U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JACKIE L. GAFFORD and DEPARTMENT OF THE INTERIOR, BUREAU OF RECLAMATION, Grand Junction, CO

Docket No. 01-473; Submitted on the Record;
Issued March 20, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS, DAVID S. GERSON

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation effective November 6, 1999; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits of his claim.

On August 15, 1989 appellant, then a 41-year-old survey technician, injured his mid back when he stepped in a ditch while walking in tall grass while in the performance of his federal duties. The Office accepted appellant's claim for an acute thoracic/lumbar strain and approved appropriate compensation benefits. By decision dated February 12, 1998, compensation benefits were terminated based on the weight of the medical evidence. By decision dated August 13, 1998 and finalized August 17, 1998, an Office hearing representative reversed the February 12, 1998 decision and remanded the case to the Office for further development. The hearing representative found that the opinion of Dr. Michael Reeder, a Board-certified osteopath and Office referral physician, was equivocal.

By decision dated November 19, 1998, the Office terminated compensation benefits effective December 5, 1998, finding that the weight of the medical evidence, was represented by the reports of Dr. Jeffrey Hrutkay, a Board-certified orthopedic surgeon and Office referral physician. By decision dated February 4, 1999, an Office hearing representative again remanded the case to the Office for further development. The hearing representative found that Dr. Hrutkay's report was insufficient to carry the weight of the medical evidence. The hearing representative further found an unresolved conflict in medical opinion existed on the issue of whether appellant's left leg condition was causally related to the employment injury of August 15, 1989. The hearing representative noted that although the Office had selected Dr. Ronald Pinson to act as a referee physician regarding this issue, an associate, Dr. David P. Fisher had indicated that he was unable to address the issue of whether the left knee condition had been affected by the employment injury and subsequently stated that an amplifying report, which the Office had requested, was unreasonable given the date of the

evaluation and the Office's request, approximately six months later. The hearing representative directed the Office to refer appellant to a Board-certified orthopedic surgeon for examination and resolution of the outstanding conflicts of medical opinion evidence regarding whether appellant has any residuals of the accepted employment injury and whether appellant's accepted back condition aggravated, accelerated or precipitated the problems with appellant's preexisting left knee condition.[1]

By decision dated October 15, 1999, the Office terminated benefits effective November 6, 1999 on the basis that the weight of the medical opinion evidence, as represented by the impartial medical evaluation of Dr. Herbert Maruyama, a Board-certified orthopedic surgeon, established that there was no work-related condition or disabling residuals of the work injury of August 15, 1989.

By letter dated May 18, 2000, appellant requested reconsideration and submitted additional evidence. By decision dated July 14, 2000, the Office found that appellant's request was not sufficient to warrant review of its prior decision.

The Board finds that the Office properly terminated appellant's compensation benefits effective November 6, 1999, as the evidence establishes that his employment-related residuals ceased.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits by establishing that the accepted disability has ceased or that it is no longer related to the employment.[2] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[3]

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits on November 6, 1999 based on the well-rationalized opinion of the impartial specialist, Dr. Maruyama.[4] In a report dated July 29, 1999, he discussed appellant's history of injury, relevant past medical history relating to the neck, back and left knee, physical complaints, the results of objective tests and listed findings on physical examination. Dr. Maruyama stated that appellant's initial diagnosis, which many of the orthopedic surgeons, a neurologist and a neurosurgeon concurred with, was a strain of the dorsolumbar junction of the

[1] The record reflects that appellant had filed a claim for a May 23, 1989 left knee injury, which the Office assigned file number A12-0116904. This claim was denied for failure to establish fact of injury in Office decisions dated November 5, 1990 and May 20, 1991.

[2] *David W. Green*, 43 ECAB 883 (1992); *Jason C. Armstrong*, 40 ECAB 907 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986); *Harold S. McGough*, 36 ECAB 332 (1984); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

[3] *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

[4] Section 8123(a) of the Federal Employees' Compensation Act provides that, "[i]f 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." 5 U.S.C. § 8123(a).

back. All of the diagnostic studies were directed to this diagnosis and to that part of appellant's back. A conservative treatment program was recommended. During appellant's period of conservative treatments to the back, as guided by Dr. David W. Terry, appellant's treating osteopathic physician, appellant developed some symptoms in his left knee. Dr. Maruyama noted that appellant's past medical records are significant in that they clearly describe appellant's past difficulties in the left knee joint. In 1981, a total medial meniscectomy was carried out because of a virtual complete tear incarcerating in the mid-portion of the knee joint between the femur and the tibia. Appellant's medical record further reflected that appellant had several knee injuries over a six-year period prior to the 1981 meniscectomy. Since the medial meniscectomy, he opined that typical wear and tear type progression has occurred in the knee joint resulting in appellant's present condition. The current x-ray of appellant's left knee joint reflected post-traumatic arthritis progressing in the medial compartment. Dr. Maruyama opined that this was a typical sequela of a medial meniscectomy and advised that such a post-traumatic condition in the knee joint will typically result in symptoms, that appellant had experienced and then continues to experience in the ensuing years and will worsen with the passage of time.

