

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES L. GREEN and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Pittsburgh, PA

*Docket No. 00-508; Submitted on the Record;
Issued March 19, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's wage-loss compensation effective December 8, 1996 on the basis that he no longer suffered from residuals of his April 4, 1984 employment injury; (2) whether appellant established that his claimed disability after December 8, 1996 was causally related to his April 4, 1984 employment injury; and (3) whether the Office abused its discretion by refusing to reopen appellant's case for merit review under 20 C.F.R. § 10.608.

On April 4, 1984 appellant, then a 26-year-old laundry worker, sustained a low back strain, sUBLUXATIONS at L4-5 and retroLYSTHESIS at C4-5 while in the performance of duty. He was placed on the periodic compensation rolls and he received appropriate wage-loss compensation for approximately 12 years following his injury. By decision dated November 13, 1996, the Office terminated appellant's compensation effective December 8, 1996 on the basis that he no longer suffered from residuals of his employment injury. Appellant subsequently requested a hearing, which was held on September 24, 1997. In a decision dated December 5, 1997, the Office hearing representative affirmed the November 13, 1996 decision terminating compensation.

On December 3, 1998 appellant filed a request for reconsideration. The Office reviewed the claim on the merits and in a decision dated March 4, 1999, the Office denied modification. Appellant filed another request for reconsideration on June 7, 1999. By decision dated July 30, 1999, the Office denied appellant's request for reconsideration.

Appellant filed an appeal with the Board on November 4, 1999. He also filed a request for reconsideration with the Office on December 16, 1999. While appellant's appeal was

pending before the Board, the Office issued a decision dated January 5, 2000 denying appellant's December 16, 1999 request for reconsideration.¹

The Board finds that the Office met its burden of proof in terminating appellant's compensation effective December 8, 1996.

Once the Office has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.² Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.³

In terminating compensation, the Office relied upon the January 3, 1996 opinion of Dr. Leland S. Blough, a Board-certified orthopedic surgeon and impartial medical examiner, who found that appellant's employment-related back strain had healed. Dr. Blough further indicated that x-rays obtained in 1984 and 1986 and a 1984 lumbar myelogram and a computerized tomography (CT) scan failed to support the diagnoses of subluxations at L4-5 and retrolysthesis at C4-5. He noted that appellant exhibited and described some degree of learned pain behavior compatible with chronic pain syndrome. However, Dr. Blough explained that "on the basis of lack of objective findings ... there is no reason why [appellant] cannot return ... to his prior unrestricted laundry duties."

In affirming the November 13, 1996 decision terminating compensation, the Office hearing representative similarly relied on Dr. Blough's findings.

The Board finds that the decision of the Office hearing representative dated December 5, 1997 is in accordance with the facts and the law in this case and hereby adopts the findings and conclusions of the hearing representative. Accordingly, the Office met its burden of proof in terminating appellant's compensation effective December 8, 1996.⁴

The Board also finds that appellant failed to establish that his claimed disability after December 8, 1996 was causally related to his April 4, 1984 employment injury.

¹ The Board finds that the Office did not have the authority to issue its January 5, 2000 decision denying reconsideration. The Board and the Office may not simultaneously exercise jurisdiction over the same issue in a case. *Arlonia B. Taylor*, 44 ECAB 591 (1993). Inasmuch as the Board obtained jurisdiction over the case on November 4, 1999, the Office lacked the authority to issue the January 5, 2000 decision denying reconsideration. Accordingly, the Office's decision dated January 5, 2000 is set aside as null and void. *Terry L. Smith*, 51 ECAB (Docket No. 97-808, issued November 29, 1999).

² *Curtis Hall*, 45 ECAB 316 (1994).

³ *Jason C. Armstrong*, 40 ECAB 907 (1989).

⁴ In cases where the Office has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight. *Gary R. Sieber*, 46 ECAB 215, 225 (1994). The Board finds that the impartial medical examiner's January 3, 1996 opinion is sufficiently well rationalized and based upon a proper factual background.

