).

[2] The Office had previously referred appellant to Dr. John Allen for an examination but the examination was not completed.

disabled to any extent and had no physical impairment or disability. He stated appellant could return to full duty as a clerk at the employing establishment with no work restrictions.

In an August 2, 1999 report, Dr. Rodriguez disagreed with Dr. Pollet's diagnosis and his conclusion on appellant's ability to work. Dr. Rodriguez stated appellant had lumbar radiculitis due to his employment injury, which caused tremendous pain to his lower back and muscle spasms with radiation of pain to both legs. He indicated appellant could walk only slowly, could not sit without acute back pain and had no ability to flex, extend or rotate his back. Dr. Rodriguez concluded that appellant was permanently disabled and could not secure any form of employment.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Terren D. Klein, a Board-certified orthopedic surgeon, for an examination to resolve the conflict in the medical evidence between Drs. Pollet and Rodriguez. In an August 30, 1999 report, Dr. Klein stated that there were no objective findings on examination, citing that appellant had no spasm of the musculature, no reflex changes, no atrophy and no other radicular findings. He noted appellant had tenderness on palpation but commented that this was not truly an objective finding. Dr. Klein concluded appellant had sustained a thoracic and lumbar sprain as a result of the employment injury but did not find any current objective findings that would correlate with the employment injury. He commented that appellant's recovery had been prolonged due to the psychological component and emotional overlay of his condition. Dr. Klein noted that a very small percentage of patients who sustained a thoracic or lumbar strain could go on to develop a chronic thoracic and lumbar strain that can last for many years. He stated, however, that, in view of the essentially normal x-rays and scans, a large component of appellant's ongoing thoracic and lumbar sprain was due to his emotional and psychological overlay. Dr. Klein indicated that appellant would not be able to return to his work as a clerk but attributed appellant's inability to work to conditions not related to the employment injury. He concluded that appellant's accepted thoracic and lumbar sprain would not prevent him from returning to work. In situations when there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[3] In this case, Dr. Klein performed a thorough examination of appellant and found no objective physical symptoms that could be related to appellant's original employment injury. He therefore concluded that appellant was no longer disabled due to the employment injury. His report, based on an accurate history of appellant's condition, is therefore entitled to special weight and, in the context of this case, is entitled to special weight.

The Board also finds that the Office properly denied appellant's request for reconsideration.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant. Under 20 C.F.R. § 10.138(b)(1), a

[3] *James P. Roberts*, 31 ECAB 1010 (1980).

claimant may obtain review of the merits of his claim by showing that the Office erroneously applied or interpreted a point of law, advancing a point of law or fact not previously considered by the Office, or submitting relevant and pertinent evidence not previously considered by the Office. Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.[4] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[5] Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.[6]

In a November 17, 1999 letter, appellant requested reconsideration, stating that he was in constant pain and unable to work. He submitted, in support of his request, a June 13, 1999 report from Dr. Rodriguez that had been submitted previously. In the report, Dr. Rodriguez stated that appellant was totally and permanently disabled due to acute lumbar radiculitis. As the report had been submitted prior to the decision terminating appellant's compensation, it was duplicative and repetitive. It therefore was insufficient to require reconsideration of the decision to terminate appellant's compensation. The Office properly denied appellant's request for reconsideration.

[4] 20 C.F.R. § 10.138(b)(2).

[5] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

[6] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

The decisions of the Office of Workers' Compensation Programs, dated December 2 and October 26, 1999, are hereby affirmed.

Dated, Washington, D.C.
August 30, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member