

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MAJORIE MAI and DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, Riverside, CA

*Docket No. 01-2064; Submitted on the Record;
Issued April 26, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,
DAVID S. GERSON

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective March 6, 2001; and (2) whether the Office properly denied appellant's request for reconsideration.

On October 16, 1997 appellant, then a 57-year-old secretary, was injured in the performance of duty when she lifted a box weighing approximately 36 pounds and hurt her back. The Office accepted the claim for a lumbosacral strain. Appellant was off work from October 20, 1997 through January 25, 1998. She sustained a second back injury at work on January 20, 1999 when she fell over a box and landed on another box. The Office also accepted that claim for a lumbar strain. Appellant last worked on January 22, 1999.

Following her initial lumbar strain on October 16, 1997, appellant went to the Beaver Medical Industrial Clinic where she received physical therapy until such time as she could return to modified duty. After the January 20, 1999 work injury, appellant went back to the clinic and came under the care of Dr. Malcom E. Heppenstall a Board-certified orthopedist, and Dr. James Watson, a Board-certified orthopedist. She was prescribed epidural steroid injections, physical therapy and anti-inflammatory medication for her continuing complaints of back pain. When these conservative measures proved unsuccessful, Dr. Watson sent appellant for a surgical consult with Dr. Brian Curtis, a Board-certified neurological surgeon. He recommended surgical intervention but felt that it should be delayed until such time as appellant's nonwork-related weight and diabetic conditions were under control.

The record includes a magnetic resonance imaging (MRI) scan dated April 14, 1999 showing spinal stenosis at L2-3 and L3-4 with a relatively small central canal measuring less than 10 millimeter (mm), primarily related to acquired changes of degenerative facet disease at each of these levels and retrolisthesis of L4 in relationship to L3. At L4-5 there was degenerative disc disease and an 8 mm retrolisthesis of L5 in relationship to L4 as well as mild, bilateral degenerative facet changes. At L5-S1 mild, bilateral degenerative facet changes were seen.

In a June 22, 1999 report, Dr. Dorsey, an Office referral physician and a Board-certified orthopedic surgeon, diagnosed appellant with morbid obesity, diabetes, degenerative facet disease with degenerative spondylolisthesis, Grade I, L4 on L5 and lumbar musculoligamentous sprain/strain, resolved. He opined that, the work injury of January 13, 1999 resulted only in a temporary ligamentous sprain/strain. Regarding his prognosis and recommendations for medical treatment, Dr. Dorsey feels that appellant did not require any treatment on an industrial basis, but on a nonindustrial basis, she required a significant weight loss and conditioning program. He did not feel that surgery was appropriate.

In a report dated July 23, 1999, Dr. Heppenstall noted that appellant remained totally temporarily disabled for work. He indicated that plans for appellant's back surgery were on hold until her diabetes was under control.

In an August 28, 1999 work capacity evaluation report, Dr. Dorsey notes appellant's work restrictions as no pushing/pulling of greater than 15 pounds, lifting no greater than 10 pounds, avoiding squatting, kneeling and climbing and limitations for sitting, walking and standing in the normal course of an eight-hour workday.

In a June 11, 1999 report, Dr. Watson notes that appellant experienced no improvement with conservative treatment and that the prescribed epidural steroid blocks had not helped her complaints of radiating pain. He opined that appellant was a candidate for surgery.

The Office determined that a conflict existed in the record between appellant's treating physician and Dr. Dorsey; therefore, she was referred for an impartial medial evaluation with Dr. Albert Simpkins, Jr., a Board-certified orthopedic surgeon. In his report dated October 25, 1999, Dr. Simpkins described appellant's work-related injuries and noted physical findings. He diagnosed strain/sprain of the lumbar spine and preexisting spondylolisthesis at L4-5 with stenosis at L2-3 and L3-4. Dr. Simpkins stated: "With regard to causation, the October 1997 incident lit up the underlying congenital condition and [appellant] has never fully recovered. The January 1999 incident further increased [her] level of discomfort." Dr. Simpkins opined that appellant "continues to remain temporarily totally disabled if surgery is performed, if not she would then be considered permanent and stationary." He further stated that absent the surgery he could not see appellant returning to work due to the amount of prolonged sitting that is required of a secretary."

The Office subsequently referred appellant for a second opinion examination with Dr. J. Pierce Conaty, a Board-certified orthopedic surgeon. In a report dated July 25, 2000, he discussed appellant's history of injury, symptoms and physical findings. He diagnosed the following conditions: Severe degenerative disc disease at L4-5 with spondylolisthesis, degenerative changes at L3-4, with degenerative spondylolisthesis and morbid obesity. Dr. Conaty opined that the claimant's accepted conditions had resolved. With regard to appellant's work injury he stated as follows:

"The diagnosis was lumbosacral strain (relating to the injury of January 20, 1999) superimposed on longstanding, significant degenerative spondylolisthesis of the lumbar spine. There are no objective findings to support the lumbar strain,

however, I believe that this strain condition has resolved. [A]ll of the current findings are related to the preexisting spondylolisthesis.

