

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RUSSELL CARVER and U.S. POSTAL SERVICE,
GENERAL MAIL FACILITY, Boston, MA

*Docket No. 01-2027; Submitted on the Record;
Issued June 7, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant has a permanent loss of use of the legs causally related to his October 30, 1987 employment injury; and (2) whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

On November 4, 1987 appellant, then a 45-year-old mailhandler, filed a claim for a traumatic injury for severe low back pain going down his right leg sustained on October 30, 1987 by pulling up a dock plate. The Office accepted that appellant sustained a low back strain and herniated discs at T12-L1 and L3-4.

By decision dated October 2, 1995, the Office reduced appellant's compensation on the basis that the position of modified mailhandler, to which he returned on November 1, 1993, fairly and reasonably represented his wage-earning capacity. On March 7, 1997 appellant elected benefits under the Civil Service Retirement Act in lieu of those under the Federal Employees' Compensation Act effective March 5, 1997.

By letter dated December 15, 1997, appellant applied for a schedule award, stating that he had severe pain radiating from his low back to his right foot since his October 1987 injury. Appellant submitted a November 17, 1997 report from an attending physician, Dr. Emilio Jacques, a general practitioner, who noted "hypoesthesia over the lateral aspect of the right leg and right foot" on examination, diagnosed "Chronic low back pain syndrome, secondary to discogenic etiology with positive right lower extremity radiculopathy," and concluded: "In my opinion [appellant] has 30 percent of permanent impairment, in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. In my opinion he has reached maximum medical improvement for this condition and I will follow him with a conservative maintenance program for his chronic spinal pain syndrome."

By letter dated December 19, 1997, the Office advised appellant of the medical evidence needed to support his claim for a schedule award. In a report dated December 29, 1997,

Dr. Jacques again noted “hypoesthesia over the lateral aspect of the right leg and right foot” on examination and concluded that appellant had reached maximum medical improvement and had a 20 percent permanent impairment of the legs calculated by the A.M.A., *Guides*.

By letter dated July 10, 1998, the Office requested that appellant’s attending physician, Dr. Ronald J. Nasif, an orthopedic surgeon,¹ evaluate any permanent impairment of appellant’s legs related to his October 30, 1987 employment injury. In a report dated July 14, 1998, Dr. Nasif stated that it was probable that appellant reached maximum medical improvement within the first 12 to 24 months after his injury, that his only significant finding was localized lower back pain and right sciatica, and that it was probable that appellant’s herniated lumbar disc and his degenerative changes of his lumbar spine were causing some mild nerve root impairment. Dr. Nasif concluded, “Based on the guidelines of the A.M.A., he has an approximate eight percent whole body permanent impairment, due to his herniated lumbar disc condition and degenerative spondylosis of his lumbar spine.”

In a report dated October 30, 1998, Dr. E.J.L. Wasserman, a Board-certified neurologist, stated that appellant’s right leg symptoms seemed to be positional and exertional in nature, that his examination showed some evidence of a possible peripheral polyneuropathy that perhaps was related to his diabetes and that his mild right hip girdle weakness may be due to lumbosacral root involvement.

On May 14, 1999 the Office referred appellant to Dr. Lawrence Geuss, a Board-certified orthopedic surgeon, for an evaluation of any permanent impairment of his legs related to his October 30, 1989 employment injury. In a report dated June 4, 1999, Dr. Geuss stated that before he could rate appellant’s permanent impairment of the legs, flow studies were needed in order “to help determine how much of the pain in his legs is due to vascular versus a neurologic problem.”

The Office referred appellant to Dr. James O. Menzoian, a Board-certified vascular surgeon, who, in a May 12, 2000 report, stated that a vascular lab assessment suggested moderately decreased arterial flow to both lower extremities at rest, that it was difficult to determine whether this problem or his spinal pathology was most relevant, but that he was quite confident that his arterial insufficiency was not appellant’s primary disabling condition. Dr. Menzoian then stated, “An orthopedic surgeon, such as Dr. Geuss would be in a position to take the information generated by this evaluation and complete the work capacity evaluation form and address a rating of permanent impairment.”

In a report dated July 28, 2000, Dr. Geuss reviewed Dr. Menzoian’s report and stated:

“Since we are going back and talking about the 1987 injury on the part of the patient, again I would state what was again in my report of June 4, 1999, that the patient at the time of his 1987 injury, his MRI [magnetic resonance imaging], CT [computerized tomography] scans and EMG [electromyograms] were all relatively benign only showing some disc bulging and degenerative joint disease

¹ In a May 6, 1998 letter, appellant advised the Office that Dr. Nasif was replacing Dr. Jacques as his attending physician.

in the low back. He had no large herniated discs noted. In 1993 he did have a herniated disc noted at L4-5. It is not felt that the 1987 injury caused significant damage to his lumbar spine. At the time of his 1987 injury he already had signs of degeneration in his lumbar spine. It is felt that he certainly strained his back and it is also felt that he would have taken a few months to recover from that in normal circumstances. The remaining degenerative joint disease that developed in his spine from 1987 onwards is felt to be a progression of his normal degeneration that was noted in the lumbar spine in his studies in 1987. It is not felt that the work-related injury significantly increased the wear-out in his back. The most positive objective findings on his physical exam[ination] of June 4, 1999 were vascular findings in the absence of palpable pulses in his lower extremities. He did not have any thigh or calf atrophy, he had no neurologic deficit to suggest a spinal problem. He did have an MRI around the time of the 1999 exam[ination] suggesting that he had some mild spinal stenosis at L4-5. This is a degenerative process and one that developed over many years. It is not felt that the 1987 injury caused this. I think his moderately severe arterial insufficiency is causing a large portion of his leg pain. I think the part of the leg pain that is possibly being caused by his spinal stenosis is less than the leg pain that is being caused by his vascular disease. People with this level of spinal stenosis can usually get around quite well with shorter walks with more frequent sitting. Certainly they are capable of performing some form of light duty type of job which gives them flexibility in standing, sitting and walking and which allows them to have a weight restriction of upwards of 10 to 15 pounds. There was no calculated impairment in his lower extremities from a spinal point of view. He did not have atrophy, he had no neurologic deficit.”

