U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHNNY M. VANCE and U.S. POSTAL SERVICE,
POST OFFICE, Weirton, WV

Docket No. 01-458; Submitted on the Record;
Issued October 18, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: whether (1) appellant met his burden of proof in establishing that he had a recurrence of disability beginning April 9, 1999 causally related to his accepted injury; and (2) whether the Office of Workers' Compensation Programs by its August 15, 2000 decision, properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

On January 5, 1999 appellant, then a 45-year-old letter carrier, filed a claim alleging that on December 11, 1998 he sustained a lower back injury, which was caused by lifting parcels out of hoppers. The Office accepted appellant's claim for lumbar sprain. Appellant stopped work on December 12, 1998 and returned on December 15, 1998 to a light-duty position.[1]

In support of his claim appellant submitted a note from Dr. George E. Bontos, a family practitioner, dated December 21, 1998, who indicated appellant could return to work subject to various restrictions.

Appellant submitted emergency room records dated December 15, 1999, an attending physicians report prepared by Dr. Bantos dated February 6, 1999, a duty status report dated February 6, 1999 and various x-ray reports. The emergency room records noted appellant was being treated for a back strain due to lifting heavy boxes. The attending physician's report noted appellant was being treated for a back strain. Dr. Bantos indicated with a checkmark "yes" that the condition was caused or aggravated by an employment activity. He noted that appellant could resume light-duty work subject to restrictions on lifting and bending. The duty status report indicated that appellant injured his back while lifting heavy boxes and was diagnosed with a lumbar strain. Dr. Bantos noted appellant could resume work December 18, 1998 on limited duty with restrictions on lifting and walking. The x-ray report of the hips dated January 13, 1999

[1] The statement of accepted facts noted appellant was terminated from the employing establishment in early 1999; however, the record does not indicate the circumstances of such termination.

was normal and the x-ray of the lumbar spine revealed mild degenerative disc and facet joint disease.

On April 14, 1999 appellant filed a CA-2a, notice of recurrence of disability. He indicated a recurrence of disability on April 9, 1999 noting that he experienced pain and tenderness in the lumbar region causally related to the employment injury of December 11, 1998. Appellant stopped work on April 9, 1999.

In support of his claim appellant submitted a duty status report dated April 14, 1999 prepared by Dr. Bontos. He diagnosed appellant with low back pain, sciatic strain and noted that appellant could return to regular duty on May 1, 1999 without restrictions.

By letter dated May 10 and August 2, 1999, the Office requested additional factual and medical evidence from appellant.

Appellant submitted a note from Dr. Bontos dated May 6, 1999, a report from Dr. Wladimir Zyznewsky, a Board-certified neurologist, dated May 10, 1999, a work capacity evaluation from Dr. Zyznewsky, an attending physicians report prepared by Dr. Bontos and a narrative statement. The note from Dr. Bontos indicated that appellant had been under his care since December 21, 1998. The report from Dr. Zyznewsky indicated that appellant began having difficulties with pain radiating to his legs in December 1998 but did not mention a work-related injury. Dr. Zyznewsky noted appellant was well until April 1999 when he began experiencing back pain radiating to the right leg accompanied by paresthesias in the lateral aspect of his thigh. He noted upon physical examination appellant's cognitive functions and cranial nerves were normal. Dr. Zynewsky noted appellant had good strength of the upper and lower extremities; reflexes at the knee and ankle levels were depressed; straight leg raises were positive around 75 degrees on the right side and the sensory and cerebellar functions were unremarkable. He diagnosed possible lumbar radiculopathy. The work capacity evaluation noted appellant could not work at the present time; but did not provide further explanation. The attending physician's report noted appellant was being treated for lower back pain with a possibility of lumbar radiculopathy. Appellant's narrative statement noted appellant worked for the employing establishment for 10 years and was involved in an automobile accident in 1987 where he injured his upper back.

