U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CARLOS A. BASMAYOR and U.S. POSTAL SERVICE,
POST OFFICE, Van Nuys, CA

Docket No. 01-2258; Submitted on the Record;
Issued October 1, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation and medical benefits effective January 14, 2000 on the grounds that he had no further disability for work or injury residuals requiring further medical treatment; and (2) whether the Office properly denied appellant's request for further consideration of his case on its merits under 5 U.S.C. § 8128(a).

The Office accepted that on May 23, 1992 appellant, then a 40-year-old letter carrier, sustained a lumbar strain while lifting a tray of flats into a gurney. He received appropriate compensation benefits and was able to return to limited duty with activity restrictions and lifting limits on May 24, 1992.[1] Periodic medical reports were submitted detailing appellant's conditions and treatment.

In 1997 the Office determined that a second opinion examination was required on appellant's back sprain injury and referred appellant to Dr. Ibrahim Yashruti, a Board-certified orthopedic surgeon. On October 23, 1997 he reviewed the record, examined appellant, noted that he exhibited signs of exaggeration or magnification and opined, in a well-rationalized opinion, that there were no objective findings to support continued work-related disability, that appellant's current condition was not work related and that he was not disabled for work. Dr. Yashruti indicated that appellant could work eight hours per day with restrictions related to nonwork-related conditions.

However, appellant's attending physician, Dr. Jacob E. Tauber, a Board-certified orthopedic surgeon, stated in multiple 1999 reports that appellant continued to be temporarily

[1] Appellant had an additional claim accepted for a neck injury, No. 13-1132948.

totally disabled due to his work-related injury[2] and required further medical treatment. He continued to report positive physical examination results.

The Office then determined that a conflict in medical evidence existed between appellant's treating physician and the Office second opinion specialist,[3] on whether appellant remained disabled for work due to his lumbar strain condition and on whether he required further medical treatment for his injury-related condition. In an effort to resolve the conflict the Office referred appellant, together with a statement of accepted facts, questions to be addressed and the case record, to Dr. Eugene Loopesko, a Board-certified orthopedic surgeon.

By report dated September 14, 1999, Dr. Loopesko reviewed appellant's factual and medical history, reported his present symptoms and current examination results, noted that Waddell's signs were strongly positive and concluded that there were no disabling objective findings of an orthopedic nature relating to the May 1992 injury. He opined that appellant "should have recovered a long time ago from the injury of 1992 and the complaints and findings at this time must be explained on another basis." Dr. Loopesko indicated that appellant's complaints and findings of disability were not explainable on an anatomic basis and were not related to residuals of the 1992 injury; he diagnosed "probable traumatic neurosis with manifestations in low back and cervical region" and he recommended that appellant be referred for a psychiatric examination. Dr. Loopesko opined that further treatment would lie in the psychiatric field and he also noted that appellant had no limitations for work from an orthopedic standpoint, causally related to his 1992 lumbar strain condition. He indicated that appellant could work eight hours per day.

On November 8, 1999 appellant was referred, together with a statement of accepted facts, questions to be addressed and the relevant case record, to Dr. Eric Lifshitz, a Board-certified psychiatrist and neurologist. He reviewed appellant's factual and medical history, reported examination and testing results and found no psychiatric condition present at the time of his examination.

By notice dated December 13, 1999, the Office advised appellant that it proposed termination of his compensation and medical benefits on the grounds that he had no further disability for work nor injury residuals requiring further medical treatment. The Office explained that this determination was based upon the weight of the medical evidence and advised appellant that if he disagreed with the proposed action he had 30 days within which to submit further evidence supporting continued disability or the need for further medical treatment.

Appellant submitted additional reports from Dr. Tauber restating his opinion and a pain management report indicating that appellant had a tender lumbar region.

[2] Diagnosed as L4-5, L5-S1 disc protrusions and chronic lumbosacral sprain with degenerative changes of the lumbar spine.

[3] A second opinion specialist in appellant's neck injury claim had also opined that he had no further objective findings to support continued disability.