Dr. Maruyama opined that, in reviewing the extensive medical records, he found no evidence that appellant had sustained any significant trauma to the left knee on August 15, 1989. Dr. Maruyama opined that the left knee was not related to the August 15, 1999 strain that appellant sustained in the dorsolumbar aspect of his back.

Dr. Maruyama advised that appellant's strain at the dorsolumbar region of the back was superimposed upon some degenerative changes in the lower dorsal and dorsolumbar junction of his spine. He noted that these degenerative changes were described by the earlier examiners and orthopedic consultants. Dr. Maruyama advised that, presently, the degenerative process has progressed to an ankylosing spondylosis in the lower dorsal spine. The large spurs that were present have progressed and then coalesced, resulting in the ankylosis. In addition, there are other spurs adjacent to the ankylosing segments. He stated that no compression fractures were sustained in the back. In reviewing the medical records, Dr. Maruyama noted that appellant had continuing complaints of pain, aching and stiffness in the back, for which little or no objective findings were noted. He advised that those ongoing complaints were typical of the underlying osteoarthritis for the degenerative process at the dorsolumbar spine described above. Dr. Maruyama further stated that recent clinical notes of Dr. Terry were similar in terms of the condition of appellant's complaints and his back and opined that, as they were similar to the type of complaints appellant had at the time of the accident and there were very little, if any, objective findings, the treatments Dr. Terry were providing were on a symptomatic basis. Dr. Maruyama opined that appellant's type of strain would have subsided and would not have required active treatment much beyond three months from the time of the incident. He believed, therefore, that Dr. Terry's efforts are to help appellant from a symptomatic standpoint.

Dr. Maruyama opined that there was some temporary aggravation to the degenerative changes at the dorsolumbar spine when the strain was sustained. He stated, however, that he did not find any evidence to indicate that there were any permanent aggravating effects sustained to the spine. Dr. Maruyama advised that he did not obtain any objective findings of an active residual from the acute dorsolumbar strain. No muscle spasms were present. A very satisfactory range of motion was noted throughout the entire back and the range of motions maneuvers were

carried out on several occasions to make certain that the procedure was being carried out properly and the status of the soft tissues and especially the paravertebral muscles, were carefully addressed with the range of motion maneuvers. No muscle spasms were present. No localizing tenderness was noted. The range of motion was very satisfactory. Dr. Maruyama noted that as appellant was stockily built with a quite prominent abdomen, his type of anatomy contributes to some range of motion differences through the trunk when compared to a more aesthetic body build. The range of motion obtain in the trunk was normal and compatible with appellant's body build. No guarding and no resistance was noted in carrying out these range of motion maneuvers. Straight leg raising test was negative on both sides and was carried out without hesitation or guarding. There was no evidence of any neurologic deficit. He noted that no one, including Dr. Terry, found any neurologic difficulties or deficit referable to the dorsolumbar strain of appellant's back.

Dr. Maruyama opined that the post-traumatic arthritis in the medial compartment of the joint is not the result of a thoracolumbar strain, but rather is a progressive condition. With appellant's overweight condition, his aging and continuous activity of daily living, progression of the arthropathy continues. He further opined that as appellant is in a deconditioned status, the degenerative arthropathy continues at the dorsolumbar aspect of his back. As there are no significant objective findings to accommodate the ongoing subjective complaints, Dr. Maruyama opined that with proper reconditioning and motivation, appellant would be able to return to work as a survey technician. Maximum medical improvement from the strain was said to have been reached years ago.

In an August 26, 1999 addendum report, Dr. Maruyama advised that the temporary aggravation as a result of the strain of August 15, 1989 has ceased and the underlying degenerative changes in the dorsolumbar spine have returned to baseline pathology and, of course, has continued its normal progression with the aging process. He further stated that there were no objective findings of an active residual process from the acute dorsolumbar strain. Nor did he find any objective findings regarding the strain of the thoracolumbar region of August 15, 1989 on his June 28, 1999 examination.

In situations when there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist of the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[5]

The Board has carefully reviewed the opinion of Dr. Maruyama and notes that it has the reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue in the present case. He provided a thorough factual and medical history through his examination of the record and noted that appellant had a past significant medical history of his left knee and had underwent a 1981 total medial meniscectomy. Dr. Maruyama advised that current x-rays indicate a post-traumatic arthritis progressing in the medial compartment and opined that appellant had and will continue to experience what is considered to be a typical sequela of a medial meniscectomy. He opined that there was no evidence that appellant had

[5] *Rosie E. Garner,* 48 ECAB 220, 225 (1996).