Once the Office properly terminates compensation for disability, appellant has the burden of proof to establish further disability for work.⁵

Following the Office hearing representative's December 5, 1997 decision, appellant sought reconsideration and obtained further merit review of the claim. He submitted, *inter alia*, objective evidence of a diffuse disc bulge at L4-5. Additionally, appellant submitted medical opinion evidence attributing the diagnosed disc bulge to his April 4, 1984 employment injury.

Where appellant claims that a condition not accepted or approved by the Office was due to his employment injury, he bears the burden of proof to establish that the condition is causally related to the employment injury.⁶

In a report dated June 4, 1998, Dr. Gerald P. Durkan, a Board-certified neurologist, noted that a recent lumbar myelogram and CT scan revealed a disc bulge at L4-5 with some flattening of the anterior aspect of the thecal sac. Dr. Durkan stated that the objective evidence would account for appellant's complaints of localized pain as well as some of the referral into his right leg. He further indicated that the recent findings date back to appellant's April 4, 1984 employment injury.

The record also includes a December 2, 1998 report from Dr. Brian M. Ernstoff⁷ who diagnosed chronic pain syndrome. Dr. Ernstoff further indicated that appellant was unable to return to his previous employment as a laundry worker.

In this case, although Dr. Durkan stated that appellant's current disc bulge at L4-5 dated back to his April 4, 1984 employment injury, he did not otherwise explain the basis for his opinion. Additionally, the record indicates that a lumbar myelogram administered in 1984 shortly after appellant's injury failed to reveal a disc bulge at L4-5. Accordingly, Dr. Durkan's opinion is insufficient to establish a causal relationship between appellant's current condition and his April 4, 1984 employment injury.

Dr. Ernstoff's December 2, 1998 report is similarly insufficient to establish that appellant continues to suffer from residuals of his April 4, 1984 employment injury. While he diagnosed chronic pain syndrome and indicated that appellant was unable to return to his previous employment as a laundry worker, he did not specifically attribute the diagnosed condition to appellant's April 4, 1984 employment injury.

As the recent reports of Drs. Durkan and Ernstoff fail to establish a causal relationship between appellant's current condition and his April 4, 1984 employment injury, the Office properly denied modification of the prior decision terminating compensation.

The Board further finds that the Office properly exercised its discretion in refusing to reopen appellant's case for merit review under 20 C.F.R. § 10.608.

⁵ *Beverly J. Duffey*, 48 ECAB 569, 571 (1997).

⁶ *Jacquelyn L. Oliver*, 48 ECAB 232, 235-36 (1996).

⁷ Dr. Ernstoff is Board-certified in physical medicine and rehabilitation.

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides 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.⁸ 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.⁹

Appellant's June 7, 1999 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, he 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).

On reconsideration appellant submitted an April 19, 1999 report from Dr. Durkan, who essentially reviewed appellant's medical records and reiterated his June 4, 1998 findings. Additionally, he stated that he did not believe that appellant's prior myelogram was normal. Evidence that is cumulative in nature is insufficient to warrant reopening a claim for merit review.¹⁰ As Dr. Durkan's April 19, 1999 report is merely a reiteration of his June 4, 1998 findings, the repetitious nature of this recent report precludes reopening of the record for merit review. Accordingly, appellant is not entitled to a review of the merits of his claim based on the third requirement under section 10.606(b)(2).

As appellant is not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2), the Board finds that the Office did not abuse its discretion in denying appellant's June 7, 1999 request for reconsideration.

⁸ 20 C.F.R. § 10.606(b)(2) (1999).

⁹ 20 C.F.R. § 10.608(b) (1999).

¹⁰ Evidence that is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening the claim. *James A. England*, 47 ECAB 115, 119 (1995); *Saundra B. Williams*, 46 ECAB 546 (1995).

The decisions of the Office of Workers' Compensation Programs dated July 30 and March 4, 1999 are hereby affirmed.

Dated, Washington, DC
March 19, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member