U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RUDY L. ORTIZ and DEPARTMENT OF THE AIR FORCE, ROBINS AIR FORCE BASE, GA

Docket No. 01-1385; Submitted on the Record;
Issued February 12, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs' refusal to open appellant's claim for a merit review under 5 U.S.C. § 8128(a) constituted an abuse of discretion.

On July 20, 1998 appellant, then a 46-year-old airplane mechanic filed a claim alleging that he injured his ankle while setting up x-ray equipment. The Office accepted the claim for left ankle sprain. Appellant stopped work on July 13, 1998 and returned to a light-duty position on July 14, 1998.

Accompanying appellant's claim was an emergency room note dated July 11, 1998; a treatment note from Dr. Greg Goings, a Board-certified orthopedic surgeon, dated July 11, 1998; and an attending physician's report from Dr. Goings. The emergency room note provided a history of appellant's injury and diagnosed appellant with a contusion of the left leg with hematoma. The treatment note and attending physician's report from Dr. Goings indicated that appellant sustained a foot and leg injury when he stepped into a hole while at work. He noted with a checkmark "yes" that the injury was caused or aggravated by appellant's employment activity. Dr. Goings recommended physical therapy and noted that appellant could return to sedentary work.

Thereafter, appellant submitted several reports from Dr. K. Scott Malone, Board-certified in physical medicine and rehabilitation, dated July 15 to September 28, 1998; and treatment notes from Dr. Goings dated October 20, 1998 to January 5, 1999. Dr. Malone's reports note that appellant was treated for a work-related medial collateral ligament strain; probable medial meniscus injury and ankle sprain. He recommended physical therapy and indicated that appellant improved with conservative treatment. The treatment notes from Dr. Goings dated October 20, 1998 to January 5, 1999 indicated that appellant continued to experience pain in his ankle. He noted nerve conduction studies and a bone scan were both negative. Dr. Goings indicated that appellant experienced pain when performing his light-duty position.

On May 6, 1999 appellant filed a Form CA-2, notice of occupational disease alleging that he experienced pain in the back and neck causally related to the employment injury of July 11, 1998.[1] Appellant was on limited duty at this time.

In support of his claim, appellant submitted treatment notes from Dr. Thomas Beach, a Board-certified family practitioner and employing establishment physician, dated April 26, 1998 to May 24, 1999; treatment notes from Dr. Harvey Jones, a Board-certified general surgeon, dated March 31 to July 16, 1999; a magnetic resonance imaging (MRI) scan of the spine dated April 12, 1999; a consultation note from Dr. Julian Earls, a specialist in physical medicine and rehabilitation, dated May 11, 1999; and two attending physician's reports from Dr. Jones dated May 11 and July 16, 1999. The treatment notes from Dr. Beach provided a history of appellant's injury on July 11, 1998 and noted appellant's continued complaints of chronic left leg pain. In his note dated April 26, 1999, Dr. Beach indicated that appellant was experiencing left leg, neck and back pain. His notes from May 3 through May 7, 1999 documented appellant's continued complaints of low back and left leg pain. Dr. Beach indicated that appellant was admitted on April 27, 1999 for a psychotic episode. The treatment notes from Dr. Jones dated March 31 to July 16, 1999 noted that appellant was being treated for injuries to his left leg and neck which occurred as a result of a fall at work. He diagnosed appellant with evidence of possible disc herniation of the cervical spine with left-sided radiculopathy; evidence of possible torn meniscus and internal derangement of the left knee; and left ankle sprain. Dr. Jones, in his note of April 23, 1999, indicated that appellant continued to experience pain in the lower extremity, however, objective findings had since resolved. Dr. Jones indicated appellant sustained a head and neck injury in a previous employment position and since that time experienced residual problems with his neck. He indicated that appellant had undergone diagnostic studies which showed evidence of degenerative disc disease at C5-6 and C6-7; a herniated disc at C6-7; degenerative disc disease at L4-5; and a herniated disc at L4-5. The MRI of the spine dated April 12, 1999 revealed degenerative disc disease at L4-5 with some posterior bulging of the disc against the dural sac; anterior protrusion of the disc; slight herniation of the disc into the posterior superior aspect of the L5 vertebral body; and degenerative disc changes at L5-S1 with slight posterior bulging of the disc. The consultation note from Dr. Earls dated May 11, 1999 indicated that appellant was being treated for left lower extremity pain. The two attending physician's reports from Dr. Jones dated May 11 and July 16, 1999 noted a history of appellant's injury on July 11, 1998. He diagnosed appellant with a herniated disc of L4-5 and degenerative disc at C5-6 and C6-7. Dr. Jones noted with a checkmark "yes" that appellant's condition was caused or aggravated by an employment activity.

