U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN B. CONROY and DEPARTMENT OF THE TREASURY, U.S. CUSTOMS SERVICE, Newark, NJ

Docket No. 00-1160; Submitted on the Record;
Issued March 9, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM, BRADLEY T. KNOTT

The issues are: (1) whether appellant met his burden of proof to establish that he sustained a recurrence of total disability on or after October 23, 1998 due to his July 31, 1998 employment injury; and (2) whether the refusal of the Office of Workers' Compensation Programs 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 July 31, 1998 appellant, then a 40-year-old customs inspector, sustained an employment-related cervical strain and lumbar sprain.[1] He returned to light-duty work on October 5, 1998[2] and stopped work on October 23, 1998 claiming that he sustained a recurrence of total disability due to his July 31, 1998 employment injury. By decision dated April 5, 1999, the Office denied appellant's recurrence of disability claim on the grounds that he did not submit sufficient medical evidence in support thereof. By decision dated May 4, 1999, the Office affirmed its April 5, 1999 decision and, by decision dated November 4, 1999, the Office denied appellant's request for merit review.

The Board finds that appellant did not meet his burden of proof to establish that he sustained a recurrence of total disability on or after October 23, 1998 due to his July 31, 1998 employment injury.

[1] On February 4, 1990 appellant sustained an employment-related low back injury and on December 6, 1991 he sustained an employment-related neck injury. Appellant returned to regular work after these injuries. Although it is unclear from the record, it appears that appellant sustained an employment-related neck injury on February 6, 1998 after which he returned to his regular work for the employing establishment.

[2] Appellant initially worked for 40 hours per week but later began working 20 hours per week. He received compensation for his partial disability. Appellant's light-duty work restricted him from lifting more than eight pounds and engaging in repetitive motion.

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he cannot perform such light duty. As part of this burden the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.[3]

In support of appellant's claim that he sustained a recurrence of total disability on October 23, 1998 due to his July 31, 1998 employment injury, he submitted an October 23, 1998 report of Dr. Paul A. Foddai, an attending Board-certified orthopedic surgeon, who listed the date of injury as July 31, 1998; diagnosed cervical and lumbar radiculopathies and right ulnar nerve neuropathy; and indicated that appellant should work in a light-duty job with no lifting more than 10 pounds and no engaging in repetitive motion. In a report dated December 9, 1998, Dr. Foddai indicated that the diagnosis of cervical and lumbar radiculopathies and a right ulnar nerve neuropathy could only be confirmed through additional diagnostic testing.

The submission of this evidence does not establish appellant's claim that he sustained an employment-related recurrence of totally disability on October 23, 1998, because Dr. Foddai did not provide a clear opinion that appellant's employment-related condition worsened such that he was totally disabled from his light-duty job.[4] Moreover, appellant's claim was accepted for cervical strain and lumbar sprain and Dr. Foddai did not provide a clear opinion regarding appellant's diagnosed condition.[5] The Office has not accepted that Dr. Foddai's provisional diagnoses of cervical and lumbar radiculopathies and a right ulnar nerve neuropathy were employment related.

Appellant also submitted reports dated February 18 and March 22, 1999 in which Dr. Mark Filippone, an attending physician Board-certified in physical medicine and rehabilitation, indicated that the results of a nerve conduction study of appellant's upper and lower extremities were normal and the results of an electromyogram (EMG) testing revealed mild C5-6, C8-T1 and L5-S1 radiculopathies. In reports dated January 27 and February 10, 1999, Dr. Peng N. Cheng, an attending Board-certified neurosurgeon, indicated that diagnostic testing showed appellant had cervical and lumbar radiculopathies. In a report dated March 31, 1999, Dr. Cheng noted that the testing obtained by Dr. Filippone showed appellant had mild C5-6, C8-T1 and L5-S1 radiculopathies. He indicated that appellant was totally disabled from work.

Although Dr. Cheng indicated that appellant was totally disabled, he did not adequately explain how appellant's employment-related condition had worsened such that he was totally disabled from his light-duty work. As noted above, it has not been accepted that appellant

[3] *Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

[4] The restrictions recommended by Dr. Foddai would have been within appellant's light-duty requirements.

[5] *See Charles H. Tomaszewski*, 39 ECAB 461, 467-68 (1988) (finding that medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

sustained employment-related cervical and lumbar radiculopathies, and Dr. Cheng did not provide a clear opinion regarding the cause of these conditions. Dr. Filippone did not provide any opinion regarding the extent of appellant's disability. The record does not contain adequate medical evidence to show that appellant sustained a recurrence of total disability on or after October 23, 1998 due to his July 31, 1998 employment injury and the Office properly denied his claim.[6]

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,[7] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.[8] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must also file his application for review within one year of the date of that decision.[9] 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.[10]

In support of his July 1999 reconsideration request, appellant resubmitted the February 18 and March 22, 1999 reports of Dr. Filippone. The resubmission of these documents does not require the Office to perform a merit review in that the Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[11]

In the present case, appellant has not established that the Office abused its discretion in its November 4, 1999 decision by denying his request for a review on the merits of its April 5 and May 4, 1999 decisions under section 8128(a) of the Act, because he did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, or submit relevant and pertinent new evidence not previously considered by the Office.

[6] Nor does the evidence show a change in appellant's light-duty requirements.

[7] 5 U.S.C. §§ 8101-8193. 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 her own motion or on application." 5 U.S.C. § 8128(a).

[8] 20 C.F.R. §§ 10.606(b)(2).

[9] 20 C.F.R. § 10.607(a).

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

[11] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

The decisions of the Office of Workers' Compensation Programs dated November 4, May 4 and April 5, 1999 are affirmed.

Dated, Washington, DC
March 9, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member