By decision dated December 1, 2000, the Office found that the medical evidence failed to establish that appellant had a permanent impairment of his legs as a result of his October 30, 1987 employment injury.

By letter dated December 13, 2000, appellant requested reconsideration. He submitted a December 21, 2000 note from Dr. Nasif, who noted a recent exacerbation of back pain and diagnosed “Persistent, chronic lumbar sprain and right sacroilitis.”

By decision dated February 12, 2001, the Office found that the additional evidence was not sufficient to warrant review of its prior decision.

The Board finds that the evidence does not establish that appellant has a permanent loss of use of the legs causally related to his October 30, 1987 employment injury.

Dr. Geuss, the Board-certified orthopedic surgeon to whom the Office referred appellant for an evaluation of any permanent impairment of his legs related to his October 30, 1987 injury, concluded in a July 28, 2000 report that appellant had no such permanent impairment. Dr. Geuss explained that the diagnostic testing done at the time of appellant’s 1987 injury was relatively benign, indicating that the injury did not cause significant damage to appellant’s lumbar spine. Dr. Geuss also noted that these tests showed that appellant already had signs of degeneration in his lumbar spine at the time of the October 30, 1987 employment injury and stated that the

degenerative joint disease that developed in appellant's spine after 1987 was a progression of normal degeneration and that the spinal stenosis seen on a 1999 MRI was not caused by the employment injury. Dr. Geuss concluded that a large portion of appellant's leg pain was caused by his moderately severe arterial insufficiency, and that appellant had "no calculated impairment in his lower extremities from a spinal point of view," as he had no atrophy and no neurologic deficit.

Two of appellant's attending physicians concluded that appellant had a permanent impairment related to his October 30, 1987 employment injury. In a July 14, 1998 report, Dr. Nasif stated that appellant had an eight percent permanent impairment of the whole body "due to his herniated lumbar disc condition and degenerative spondylosis of his lumbar spine." However, a schedule award is not payable for the loss, or loss of use, of a part of the body that is not specifically enumerated under the Federal Employees' Compensation Act² or under its implementing regulations.³ Neither the Act nor its implementing federal regulations provides for a schedule award for impairment to the back or to the body as a whole. Furthermore, the back is specifically excluded from the definition of "organ" under the Federal Employees' Compensation Act.⁴ While a claimant may be entitled to a schedule award for a permanent impairment of the legs caused by a spinal pathology,⁵ Dr. Nasif did not indicate appellant had a permanent impairment of either leg.

Dr. Jacques stated, in a November 17, 1997 report, that appellant had a 30 percent permanent impairment, but did not state whether this was an impairment of the whole person, the back or the legs. In a December 29, 1997 report, Dr. Jacques indicated that appellant had reached maximum medical improvement and had a 20 percent permanent impairment of the legs.

A schedule award is not payable until maximum improvement of the claimant's condition has been reached. Maximum improvement means that the physical condition of the injured member of the body has stabilized and will not improve further. Generally, maximum improvement has not been reached until medical treatment has been discontinued.⁶

The November 17 and December 29, 1997 reports from Dr. Jacques do not establish that maximum improvement had been reached. Although Dr. Jacques reported hypoesthesia of appellant's right leg and foot in these reports, Dr. Jacques noted an intact neurologic examination and no sensory deficit in February 9 and March 25, 1998 reports. These reports indicate that the hypoesthesia, the only finding of leg impairment in the earlier reports, had resolved and was not permanent. These later reports also reflected ongoing treatment in the form of trigger point injections.

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404.

⁴ 5 U.S.C. § 8101(19).

⁵ *Rozella L. Skinner*, 37 ECAB 398 (1986).

⁶ *Robert L. Mitchell, Jr.*, 34 ECAB 8 (1982).

The reports from Drs. Jacques and Nasif are of limited value in assessing whether appellant has a permanent loss of use of his legs related to his October 30, 1987 employment injury to his back. The report of Dr. Geuss constitutes the weight of the medical evidence on this issue and shows that appellant does not have such a permanent loss of use of his legs.

The Board further finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim under 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 own motion or on application. The Secretary, in accordance with the facts found on review may --

- (1) end, decrease or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”

Under 20 C.F.R. § 10.606(b)(2), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law, by advancing a relevant legal argument not previously considered by the Office, or by submitting relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b) provides that 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.⁷ Evidence that does not address the particular issue involved does not constitute a basis for reopening a case.⁸

The only new evidence appellant submitted with his December 13, 2000 request for reconsideration was a December 21, 2000 note from Dr. Nasif that did not address a permanent impairment of appellant's legs. This report and appellant's request for reconsideration were insufficient to require that the Office reopen the case for further review of the merits of appellant's claim.

⁷ *Eugene F. Butler*, 36 ECAB 393 (1984).

⁸ *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

The February 12, 2001 and December 1, 2000 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
June 7, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member