U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONNA CURLEY and DEPARTMENT OF VETERANS AFFAIRS
VETERANS ADMINISTRATION MEDICAL CENTER, Hampton, VA

Docket No. 01-258; Submitted on the Record;
Issued September 4, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied merit review of appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

On June 25, 1998 appellant, then a 46-year-old part-time nurse, filed a notice of recurrence of disability and claim for continuation of pay/compensation (Form CA-2a) alleging that, on March 29, 1998, she had a recurrence of her disability due to December 9, 1988 injury when she was placed on alternative duty status with limitations in lifting, bending, twisting, sitting and standing, etc.[1] Appellant indicated, while at work, she began to experience mild pain in her left leg, calf and ankle. She asserted that she was assisting a patient in bed and he only required a one-person assist. Appellant stopped work on April 12, 1998.[2]

Appellant submitted factual and medical information in support of her claim.

By letter dated November 25, 1998, the Office requested additional information from appellant. Specifically, the Office requested a comprehensive medical report describing appellant's symptoms, results of examinations and tests, diagnosis, the treatment provided, the effect of treatment and the doctor's opinion, with medical reasons, on the cause of the condition. Appellant was allotted 30 days to submit the requested evidence.

Appellant submitted additional medical reports and a statement, which were received by the Office on December 28, 1998. In her statement, she indicated that she did not have a new injury but a recurrence. Appellant additionally indicated that she was uncertain with respect to

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[1] The record reflects that appellant had a claim for sprain/lumbar region on December 9, 1988. (Claim # 250334470). The Office stated that this claim was closed out as there was no activity since April 25, 1992.

[2] Although, appellant filed her claim as a recurrence, the Office determined that appellant was claiming a new injury and developed the claim as a new injury because the CA-2a form described a new incident of injury.

what would be considered a physician's report as she had previously provided copies of her medical records.

In a December 29, 1998 merit decision, the Office denied appellant's claim for compensation because fact of injury was not established.

Appellant subsequently submitted additional information consisting of several duty status reports, employee health records, treatment notes, disability certificates and nursing notes.

In a May 15, 1998 report, Dr. Richard B. McAdam, a Board-certified neurological surgeon, indicated that appellant was seen at the request of Dr. Dana Bachtell, a Board-certified family practitioner. Dr. McAdam noted that appellant had insidious onset of pain in her leg about two months ago and had back pain on and off over the years. He diagnosed a lumbar herniated nucleus pulposus (HNP) with radiculopathy affecting the left lower extremity.

In treatment notes dated May 28, 1998, Dr. Bachtell indicated that appellant was seen in follow-up for radiculopathy and an epidural steroid injection. Dr. Bachtell indicated that appellant was "pain free at this time and has been since injury."

In a letter received by the Office on March 29, 1999, appellant requested reconsideration and enclosed a report dated February 23, 1999 from Dr. Bachtell. She stated that she was appellant's attending physician from October 1992 to the present. Dr. Bachtell noted appellant's history of injury and treatment but declined to provide a detailed report, as she did not wish to duplicate data. She stated that appellant did not have a new injury in March 1998 but rather, she had recurrent symptoms intermittently since her December 8, 1988 injury. Dr. Bachtell also stated that she "was reasonably certain" that all of appellant's back and left leg pains for the last 10 years were recurrences of the symptoms of the original injury of December 8, 1988. She indicated that she felt appellant had intermittent nerve root impingement caused by her December 8, 1988 injury. Dr. Bachtell noted that the episodes had resolved with conservative treatment until her last episode, which required further investigation with a magnetic resonance imaging (MRI) scan and then treatment with an epidural steroid injection by the neurosurgeon, Dr. McAdam. She also noted that, prior to appellant's original work-related injury of December 8, 1988, appellant did not have back or leg pains. Additionally, Dr. McAdam stated that appellant's recurring symptoms of back and leg pain stemmed from her original work-related injury of December 8, 1988. Dr. Bachtell noted that despite marked improvement, since the injection, appellant continued to have a herniated disc, which could cause future problems including the need for surgery. He indicated that appellant had returned to her full capacity as a registered nurse; however, she indicated that, due to the nature of appellant's position, she believed there was a good chance of recurrence.

By merit decision dated May 14, 1999, the Office denied appellant's request for modification of the December 29, 1998 merit decision finding that the evidence submitted in support of the request was not sufficient to warrant modification of the prior decision.

In a letter dated April 30, 2000 and received by the Office on May 8, 2000, appellant requested reconsideration. She again offered an explanation as to the employment factors that she believed caused her condition, and continued to allege that it stemmed from her original

injury in 1988. Appellant indicated that she was full time and converted to part-time status on April 25, 1992. Additionally, she stated that she received no medical treatment from January 10, 1989 to July 15, 1991. Additionally, appellant stated that she was involuntarily assigned to the nursing home care unit, which involved an increase in heavy lifting, pulling and pushing, which exacerbated her condition. She also stated that her condition stemmed from the 1988 incident and there was no new injury in 1998. Appellant also provided a copy of the job reassignment memorandum and medical reports.