sustained any significant trauma to his left knee on August 15, 1989 and that the left knee was not related to the August 15, 1989 dorsolumbar strain. Moreover, Dr. Maruyama provided a proper analysis of the factual and medical history and findings on examination and reached conclusions regarding appellant's condition which comported with this analysis. He included medical rationale for his opinion that the work injury resulted in only a temporary aggravation to the preexisting degenerative changes at the dorsolumbar spine when the strain was sustained and that the temporary aggravation had ceased and the underlying degenerative changes in the dorsolumbar spine have returned to baseline pathology and has continued its normal progression with the aging process. Dr. Maruyama explained that there were no objective findings of an active residual from the acute dorsolumbar spine as no muscle spasms were present, there was a satisfactory range of motion given appellant's stature, straight leg raising was negative and there was no evidence of any neurologic deficit. He further reasoned that as appellant's current complaints were similar to the ones described to earlier examiners, appellant's degenerative process had progressed to an ankylosing spondylosis in the lower dorsal spine given its normal progression with the aging process and the fact that the record contained little, if any, objective findings.

Appellant offered no response to the Office's proposed termination of compensation. A September 13, 1999 treatment note from Dr. Terry reported an assessment of chronic back pain and lumbosacral strain. However, Dr. Terry failed to provide any medical rationale or statement to causally relate the strain to appellant's work injury of August 15, 1989.

The Board notes that as the weight of the medical evidence has been afforded the referee specialist, Dr. Maruyama, the September 13, 1999 treatment note from Dr. Terry is insufficient to overcome the weight of Dr. Maruyama's reports. Dr. Terry's treatment note is of limited probative value on the relevant issue because it does not contain adequate medical rationale in support of an opinion on causal relationship[6] or to support a work-related condition or disabling residuals. Accordingly, Dr. Maruyama's opinion that only a temporary aggravation of appellant's underlying degenerative joint disease of the dorsolumbar spine had long ago resolved and has continued its normal progression with the aging process still constitutes the weight of the medical evidence.

In a letter dated October 13, 1999, appellant's attorney advised that the Office was relying on a one time examination, in which the physician indicates that there are no objective findings during that one examination to support appellant's pain. The attorney argued that Dr. Terry offers objective findings to support appellant's condition and this is what the Office should rely on along with the opinions of physicians previously of record. As Dr. Maruyama's opinion is sufficiently well rationalized and based upon a proper factual background, it is given the special weight accorded to an impartial medical specialist.[7] Furthermore, as the statement of accepted facts provided to Dr. Maruyama is consistent with the facts of this case, he had a proper factual background upon which to render his opinion.

[6] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (finding that a medical opinion not fortified by medical rationale is of little probative value).

[7] *Rosie E. Garner*, *supra* note 5.

Accordingly, the Board finds that Dr. Maruyama's opinion is sufficient to meet the Office's burden of proof in terminating appellant's compensation.

The Board further finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim.

Under 20 C.F.R. § 10.606(b), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a point of law, by advancing a relevant legal argument not previously considered by the Office, or by submitting relevant and pertinent evidence not previously considered by the Office.[8] 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.[9] 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. Evidence that does not address the particular issue involved does not constitute a basis for reopening a case.

Appellant's May 18, 2000 request for reconsideration did not show that the Office erroneously applied a point of law, nor did it advance a point of law not previously considered by the Office. Although appellant's attorney argued that the Office erred in affording determinative weight to Dr. Maruyama's opinion, this argument was previously considered and did not add anything new. Copies of chart notes from Dr. Terry dated November 1998 through April 24, 2000, were provided along with a November 4, 1998 check and mark form from him. Chart notes dated November 1998 through September 20, 1999, along with the November 4, 1998 check and mark form from Dr. Terry are duplicate of evidence already in the case record and, therefore, has no evidentiary value and does not constitute a basis for reopening a case.[10] Although chart notes covering the period October 12, 1999 through April 24, 2000, are considered new evidence, this evidence is considered to be of a cumulative nature no new information or argument is contained in the documentation of appellant's various medical clinic visits.[11]

The Office properly noted that the record contained physical therapy reports and discharge summary for the period from September 21 through October 6, 1999. The treatment notes from appellant's physical therapist are of no probative value because a physical therapist is not a physician under the Act and, therefore, is not competent to give a medical opinion.[12] Accordingly, these reports would have no weight in determining whether or not appellant has any continuing injury-related residuals.

[8] 20 C.F.R. § 10.606(b) (1999).

[9] 20 C.F.R. § 10.608(b) (1999).

[10] *Jerome Ginsberg*, 32 ECAB 31 (1980).

[11] *Id.*

[12] 5 U.S.C. § 8101(2); *see also Jerre R. Rinehart*, 45 ECAB 518 (1994); *Barbara J. Williams*, 40 ECAB 649 (1989); *Jane A. White*, 34 ECAB 515 (1983).

Because appellant has failed to submit any new relevant and pertinent evidence not previously reviewed by the Office and further failed to raise any substantive legal questions, the Office acted within its discretion by refusing to reopen appellant's claim for review of the merits.

The July 14, 2000 and October 15, 1999 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
March 20, 2002

Michael J. Walsh
Chairman

Alec J. Koromilas
Member

David S. Gerson
Alternate Member