

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DON LEE WELSCH and U.S. POSTAL SERVICE,
POST OFFICE, Golden, CO

*Docket No. 01-1044; Submitted on the Record;
Issued January 3, 2002*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective March 25, 2000; and (2) whether the Office properly denied appellant's request for reconsideration on the merits.

On October 31, 1980 appellant, then a 50-year-old mail clerk, filed a claim alleging that on October 20, 1980 he sustained an injury to his lower back while in the performance of duty.

The Office subsequently accepted the claim for chronic low back strain and temporary aggravation of degenerative disc disease at L5-S1 and paid appellant appropriate compensation.

By decision dated September 25, 1998, the Office terminated appellant's compensation on the grounds that he no longer had residuals of his work-related injuries. By decision dated February 4, 1999, the hearing representative remanded the case to the Office for referral to an impartial medical examiner to resolve a conflict in medical opinion.

On October 29, 1999 the Office referred appellant to Dr. Jack Akmakjian, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict in medical opinion.

In a report dated December 29, 1999, Dr. Akmakjian stated that appellant showed symptoms of exaggerated-type behavior when walking, could not walk on his toes when asked to do so and demonstrated quivering and an unsteady gait while heel walking on request. However, appellant walked normally when not completing a physician-directed walking exercise. Appellant was able to flex his back to 20 degrees and bend laterally to only 10 degrees. However, he was able to bend over and pick up his x-rays and move about the room freely. Dr. Akmakjian stated that appellant did not demonstrate any symptoms of lower back pain.

While sitting, appellant's leg strength was negative with negative Laseque maneuver; however, while lying down, appellant reported severe back and leg pain bilateral at 10 degrees.

Dr. Akmakjian stated that this was an inconsistent finding. Appellant demonstrated positive Waddell's signs including pain across his lower back and that "give-way" muscles throughout his lower extremities. Dr. Akmakjian further noted that appellant had normal knee and ankle jerks and his motor strength was intact. No atrophy was identified; sensation and distal and reflexes were equal and symmetric.

Dr. Akmakjian reviewed a June 23, 1984 myelogram, which revealed degenerative disc changes at L5-S1 and a June 8, 1984 lumbar spine computerized tomography (CT) scan, which revealed a narrowing of the sagittal diameter consistent with spinal stenosis but was otherwise normal. He opined that appellant had symptom magnification, chronic lumbar strain and lumbar disc disease at L5-S1. Dr. Akmakjian concluded that there were no current objective findings of a work-related low back strain or an aggravation of degenerative disc disease. He found that the initial aggravation of appellant's preexisting disc disease was temporary, all residuals having ceased. Dr. Akmakjian stated that appellant was not disabled from his work-related injury.

In a supplemental report dated February 2, 2000, Dr. Akmakjian stated that appellant had no objective findings on his examination that would support a diagnosis of low back strain or permanent aggravation of degenerative disc disease. He noted that if appellant had an aggravation of a preexisting degenerative disc disease or lumbar strain, it would have resolved within six months or a year from the date of onset. Dr. Akmakjian stated that appellant's current complaints were a result of a natural progression of his underlying disease and were unrelated to his 1980 work injury.

On February 10, 2000 the Office issued a notice of proposed termination.

By decision dated March 14, 2000, the Office terminated appellant's compensation and medical benefits on the grounds that the medical evidence established that his work-related disability ceased no later than March 25, 2000.

By decision dated November 20, 2000, the hearing representative affirmed the Office's March 14, 2000 decision terminating benefits.

By letter dated February 9, 2001, appellant through counsel requested reconsideration.

By decision dated February 23, 2001, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was cumulative and thus insufficient to warrant review of the prior decision.

The Board finds the Office met its burden of proof in terminating appellant's compensation.

