U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICKY T. ROBINSON and U.S. POSTAL SERVICE,
POST OFFICE, Tacoma, WA

Docket No. 01-948; Submitted on the Record;
Issued November 27, 2002

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant met his burden of proof to establish that he sustained a recurrence of total disability during the period May 11, 1995 to March 1, 1996; and (2) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

On March 6, 1995 appellant, then a 40-year-old distribution clerk, sustained a left cervical strain and a left shoulder strain when he reached for a small package at work.[1] In May 1994, appellant began working in a limited-duty position on a full-time basis which involved no lifting more than 25 pounds, no overhead work and minimal reaching overhead. The position required separating mail, removing strings and rubber bands from mail and turning mail around. In April 1995, appellant began working in a less physically demanding limited-duty position which involved patch-up work (sitting in a chair and repairing torn mail with tape) and flip-flop or facing work (sitting in chair and using his right arm to turn mail around). The position did not require lifting more than 15 pounds or repetitive left shoulder or neck movements.[2]

Appellant alleged that he sustained a recurrence of total disability during the period May 11, 1995 to March 1, 1996 due to his March 6, 1995 employment injury. By decision dated

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[1] Appellant sustained prior employment-related injuries. On February 8, 1993 he sustained cervical and left trapezius strains with cervical radiculopathy. In May 1993, appellant underwent discectomy and fusion surgery at C5-6 and C6-7 which was authorized by the Office. He also underwent a left shoulder acromioplasty in January 1994. On November 7, 1992 he sustained left shoulder, upper back and trapezius strains. The case files for these injuries have been combined into the present case file. In October 1996 and April 1999, appellant received schedule awards for permanent impairment of his left arm. He also sustained an employment-related cervical strain on March 14, 1996, but this injury is not a subject of the current appeal.

[2] The duties of this position were in accordance with restrictions recommended by Dr. Daniel Fife, an attending Board-certified orthopedic surgeon, who did not place any restrictions on appellant for engaging in repetitive wrist motion or grasping and releasing objects with his hands.

March 11, 1996, the Office denied appellant's claim on the grounds that he did not submit sufficient medical evidence in support thereof.[3] By decision dated February 4, 2000, the Office affirmed its March 11, 1996 decision and, by decision dated September 26, 2000, the Office denied appellant's request for a merit review.

The Board finds that appellant did not meet his burden of proof to establish that he sustained a recurrence of total disability during the period May 11, 1995 to March 1, 1996.

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he cannot perform such light duty. As part of this burden the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the limited-duty job requirements.[4]

Appellant did not submit sufficient medical evidence to establish that he sustained a recurrence of total disability during the period May 11, 1995 to March 1, 1996.

Appellant submitted reports dated June 20, 1995 in which Dr. Murray Rouse, an attending osteopath, diagnosed degenerative joint disease of his cervical spine and a cervical strain related to his March 6, 1995 employment injury. He stated that appellant had been off work that week because of a flareup of pain to his left neck and shoulder area. Dr. Rouse indicated that he had not examined appellant and stated, "[appellant] will remain off work this week and return to light duty on Monday." This report, however, does not support appellant's claim, in that, Dr. Rouse did not provide a clear opinion that appellant sustained a recurrence of total disability due to his March 6, 1995 for any period between May 11, 1995 and March 1, 1996.[5] Rather, Dr. Rouse appears to have merely reported that appellant stopped work for a period due to his self-reported symptoms.[6]

In a report dated September 11, 1995, Dr. Rouse stated that appellant asked him to provide a note regarding his limited-duty status. He noted that he had not examined appellant on that date. In a note dated September 11, 1995, Dr. Rouse indicated that appellant could perform limited-duty work but that he could not lift more than 15 pounds, engage in patch-up work, carry or throw mail or perform repetitive left shoulder and neck motions. In a report dated

[3] By decisions dated April 10 and 13, 1998, the Office denied appellant's requests for merit review of its March 14, 199 decision.

[4] *Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

[5] *See Charles H. Tomaszewski*, 39 ECAB 461, 467-68 (1988) (finding that medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

[6] In reports dated May 30, 1995, Dr. Rouse indicated that appellant had a history of degenerative joint disease of his cervical spine and a cervical strain related to his March 6, 1995 employment injury. He noted that appellant could return to limited-duty work on May 31, 1995. Dr. Rouse did not, however, clearly indicate that appellant was totally disabled for any period.

September 26, 1995, Dr. Rouse noted that appellant reported injuring himself on March 6, 1995 by pulling packages out of a hamper. He stated that an examination revealed that appellant had limited range of motion in his neck. Dr. Rouse noted that it was more reasonable than not that the March 6, 1995 injury resulted in a reexacerbation of appellant's left neck and shoulder strains. He stated that "continued full duty at the [employing establishment] under the given circumstances will only reexacerbate his problem" and again recommended that appellant perform limited-duty work which did not require lifting more than 15 pounds, engaging in patch-up work, carrying or throwing mail or performing repetitive left shoulder and neck motions. In a report dated September 29, 1995, Dr. Rouse provided a similar assessment of appellant's condition.