“The previous condition of lumbosacral strain superimposed on underlying conditions, represented a direct causation of the work injury. [T]here is nothing to suggest that there were any aggravation that occurred in the original October 1997 work injury. However, I believe that the second work injury January 1999 had aggravated her underlying back condition but there is also nothing to suggest that there were any permanent material objective findings or changes that altered the course of her underlying disease, therefore, this was a temporary aggravation and should have ceased after some [three] months after the second injury. Previous MRI’s and x-ray findings from 1997 have remained essentially unchanged in the more recent studies April 1999.”

Dr. Conaty concluded: “[T]here are no injury-related factors of disability.” He opined that appellant’s subjective complaints certainly were consistent with her preexisting degenerative back disease. Dr. Conaty further opined that appellant could work eight hours a day with certain restrictions.

On January 12, 2001 the Office issued a notice of proposed termination of compensation on the grounds that the opinion of Dr. Conaty established that appellant had no continuing disability or residuals due to her work injury.

In a decision dated March 6, 2001, the Office terminated appellant’s entitlement to continuing compensation and medical benefits.

By letter dated March 12, 2001, appellant requested reconsideration. In support of her request, she also submitted an additional statement dated February 2, 2001 and a copy of the Office’s memorandum to the Director dated January 12, 2001, which was issued as an attachment to the notice of proposed termination of compensation of the same date. Appellant complained that the opinion of Dr. Conaty contradicted the opinion of the referee physician and should not be relied upon to terminate her compensation. She argued that her current problems resulted from her work injuries and that she should receive some sort of compensation for the pain and suffering she has experienced.

In a May 17, 2001 decision, the Office found that appellant’s request for reconsideration was insufficient to warrant a merit review.

The Board finds that the Office properly terminated appellant’s compensation effective March 6, 2001.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.¹ After the Office determines that an employee has a disability causally related to his or her employment, the Office may not terminate compensation without establishing that its original determination was erroneous or that the disability has ceased or is no

¹ *Martha A. McConnell*, 50 ECAB 128 (1998); *Edwin L. Lester*, 34 ECAB 1807 (1983).

longer related to the employment injury.² The Office's burden includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.³

The Board finds that the weight of the recent medical evidence lies with the detailed findings of Dr. Conaty, who opined that appellant has no continuing disability or residuals related to her work-related lumbosacral strains. Although appellant argues that Dr. Conaty's report is inconsistent with the October 25, 1999 report of the impartial medical specialist, Dr. Simpkins, the Board disagrees. Dr. Simpkins opinion is relevant only as to appellant's condition at the time of his examination on October 25, 1999. The Office has the discretion to obtain information regarding the status of appellant's continuing disability⁴ and did so nine months later by referring appellant to Dr. Conaty for a second opinion evaluation.⁵ His report is the most recent and relevant regarding appellant's current medical status. Appellant was also given the opportunity to submit a contemporaneous medical report from her treating physician pursuant to the notice of proposed termination of compensation but she did not provide any additional evidence. Dr. Conaty's report is well rationalized and he notes the absence of any objective evidence to support on-going residuals or disability due to the work injury. He opined that appellant's preexisting degenerative disc disease is responsible for her continuing symptoms but would not preclude her from returning to work. Thus, the Office met its burden of proof in terminating appellant's compensation benefits.

The Office also properly denied appellant's request for reconsideration on the merits under section 8128.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with the discretionary authority to determine whether it will review an award for or against compensation.⁶ The regulations provide that a claimant may obtain review of the merits of the claim by: (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) submitting relevant and pertinent new evidence not previously considered by the Office.⁷ 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. 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.⁸ Evidence that does not address the

² *Id.*

³ *Raymond W. Behrens*, 50 ECAB 221 (1999).

⁴ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapters 2.0812-6 and 2.0812-7 (April 1993).

⁵ Appellant was receiving compensation on the periodic rolls and was expected to provide evidence of his continuing disability. See 20 C.F.R. § 10.501 (1999).

⁶ 5 U.S.C. § 8128; see *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁷ 20 C.F.R. § 10.606(b) (1999).

⁸ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

particular issue involved also does not constitute a basis for reopening a case.⁹ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.¹⁰

In this case, appellant's reconsideration request did not show that the Office erred in applying or interpreting a specific point of law. Appellant did not advance a relevant legal argument nor did she submit any new and relevant evidence. Because appellant did not satisfy one of the three requirements of section 8128, the Office properly denied appellant's application for reconsideration without a merit review.

The decisions of the Office of Workers' Compensation Programs dated May 17 and March 6, 2001 are hereby affirmed.

Dated, Washington, DC
April 26, 2002

Michael J. Walsh
Chairman

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

⁹ *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

¹⁰ *Gloria Scarpelli-Norman*, 41 ECAB 815 (1990); *Joseph W. Baxter*, 36 ECAB 228 (1984).