In an April 26, 2000 report, Dr. Bachtell indicated that it was her reasoned opinion that appellant's recurrent back and leg symptoms stemmed from the original injury of December 9, 1988. She noted that appellant's symptoms were handled appropriately with conservative treatment until March 1998. Dr. Bachtell stated that appellant's symptoms were unremitting and progressive. She also stated that appellant's symptoms were the same, only more intense and with more definitive signs on examination, including a positive straight leg raise and decreased ankle reflex. Dr. Bachtell noted that appellant worsened symptomatically and clinically despite having no specific injury, which was not uncommon in the natural history of disc disease. She also asserted that the MRI scan of April 1998 showed an abnormality. Dr. Bachtell indicated that the test results were indicative of a radiculopathy. She stated that the epidural injection was appropriate as appellant was pain free for almost two years. Dr. Bachtell noted this was convincing evidence that the recurrent back and left leg symptoms were caused by the original injury. She stated that it was her belief that some degree of disc herniation had occurred since the 1988 incident.

In an April 15, 2000 report, Dr. McAdam noted that appellant had intermittent leg pain since an injury that occurred at work in 1988. He asserted that it was clear that she has had pain on and off since the injury of 1988. Dr. McAdam opined that appellant's chronic back and leg pain were indeed causally related to the injury that occurred at work in 1988.

In an August 3, 2000 decision, the Office denied merit review of appellant's request for reconsideration on the grounds that evidence submitted was found not to support the claim in this case file, that an occupational injury was sustained on March 29, 1998 and was insufficient to warrant a review of the prior decision.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[3] As appellant filed her appeal with the Board on November 1, 2000, the Board lacks jurisdiction to review the Office's most recent merit decision dated May 14, 1999. Consequently, the only decision properly before the Board is the Office's August 3, 2000 decision denying appellant's request for reconsideration.

The Board finds that the Office properly denied merit review of appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation. The Secretary of Labor may

[3] 20 C.F.R. §§ 501.2(c), 501.3(d)(2) (1998) and 20 C.F.R. § 10.607(a) (1999).

review an award for or against payment of compensation at any time on his or her own motion or on application:

The Secretary in accordance with the facts found on review may --

"(1) end, decrease or increase the compensation awarded; or

(2) award compensation previously refused or discontinued."

Under 20 C.F.R. § 10.606(b)(2) (1999), a claimant may obtain review of the merits of the claim by submitting evidence and argument: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b) (1999) provides that where the request is timely but fails to meet at least one of the standards described in section 10.606(b)(2) (1999) or where the request is untimely and fails to present any clear evidence of error, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[4]

In the present case, relevant and pertinent new medical evidence did not accompany appellant's request for reconsideration. This is important since the underlying issue in the claim, whether appellant sustained an occupational injury on March 29, 1998, is essentially medical in nature.

In its August 3, 2000 decision, the Office correctly noted that the evidence submitted in support of her request for reconsideration did not support the claim that an occupational injury was sustained on March 29, 1998.

Appellant, in her request for reconsideration, asserted that her March 29, 1998 injury was not a new injury but rather stemmed from her December 8, 1988 injury. She also stated there was no new injury in 1998. Additionally, the memorandum of assignment did not discuss any injury. This information was not relevant or pertinent as the essential issue in the claim is medical in nature. The Board has held that the submission of evidence or argument, which does not address the particular issue involved does not constitute a basis for reopening a case.[5]

The subsequent reports provided by Drs. Bachtell and McAdams did not address the March 29, 1998 incident. Dr. Bachtell indicated that appellant's symptoms increased in March 1998; however, she did not indicate that it was due to any specific factors of appellant's employment. Both physicians indicated that appellant's condition stemmed from her 1988 work injury. Neither of these reports addressed the issue in this claim, whether appellant sustained an occupational injury on March 29, 1998 and therefore did not constitute a basis for reopening the claim.[6] Appellant did not provide relevant or pertinent new evidence, nor did she advance a relevant legal argument that had not been previously considered by the Office. Additionally, she

[4] 20 C.F.R. § 10.608(b) (1999).

[5] *Linda I. Sprague*, 48 ECAB 386 (1997).

[6] *Id.*

did not argue that the Office erroneously applied or interpreted a specific point of law. Consequently, appellant is not entitled to a merit review of the merits of the claim based upon any of the above-noted requirements under 10.606(b)(2)(1999). Accordingly, the Board finds that the Office properly denied merit review of appellant's April 30, 2000 request for reconsideration.

The decision of the Office of Workers' Compensation Programs dated August 3, 2000 is hereby affirmed.

Dated, Washington, DC
September 4, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member