U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CLARENCE BONEY and DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Richmond, VA

Docket No. 01-1352; Submitted on the Record;
Issued January 16, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

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

On September 8, 1998 appellant, then a retired 43-year-old tax payer service representative, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that he sustained sciatica, lumbago and degenerative disc disease culminating in three disc removal surgeries and denervation.[1] Appellant's last exposure was on January 28, 1997.[2]

In support of his claim, appellant provided various medical reports pertaining to a lumbar discectomy in 1991 and juvenile hemaparesis that occurred from a gunshot wound at the age of 10.

The employing establishment agency controverted the claim in a statement received by the Office on November 25, 1998.

In a November 24, 1999 decision, the Office denied appellant's claim as the medical evidence was not sufficient to establish that his condition was caused by the event.

By letter dated November 17, 2000, appellant requested reconsideration and submitted additional medical evidence comprised of diagnostic tests and medical reports.

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[1] The file contains medical records for fairly significant right hemiplegia from a gunshot wound at the age of 10 and angioplasties from 1995 and 1996. Additionally, appellant filed three previous claims for lumbosacral strain. Two of the claims were accepted. (No. 0301140588 for date of injury February 2, 1989 and No. 030160352 for date of injury December 10, 1990). A third claim, which involved a motor vehicle accident, was judged to be nonwork related.

[2] The record reflects that appellant retired on disability retirement effective April 8, 1998.

In a May 21, 1998 report,[3] Dr. Frank Falco, Board-certified in physical medicine and rehabilitation, revealed that a general inspection showed muscle contractures of the right hand and wrist and reduced muscle mass in the right upper extremity secondary to stroke and a leg length discrepancy. He recommended a lumbar discogram.

In July 16, 1998 reports, Dr. Falco provided a lumbar computerized tomography discography report with an impression of normal L2-3 nucleus with annular disruption, normal L3-4 nucleus with annular disruption, normal L4-5 disc and severely degenerative L5/S1 disc. He also performed a lumbar discography.

In an October 10, 1998 operative report, Dr. Falco diagnosed discogenic low back pain at the L2-3, L3-4 and L5-S1 levels and performed denervation injections.

In a January 5, 1999 report, Dr. Falco noted that appellant was status post left-sided approach annular denervation at L2-3, L3-4 and L4-5 levels on December 29, 1998. He further stated that appellant's left-sided back pain had decreased since the denervation; however, he continued to complain of right-sided back pain, which radiated down the back of his right leg. Dr. Falco stated that appellant was decompressed at this level two times in the past and noted that a magnetic resonance imaging scan was needed to rule out a recurrent disc herniation. His impression was discogenic low back pain, with status post annular denervation and a stroke secondary to a gunshot wound.

In a February 5, 1999 report, Dr. Thomas W. Fiss, Jr., Board-certified in diagnostic radiology, reported that the computerized axial tomography scan of the lumbar spine showed a laminectomy at L5-S1. His impression was that there was no evidence of a recurrent disc protrusion, there were mild degenerative changes of the facet joints and the neural foramina were within normal limits. At L4-5, there were mild degenerative changes of the facet joints and mild lateral recess stenosis. No focal disc protrusion was demonstrated. At L3-4, there was bulging of the annulus fibrosis and degenerative changes of the facet joints. No focal disc protrusion was demonstrated. The neural foramina were within normal limits. Dr. Fiss stated that appellant was status post surgery at L5-S1 and had mild lateral recess stenosis bilaterally at L4-5.

In a July 2, 1999 fluoroscopy report, Dr. Steven Smith, an osteopath, stated that there was an annuloplasty device present at L4-5, which could be seen on two intraoperative digital films. Dr. Falco stated that the L4-5 annuloplasty was performed today under fluoroscopic visualization.

In reports dated May 13, June 10, July 2, August 31, October 5, November 9 and December 23, 1999 and February 23 and March 16, 2000, Dr. Falco indicated that appellant came in for followup of back pain. He noted appellant's history of injury, which included right-sided leg pain radiating in an S1 dermatomal pattern and that appellant stated that the pain was excruciating and continued to worsen. He diagnosed discogenic low back pain, stroke secondary to gunshot wound and right lumbosacral radiculopathy in an S1 distribution. He did not address causal relation in any of his reports.

[3] Page one of the report was not attached.

In a January 10, 2001 decision, the Office denied merit review of appellant's request for reconsideration on the grounds that the evidence submitted was of an immaterial nature and not sufficient 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.[4] As appellant filed his appeal with the Board on April 11, 2001, the Board lacks jurisdiction to review the Office's most recent merit decision dated November 24, 1999. Consequently, the only decision properly before the Board is the Office's January 10, 2001 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 Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may 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--
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> (1) end, decrease, or increase the compensation awarded; or
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> (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.[5]

In this 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 established that his claimed condition was causally related to his work factors, is essentially medical in nature.

[4] 20 C.F.R. §§ 501.2(c), 501.3(d)(2) (1998) and 20 C.F.R. § 10.607(a) (1999).

[5] 20 C.F.R. § 10.608(b) (1999).

While appellant submitted numerous diagnostic tests results and narrative medical reports from treating physicians, they did not address whether his condition was causally related to factors of his federal employment.[6]

Appellant provided reports from Dr. Falco where he described appellant's symptoms and treatment regimen, but never described the factors of his federal employment or provided an opinion as to whether appellant's complaints were causally related to his employment.[7] Additionally, he did not attempt to explain whether appellant's symptoms were caused by his preexisting conditions, his previous work-related injuries or his nonwork-related accident.

In his February 5, 1999 report, Dr. Fiss noted appellant's symptoms and conditions but did not discuss causal relationship or provide any opinion as to whether appellant's condition was causally related.[8] Likewise, the July 2, 1999 diagnostic fluoroscopy report provided by Dr. Smith contained no discussion or opinion on causal relation, or any discussion of appellant's history of injury and treatment.[9]

None of the reports addressed whether appellant's condition was causally related to his employment conditions. The Board has held that the submission of evidence which does not address the particular issue involved is of little probative value. Because these reports are irrelevant, neither is sufficient to require the Office to reopen appellant's claim for merit review.[10]

In its January 10, 2001 decision, the Office correctly noted that appellant did not provide any new and relevant evidence or raise any substantive legal arguments not previously considered sufficient to warrant a merit review. Appellant also did not argue that the Office erroneously applied or interpreted a point of law. Consequently, appellant is not entitled to a merit review of the merits of the claim based upon any of the requirements under 20 C.F.R. § 10.606(b)(2). Accordingly, the Board finds that the Office acted within its discretion in denying appellant's request for reconsideration.

[6] Rationalized medical evidence is medical evidence that includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. Such an opinion of a physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by appellant. *See Donna Faye Cardwell,* 41 ECAB 730 (1990); *Lillian Cutler,* 28 ECAB 125 (1976).

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *John E. Watson,* 44 ECAB 612, 614 (1993).

The January 10, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
January 16, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member