In these reports, Dr. Rouse indicated that appellant was totally disabled for various periods between May 11, 1995 and March 1, 1996 due to his March 6, 1995 employment injury. However, his opinion is of limited probative value for the reason that it is not based on a complete and accurate factual and medical history.[7] Dr. Rouse indicated that appellant's limited-duty work, including his patch-up duties, required him to lift more than 15 pounds, carry and throw mail and perform repetitive left shoulder and neck motions. However, the record clearly shows that appellant's limited-duty did not require him to perform such physical actions.[8] The patch-up work of appellant's limited-duty position involved sitting in a chair and repairing torn mail with tape and flip-flop or facing work required sitting in chair and using his right arm to turn mail around.[9] Moreover, he did not provide an accurate and complete history of appellant's March 6, 1995 employment injury, left cervical and left shoulder strains. Dr. Rouse indicated that appellant injured himself by pulling a number of packages out of a hamper; however, the record reveals that appellant injured himself when he reached for one small package. His opinion is of limited probative value for the further reason that he did not provide sufficient medical rationale explaining how appellant's employment-related soft-tissue injury could have worsened to the point that he was totally disabled after May 11, 1995. In essence, Dr. Rouse's opinion appears to be based more on appellant's reported subjective symptoms than on objective findings on examination and diagnostic testing.

In a form report dated February 6, 1996, Dr. Rouse indicated that appellant could only work for 4 hours per day and that he could not lift more than 20 pounds or engage in repetitive use of his left arm. In a report dated April 10, 1996, he stated that appellant could not engage in "repetitive activity such as patch-up or flip-flop." With respect to appellant's claim of total disability for the period May 11, 1995 to March 1, 1996, these reports are deficient for the same reasons as the previous reports of Dr. Rouse. These reports were not based on a complete and accurate factual and medical history in that Dr. Rouse continued to suggest that appellant was

[7] *See William Nimitz, Jr.*, 30 ECAB 567, 570 (1979) (finding that a medical opinion on causal relationship must be based on a complete and accurate factual and medical history).

[8] Appellant asserted that he was required to work beyond his restrictions, but the record does not contain any evidence supporting this assertion.

[9] These duties did not require lifting more than 15 pounds or performing repetitive left shoulder or neck motions.

required to perform such duties as lifting more than 15 pounds and performing repetitive left shoulder and neck motions in his limited-duty position.[10] Moreover, Dr. Rouse did not explain how appellant's condition had worsened such that he was no longer able to perform his limited-duty work.[11]

For these reasons, appellant did not meet his burden of proof to establish that he sustained a recurrence of total disability during the period May 11, 1995 to March 1, 1996

The Board finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[12] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.[13] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his application for review within one year of the date of that decision.[14] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[15]

In support of his August 27, 2000 reconsideration request, appellant argued that he was required to work beyond his restrictions by performing patch-up and flip-flop work in his limited-duty job. However, he has already made this argument and the Office has previously rejected it. The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[16] Appellant also submitted a November 15, 1999 of Dr. Rouse, but the report does not contain any opinion on his disability during the period May 11, 1995 to March 1, 1996. Therefore, the report is not relevant to the main issue of the present case, *i.e.*, whether appellant submitted sufficient probative medical evidence to establish that he sustained a recurrence of total disability during

[10] In a report dated January 24, 1996, Dr. Rouse indicated that appellant reported his job required repetitive left arm movement and lifting more than 15 pounds.

[11] In an undated form report, Dr. Michael S. McManus, an attending physician Board-certified in preventive medicine, indicated that appellant could not engage in repetitive of "forceful" use of his left shoulder or arm between July 19 and 26, 1995. However, Dr. McManus did not indicate that appellant's work restrictions were necessitated by an employment-related condition.

[12] Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[13] 20 C.F.R. §§ 10.606(b)(2).

[14] 20 C.F.R. § 10.607(a).

[15] 20 C.F.R. § 10.608(b).

[16] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

the period May 11, 1995 to March 1, 1996. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[17] Appellant also submitted reports of physicians assistants, but such reports of nonphysicians would not constitute probative medical evidence and, therefore, would not be relevant to the main issue of the present case.[18]

In the present case, appellant has not established that the Office abused its discretion in its September 26, 2000 decision by denying his request for a review on the merits of its February 4, 2000 decision under section 8128(a) of the Act, because he did not to show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or submit relevant and pertinent new evidence not previously considered by the Office.

The decisions of the Office of Workers' Compensation Programs dated September 26 and February 4, 2000 are affirmed.

Dated, Washington, DC
November 27, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[17] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

[18] *See Bertha L. Arnold*, 38 ECAB 282, 285 (1986); 5 U.S.C. § 8101(2).