Thereafter, appellant submitted various medical records including progress notes from Dr. Bontos dated October 1994 to November 17, 1999 an electromyogram (EMG) dated August 13, 1999, a magnetic resonance imaging (MRI) scan dated August 16, 1999, an x-ray of the lumbar spine dated August 18, 1999, a report from Dr. David H. Liebeskind, Board-certified in physical medicine and rehabilitation dated October 13, 1999 and a work capacity evaluation prepared by Dr. Liebeskind. The progress notes from Dr. Bontos noted a history of appellant's injury beginning in December 1998. He noted appellant's recurrent back pain beginning in April 1999 through November 1999. The EMG revealed normal nerve conduction velocity and needle studies of the lower extremities, with no evidence of radiculopathy or neuropathy. The MRI revealed degenerative changes at the L3-4 level with mild bulging of the annulus with no evidence of significant spinal or neural foraminal stenosis. The x-ray of the lumbar spine dated August 18, 1999 revealed very mild narrowing of the L3-4 disc space, otherwise the lumbar spine was within normal limits. The report from Dr. Liebeskind noted a history of appellant's

work injury and indicated appellant still experienced back pain and discomfort. He noted upon physical examination range of motion was limited in virtually all directions, deep tendon reflexes of the patellar and Achilles revealed right +3 and left +2; sensation was grossly intact; palpation of the low back did not reveal any trigger points and bending the knees in the prone position did not cause discomfort. He diagnosed appellant with chronic low back strain/sprain syndrome. Dr. Liebeskind further noted that he did not find any evident pathology. He indicated that appellant had a "probable behavioral component superimposed upon any pain that he may have." Dr. Liebeskind noted appellant could return to work with reduced hours and limited activity. The work capacity evaluation prepared by him noted appellant could return to work for four hours a day with restrictions on sitting, walking, standing and lifting.

On October 15, 1999 the employing establishment offered appellant a limited-duty assignment in compliance with the restrictions set forth by Dr. Liebeskind. Appellant rejected the offer of employment and indicated that his treating physician Dr. Bontos did not release him back to work. Thereafter, he released appellant to work and he returned on October 26, 1999 to light duty, four hours per day.

On November 22, 1999 appellant filed a Form CA-2a, notice of recurrence of disability. He indicated a recurrence on October 27, 1999, noting that he experienced pain and tenderness in the lumbar region causally related to the employment-related injury on December 11, 1998. Appellant stopped work on October 27, 1999. In a report from Dr. Bontos dated November 23, 1999, he noted appellant was undergoing physical therapy and continued to experience pain radiating to the right leg.

By decision dated December 1, 1999, the Office denied appellant's claim for compensation on the grounds that the medical evidence submitted was not sufficient to establish appellant's continuing condition or disability was caused by his employment.[2]

In an undated letter received July 20, 2000, appellant requested reconsideration of his claim. He submitted a report from Dr. Craig S. Bentley, a chiropractor and a duplicative MRI dated August 16, 1998 and x-ray report dated November 18, 1999.

By decision dated August 15, 2000, the Office denied appellant's application for review without conducting a merit review on the grounds that the evidence submitted was repetitious and insufficient to warrant review of the prior decision.

The Board finds that appellant has failed to establish that he had a recurrence of disability beginning April 9, 1999 is causally related to the accepted employment injury of December 11, 1998.

An individual who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and

[2] While appellant filed several notices of recurrence of disability Forms (CA-2a's), the Office chose to develop the matter as whether or not he had disability after April 9, 1999 causally related to his December 11, 1998 employment injury.

probative evidence that the disability for which compensation is claimed is causally related to the accepted injury.[3]

The Office accepted appellant's claim for lumbar sprain. However, the medical evidence submitted in support of the wage-loss compensation claim for disability beginning April 9, 1999 is insufficient to establish disability.[4]

The record contains reports from Dr. Bontos from April 14 to November 23, 1999 diagnosing appellant with low back pain and sciatic strain but these reports are insufficient to establish a work-related disability because they do not address whether the employment injury was a cause of the disability. Additionally, even though Dr. Bontos noted that appellant was still experiencing symptoms of his back condition, without any further explanation or rationale, such report is insufficient to establish a causal relationship.[5]