By letter dated September 1, 1999, the Office of Workers' Compensation Programs requested that appellant submit additional factual and medical evidence to support his claim and afforded him 30 days within which to do so.

Appellant submitted treatment notes from Dr. Jones dated March 31 to September 17, 1999; treatment notes from Dr. James Benion, a family practitioner and employing establishment physician, from July 13, 1998 to May 24, 1999; and notes from Dr. Regina Shillinglaw, a

[1] Upon review of the evidence submitted in support of appellant's claim, the Office decided to develop appellant's claim as a recurrence of disability commencing May 6, 1999.

psychologist. The treatment notes from Dr. Jones dated June 6 to September 17, 1999 noted that appellant continued to experience persistent pain over the left leg, back and neck. He indicated that appellant sustained a previous injury to his neck which may have some relationship to appellant's neck pain. Dr. Jones' July 1999 notes indicated that appellant was treated for burn wounds to his face and legs. Dr. Jones noted that appellant still had some swelling in his left leg from his injury in July 1998. His September 17, 1999 note indicated that appellant was injured at work in July 1998 and since that time appellant had been incapacitated due to the lower leg injury and persistent neck and lower back pain. Dr. Jones further noted that objective findings support that appellant sustained injuries to his left lower extremities; neck; lower back; a herniated disc at L4-5 and L5-6; and a degenerative disc at C5-6 and C6-7. The treatment notes from Dr. Benion from July 13, 1998 to May 24, 1999 indicate that appellant was treated for a continuing psychotic episode and depression. The consultation note from Dr. Shillinglaw indicated that appellant was not psychotic but he believed that he was being harassed by management which caused him stress and depression.

In a decision dated November 23, 1999, the Office denied appellant's claim as the evidence was not sufficient to establish that the claimed recurrences of disability in May 1999 was causally related to the accepted injury of July 11, 1998. The Office specifically noted that appellant did not submit a reasoned opinion from a physician explaining why his back condition was caused by the accepted work injury of July 1998 nor was there an explanation as to why appellant delayed in mentioning his back and neck injuries for 10 months after the July 1998 injury.

In a September 28, 2000 letter, appellant requested reconsideration of his claim. Appellant submitted various medical records, many of which were duplicates of those in the record. Appellant also submitted a January 28, 2000 lumbar myelogram; a new medical report from Dr. Frank Garcia, a Board-certified orthopedic surgeon, dated June 30, 2000; and two attending physician's reports from Dr. Garcia. The lumbar myelogram revealed degenerative changes at L4-5 disc; a herniated intervertebral disc in the anterior aspect of the canal at L4-5 level; herniated intravertebral disc at level C5-6; partially calcified herniated intravertebral disc at C6-7 levels; and early changes due to spondylosis. Dr. Garcia's report of June 30, 2000 noted that appellant sustained a series of injuries from May 1982 to July 1998 including a cervical and lumbar injury. He noted that in July 1998 appellant sustained a work-related injury. Dr. Garcia noted that due to the acute nature of this injury appellant sustained a contusion and hematoma of the left lower extremity and generalized discomfort throughout his body. Dr. Garcia noted that when the contusion and hematoma resolved appellant experienced cervical spine and low back pain. He further noted that the only reason appellant did not indicate that he had injured his cervical spine and low back at the time of the injury was because he was concerned with his left lower extremity and the possibility of an amputation. Dr. Garcia concluded that appellant reinjured his cervical and lumbar spine during the July 11, 1998 injury. The attending physician's reports dated August 23 and October 31, 2000 noted that appellant sustained an injury on July 11, 1998 which caused pain in his left lower extremity, back and cervical area. Dr. Garcia indicated with a checkmark "yes" that appellant's condition was caused or aggravated by an employment activity.

