U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONALD J. LEWIS and U.S. POSTAL SERVICE,
POST OFFICE, Mount Laurel, NJ

Docket No. 01-324; Submitted on the Record;
Issued September 11, 2001

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant sustained a recurrence of disability on September 30, 1998, causally related to his February 14, 1998 accepted 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 February 17, 1998 appellant filed a claim for a traumatic injury sustained on February 14, 1998. The Office accepted the claim for left shoulder strain and later approved left shoulder acromioplasty with resection of the distal clavicle.[1]

On October 26, 1998 appellant filed a claim for recurrence of disability beginning on September 30, 1998. He noted that he had continuous pain in his shoulder and in the base of his neck from February 16, 1998. The employing establishment noted that appellant had returned to full duty on June 15, 1998.

By decision dated March 1, 1999, the Office denied appellant's claim.

By letter dated May 13, 1999 and received by the Office on June 1, 1999, appellant requested reconsideration.[2]

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[1] It is noted that the Office, on March 20, 1998, accepted appellant's claim for left shoulder strain. However, in its March 30, 2000 decision, the Office stated that appellant's claim was accepted for left shoulder sprain. In appellant's brief, counsel refers to the accepted injury as shoulder sprain.

[2] As part of his May 13, 1999 submission, appellant included an April 28, 1999 claim for recurrence of disability beginning on September 30, 1998. He noted that his neck had not improved since the February 14, 1998 work-related injury. Appellant also included a chronological narrative from February 14 to March 31, 1998 including references to his neck condition beginning on February 27, 1998.

By letter dated September 21, 1999, the Office advised appellant that the medical evidence did not support that he sustained a neck injury on February 14, 1998 and noted that the initial reference to a neck condition was in a November 2, 1998 report from Dr. Mark Schwartz who had been treating him since March 5, 1998. The Office noted that Dr. Schwartz must provide reasons if he believed that appellant's neck condition was causally related to his February 14, 1998 work-related injury.

By letter dated October 13, 1999, appellant, through counsel, requested that the Office accept that a herniated disc and cervical spine condition be accepted as work-related injuries and submitted medical reports from Drs. Peter D. Corda and William C. Murphy, and a cervical magnetic resonance imaging (MRI) scan dated February 16, 1999.

By decision dated November 26, 1999, the Office denied modification of its March 1, 1999 decision.

By letter dated December 30, 1999, appellant requested reconsideration of the Office's decisions.

By letter dated February 22, 2000, appellant submitted additional medical evidence in support of his December 30, 1999 requests.

By decision dated March 30, 2000, the Office denied modification of its March 1, 1999 decision.

By letter dated May 22, 2000, appellant requested reconsideration of the Office's March 30, 2000 decision.

By nonmerit decision dated August 3, 2000, the Office denied review.

The Board finds that appellant did not submit sufficient medical evidence to establish that he sustained a recurrence of disability on September 30, 1998 due to his February 14, 1998 work-related injury.

Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between his recurrence of disability commencing September 30, 1998 and his February 14, 1998 employment injury.[3] This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.[4]

In this case, the Office accepted appellant's February 14, 1998 left shoulder injury and approved left shoulder surgery. However, appellant's claim for a recurrence of disability was based on his alleged neck condition which was not an accepted condition based on his February 14, 1998 work-related injury, nor identified as a condition until November 2, 1998,

[3] *Dominic M. DeScala*, 37 ECAB 369, 372 (1986); *Bobby Melton*, 33 ECAB 1305, 1308-09 (1982).