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of compensation. Thus, after the Office determines that an employee has disability causally related to his or her employment, the Office may not terminate

compensation without establishing either that its original determination was erroneous or that the disability has ceased or is no longer related to the employment injury.¹

The fact that the Office accepts appellant's claim for a specified period of disability does not shift the burden of proof to appellant to show that he or she is still disabled. The burden is on the Office to demonstrate an absence of employment-related disability in the period subsequent to the date when compensation is terminated or modified.² The Office burden includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.³

The Federal Employees' Compensation Act, at 5 U.S.C. § 8123(a), in pertinent part, provides: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."⁴

In this case, the Office properly determined that a conflict in medical opinion evidence existed between appellant's treating physicians, Dr. Richard Kem, a Board-certified orthopedic surgeon and Dr. Yechiel Kleen, Board-certified in physical medicine and rehabilitation and Dr. Stephen Dineberg, the Office's second opinion physician. The Office thus referred appellant, a statement of accepted facts, questions to be resolved and the complete case record to an impartial medical examiner, Dr. Akmakjian, for resolution of the conflict.

Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual and medical background, is entitled to special weight.⁵

The Board finds that Dr. Akmakjian's December 29, 1999 and February 2, 2000 reports are well rationalized and are based on a proper factual background and must, therefore, be accorded special weight on the issue of whether appellant continued to have residuals of his work-related injuries. As the weight of the medical opinion evidence on this issue, these reports justify the Office's decision terminating appellant's compensation.

Dr. Akmakjian demonstrated a familiarity with appellant's history of injury, noting in detail appellant's medical chronology including his various diagnoses and prognoses that had been rendered over 20 years. He also examined appellant and compared his clinical results against appellant's subjective complaints of pain. Dr. Akmakjian noted, for example, that while appellant's clinical range of motion findings supported significant limitations, appellant's normal

¹ *Carl D. Johnson*, 46 ECAB 804, 809 (1995).

² *Patrick P. Curran*, 47 ECAB 247 (1995).

³ *Mary Lou Barragy*, 46 ECAB 781, 787 (1995).

⁴ 5 U.S.C. § 8123(a).

⁵ *Richard L. Rhodes*, 50 ECAB 259 (1999).

walking episodes and comparative tests revealed symptom magnification. Appellant essentially had negative knee and ankle jerks, normal motor strength, no atrophy and equal and symmetric reflexes. Dr. Akmakjian stated in a supplemental report that there were no current objective findings of a work-related low back strain or an aggravation of degenerative disc disease. Any aggravation had been temporary and no longer existed.

The Board finds that the Office properly exercised its discretion in refusing to reopen appellant's case for merit review.

Section 8128(a) and its implementing regulation provide that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (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.⁶ Section 10.608(b) provides that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.⁷

Appellant's February 9, 2001 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).

In support of his request for reconsideration, appellant submitted a January 24, 2001 report of Dr. Kem, appellant's Board-certified treating orthopedic surgeon, who stated that appellant's December 6, 2000, x-rays revealed severe narrowing of the disc space at L5-S1. He also noted that appellant's February 1981 CT scan revealed a normal lumbar spine, while a January 1984 CT scan revealed degenerative disc disease at L5-S1. Dr. Kem opined that appellant's condition began with his work-related injury and deteriorated over time as a result of the same.

Dr. Kem, however, failed to provide any medical rationale explaining how or why the accepted employment incident in 1980 continued to cause appellant's disability, especially in light of a 1981 normal CT scan. Further, Dr. Kem's report essentially reiterates the contents of his August 1998 report, which the hearing representative noted in her February 4, 1999 remand order "provided little medical rationale for his opinion that the claimant continues to have residuals due to the employment injury." Consequently, this evidence is not sufficient to warrant reopening the record for merit review.

Inasmuch as appellant has failed to show that the Office erroneously applied or interpreted a specific point of law, to advance a relevant legal argument not previously considered by the Office or to submit relevant and new pertinent evidence not previously

⁶ 20 C.F.R. § 10.606(b)(2) (1999).

⁷ 20 C.F.R. § 10.606(b) (1999).

considered by the Office, the Office properly refused to reopen appellant's claim for a review on the merits.

The February 23, 2001 and November 20, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
January 3, 2002

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member