By decision dated February 9, 2001, the Office denied appellant's application for review without conducting a merit review on the grounds that the evidence submitted was duplicative and repetitious in nature and insufficient to warrant review of the prior decision.

The Board finds that the refusal of the Office to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a) constituted an abuse of discretion.[2]

The only decision before the Board on this appeal is the Office decision dated February 9, 2001. Since more than one year elapsed from the date of issuance of the Office's November 23, 1999 merit decision to the date of the filing of appellant's appeal, April 23, 2001, the Board lacks jurisdiction to review this decision.[3]

Under section 8128(a) of the Act,[4] 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,[5] which provides that a claimant may obtain review of the merits if her 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]."[6]

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.[7]

In the present case, the Office denied appellant's claim without conducting a merit review on the grounds that the evidence submitted was repetitious and duplicative of medical records in the file and failed to support appellant sustained a recurrence of disability causally related to the July 11, 1998 injury. However, appellant submitted relevant and pertinent evidence not previously considered by the Office. After the November 23, 1999 decision, appellant submitted a new medical report from Dr. Garcia dated June 30, 2000 as well as two attending physician's

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

[3] *See* 20 C.F.R. § 501.3(d).

[4] 5 U.S.C. § 8128(a).

[5] 20 C.F.R. § 10.606(b) (1999).

[6] *Id.*

[7] 20 C.F.R. § 10.608(b).

reports. Dr. Garcia's report noted that appellant sustained a work-related injury in July 1998. He indicated that because of the acute nature of the injury appellant's main concern at time of the injury was his left lower extremity and the possibility of an amputation. Dr. Garcia noted that appellant sustained a contusion and hematoma of the left lower extremity and generalized discomfort throughout his body. Dr. Garcia further noted that when the contusion and hematoma resolved appellant experienced cervical spine discomfort and low back pain. He concluded that appellant reinjured his cervical and lumbar spine during the July 11, 1998 injury. This particular medical evidence is relevant as it addressed causal relationship of appellant's current condition to the original work-related injury by noting it was directly related to the original work-related injury of July 11, 1998 and was not previously considered by the Office in rendering a decision. Additionally, the Office particularly questioned why appellant delayed in reporting a cervical and lumbar condition months after the July 1998 injury. In his report, Dr. Garcia specifically addresses appellant's delay in reporting a cervical and lumbar condition, an issue which is relevant to appellant meeting the burden of proof in establishing that the incident was causally related to the July 11, 1998 injury. He indicated that the only reason appellant did not state that he had injured his cervical spine and low back was because he was concerned with his left lower extremity and the possibility of an amputation. The Board has held that the requirement for reopening a claim for merit review does not include the requirement that a claimant must submit all evidence which may be necessary to discharge his or her burden of proof. Instead, 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.[8]

Therefore, the Office abused its discretion in refusing to reopen appellant's claim for further review on its merits under 5 U.S.C. § 8128. Consequently, the case must be remanded for the Office to reopen appellant's claim for a merit review. Following this and such other development as deemed necessary, the Office shall issue an appropriate merit decision on appellant's claim.

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

Accordingly, the decision of the Office of Workers' Compensation Programs dated February 9, 2001 is hereby set aside and the case is remanded to the Office for further development in accordance with this decision.

Dated, Washington, DC
February 12, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member