[4] *See Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

when appellant's attending physician noted that he had treated appellant for left-sided neck pain. He related appellant's statement that "he says he has had this neck pain since the time of his fall back in February." Appellant noted that cervical spine x-rays revealed "some diffuse mild degenerative changes but no acute bony abnormalities," and referred him to physical therapy. The Board notes that none of Dr. Schwartz's reports from March 5 to July 23, 1998 noted appellant's subjective complaints of neck pain. For example, in his March 5, 1998 report, Dr. Schwartz noted a familiarly with appellant's history of injury, stating that he had fallen at work on February 14, 1998, landing on his left shoulder. He also noted appellant's prior February 1996 arthroscopic subacromial decompression. Dr. Schwartz then examined appellant's left shoulder and determined that he had rotator cuff tendinitis and possible rotator cuff tear. He did not identify a neck condition at that time. In reports dated April 1, May 5 and 7, 1998, Dr. Schwartz noted that appellant had responded poorly to cortisone shots in his left shoulder, had performed a rotator cuff repair on May 5, 1998 and noted in a follow-up report on May 7, 1998 that he would obtain x-rays at a subsequent visit. These reports reflect Dr. Schwartz's treatment of appellant' shoulder condition during a five-month period. It was not until November 1998 that the doctor noted appellant's complaint of neck pain but did not attribute this condition to his work-related injury. Given the thorough and frequent medical examinations by Dr. Schwartz and his familiarity with appellant's work-related injury, subsequent surgery and related follow-up treatment, his reports do not establish that appellant sustained a neck or cervical injury as a result of his February 14, 1998 work-related injury.

The record also includes medical reports from appellant's treating osteopath, Dr. Corda. In an April 21, 1999 report, Dr. Corda stated that appellant had sustained cervical radiculopathy bilaterally. In a report dated April 28, 1999, he noted that he had been treating appellant for almost two years "secondary to an injury to his neck." In a report dated December 30, 1999, Dr. Corda stated that he had first treated appellant on November 11, 1998 for neck pain and that, upon examination, an MRI scan and an electromyogram test, appellant had sustained cervical radiculopathy. However, these reports are insufficient to establish that appellant's neck condition was causally related to his work-related injury because they are not contemporaneous with appellant's injury.[5] Dr. Corda initially treated appellant 14 months after the work-related injury and thus his reports are not contemporaneous with appellant's work-related injury.

Appellant also submitted a May 6, 1999 report from Dr. Murphy, an osteopath, who read appellant's nerve conduction studies and electromyography test as revealing bilateral C6 radiculopathy and right C4 nerve irritation. Dr. Murphy related appellant's history of his February 14, 1998 injury noting that appellant "developed shoulder and neck pain symptoms over the next several hours and particularly noted this the next morning." He stated that "within a reasonable degree of medical certainty" appellant's neck condition was related to his February 14, 1998 work-related injury. In an October 7, 1999 report, Dr. Murphy stated that appellant's cervical strain and sprain condition was "a direct result of a work-related fall which occurred on February 14, 1998." Similarly, these reports are not contemporaneous with appellant's work-related injury and note findings inconsistent with the reports of Dr. Schwatz.

[5] The Board has consistently held that contemporaneous evidence is entitled to greater probative value than later evidence; *see Katherine A. Williamson*, 33 ECAB 1696 (1982); *Arthur N. Meyers*, 23 ECAB 111 (1971).

The medical evidence in this case failed to establish that appellant's neck condition was causally related to his work-related injury.

The Board finds that appellant failed to establish that he sustained a recurrence of disability on September 30, 1998 causally related to his February 14, 1998 work-related injury.

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,[6] 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) constitute relevant and pertinent new evidence not previously considered by the Office.[7] 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.[8] To be entitled to merit review of an Office decision denying or terminating a benefit, a claimant must also file his or her application for review within one year of the date of that decision.[9]

The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case,[10] and 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] However, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.[12]

In his May 22, 2000 reconsideration request, appellant submitted unsigned charts with a medical business card superimposed on the top of the report. The Board has long held that an unsigned medical report is of no probative value.[13] Consequently, the evidence submitted by appellant did not meet the requirements set forth at 20 C.F.R. § 10.606(b), noted above.

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[6] 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).

[7] 20 C.F.R. § 10.606(b)(2).

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

[9] 20 C.F.R. § 10.607(a).

[10] *Daniel Deparini*, 44 ECAB 657 (1993); *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

[11] *Richard L. Ballard*, 44 ECAB 146 (1992); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

[12] *See Helen E. Tschantz*, 39 ECAB 1382 (1988).

[13] *Merton J. Sills*, 39 ECAB 572 (1988).

The decisions of the Office of Workers' Compensation Programs dated August 3 and March 30, 2000 and November 26, 1999 are affirmed.[14]

Dated, Washington, DC
September 11, 2001

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[14] The Board notes that this case record contains evidence which was submitted subsequent to the Office's August 3, 2000 decision. The Board has no jurisdiction to review this evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35, 36 (1952).