Dr. Zyznewsky's report dated May 10, 1999 indicated appellant began having difficulties with pain radiating to his legs in December 1998. He noted appellant was well until April 1999 when he began experiencing back pain radiating to the right leg accompanied by paresthesias in the lateral aspect of his thigh. However, Dr. Zyznewsky neither indicated knowledge that appellant's condition was a result of a work-related injury, nor did he address whether the employment injury was a cause of the disability. Without any further explanation or rationale such report is also insufficient to establish a causal relationship.[6]

The report from Dr. Liebeskind dated October 13, 1999 diagnosed appellant with chronic low back strain/sprain syndrome. He indicated that he found no evident pathology. Dr. Liebeskind attributed appellant's condition not to a work-related injury but to a "probable behavioral component superimposed upon any pain that he may have." Further, he did not specifically address whether appellant had an employment-related disability beginning April 9, 1999. Therefore, this report is insufficient to meet appellant's burden of proof.

The remainder of the medical evidence fails to provide a specific opinion on the causal relationship between the employment injury and the claimed period of disability. For this reason, this evidence is not sufficient to meet appellant's burden of proof.

The Board finds that the Office in its August 15, 2000 decision, properly denied appellant's request for reconsideration on the merits under 5 U.S.C. § 8128(a) on the basis that his request for reconsideration did not meet the requirements set forth under section 8128.[7]

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[3] *Bernard Snowden*, 49 ECAB 144 (1997).

[4] By letter dated August 2, 1999, the Office advised appellant that his April 9, 1999 recurrence was accepted for additional medical treatment.

[5] *Lucrecia M. Nielson*, 42 ECAB 583, 594 (1991).

[6] *Id*.

[7] *See* 20 C.F.R. § 10.606(b)(2)(i-iii) (1999).

Under section 8128(a) of the Act,[8] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,[9] which provides that a claimant may obtain review of the merits if his written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

> "(i) Shows that the Office erroneously applied or interpreted a specific point of law; or
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> "(ii) Advances a relevant legal argument not previously considered by the Office; or
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> "(iii) Constitutes relevant and pertinent new evidence not previously considered by the Office."

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[10]

In the present case, the Office denied appellant's claim without conducting a merit review on the grounds that the evidence submitted was insufficient. In support of his request for reconsideration, appellant submitted a report from Dr. Bentley, a chiropractor, dated July 10, 2000, an MRI dated August 16, 1998 and an x-ray report dated November 18, 1999. In his report, Dr. Bentley referred to the MRI and an x-ray report; however, he is not a physician as he did not diagnose a spinal subluxation based on x-rays. Section 8101(2) of the Act provides that chiropractors are considered physicians "only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulation by the Secretary."[11]

Thus, where x-rays do not demonstrate a subluxation (a diagnosis of a subluxation based on x-rays has not been made), a chiropractor is not considered a "physician" and his or her reports cannot be considered as competent medical evidence under the Act.[12] Thus, as the underlying issue in this case is medical in nature, Dr. Bentley's report, while new, is of no relevance as he is not a physician under the Act.

[8] 5 U.S.C. § 8128(a).

[9] 20 C.F.R. § 10.606(b) (1999).

[10] 20 C.F.R. § 10.608(b) (1999).

[11] 5 U.S.C. § 8101(2).

[12] *See Susan M. Herman,* 35 ECAB 669 (1984).

The MRI dated August 16, 1998 and an x-ray report dated November 18, 1999 were both duplicative and previously considered by the Office.[13] Thus, these reports are insufficient to require reopening of the claim for a merit review.

Appellant neither showed that the Office erroneously applied or interpreted a point of law; advanced a point of law not previously considered by the Office; nor did he submit relevant and pertinent evidence not previously considered by the Office.[14] Therefore, appellant did not submit relevant evidence not previously considered by the Office.

The decisions of the Office of Workers' Compensation Programs dated August 15, 2000 and December 1, 1999 is hereby affirmed.

Dated, Washington, DC
October 18, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

[13] *See Eugene F. Butler*, 36 ECAB 393, 398 (1984) (where the Board held that material which is repetitious or duplicative of that already in the case record is of no evidentiary value in establishing a claim and does not constitute a basis for reopening a case).

[14] *Supra* note 9.