By decision dated January 14, 2000, the Office finalized its proposed termination of all benefits. It determined that the evidence received, in response to the proposed termination, was repetitive and insufficient to overcome the weight accorded the report of the impartial medical examiner and that it failed to establish injury-related continuing disability or the need for medical treatment.

Appellant disagreed with the decision and he requested an oral hearing. A hearing was held on June 28, 2000 at which appellant testified. He also submitted further medical evidence from Dr. Tauber and Dr. Michael S. Cann, a Board-certified orthopedic surgeon,[4] an August 30, 1999 report from the pain management clinic Dr. Nabil S. Dahi, an anesthesiologist[5] and several radiology reports.[6] Appellant testified that he still suffered from the pain he experienced when he was first injured and that he was getting worse. Following the hearing, appellant submitted June 10 and 12, 1998 reports from Dr. Jack L. Vandernoot, a Board-certified orthopedic surgeon,[7] March 9 and May 30, 2000 reports from Dr. Mikael M. Purne, a Board-certified orthopedic surgeon[8] and a January 12, 2000 duty status report from Dr. Tauber.

By decision dated September 19, 2000, the hearing representative affirmed the January 14, 2000 decision finding that the report of Dr. Loopesko still constituted the weight of the medical evidence. The hearing representative found that no injury-related psychiatric diagnosis was established, that Dr. Tauber was on one side of the conflict in opinion that was resolved by Dr. Loopesko, such that additional medical reports stating the same general things were insufficient to create a new conflict, that radiology reports demonstrate multiple nonaccepted conditions and that Dr. Vandernoot's impartial medical report was requested in relation to a conflict in appellant's neck injury case No. 13-1132948.

In a letter dated October 9, 2000, appellant requested reconsideration of the September 19, 2000 decision. In support he submitted another copy of the October 23, 1998 report from Dr. Cann that had been previously submitted and considered on its merits for the September 19, 2000 decision.

By decision dated November 2, 2000, the Office declined to reopen appellant's case for further review on its merits. The Office indicated that the evidence submitted in support of the request was repetitious and, therefore, insufficient to warrant reopening of the case for further merit review.

---

[4] Dr. Cann found lumbar spine discogenic disease with left radiculopathy and discussed treatment.

[5] Dr. Dahi merely discussed appellant's chronic pain and proposed treatment.

[6] The radiology reports diagnosed degenerative disc disease of the lumbar spine.

[7] Appellant also submitted a May 20, 1998 letter from the Office directing him to appear for an examination by Dr. Vandernoot to resolve a conflict in medical opinion. Dr. Vandernoot addressed appellant's accepted neck condition. He diagnosed cervicothoracic strains with left upper extremity radiculopathy and mentioned lumbar strain by history only.

[8] Dr. Purne found low back pain with radiculopathy, recommended physical therapy, did not find that he could help appellant, and did not address causal relation.

The Board finds that appellant had no further disability for work or injury residuals requiring further medical treatment after January 14, 2000.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[9] After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[10] Further, the right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for wage loss.[11] To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition that require further medical treatment.[12] The Office has met its burden to terminate both in this case.

In this case, appellant's treating physician, Dr. Tauber, supported appellant's continued disability for work and the need for further medical treatment due to several unaccepted medical conditions including multiple level lumbar discogenic disease with radiculopathy, dextroconvex scoliosis and multi-level minimal disc protrusions. Drs. Cann, Purne, Vandernoot and Dahi, all addressed these conditions and their treatment and did not discuss causal relation of any of appellant's symptoms with his 1992 lumbar muscular strain. They all failed to identify any lumbar strain injury-related residuals or explain the need for any further medical treatment for the 1992 lumbar strain.

The Office's second opinion specialist, Dr. Yashruti, however, thoroughly examined and tested appellant and opined, based upon the results and upon an accurate factual and medical history, that he had no lumbar strain-related objective findings to support continued work-related disability and needed no further medical treatment for residuals of his work-related muscular injury. Therefore, a conflict in medical opinion arose between appellant's treating physicians and the Office second opinion specialist, Dr. Yashruti on the issues of whether appellant had further injury-related disability for work or had injury-related residuals requiring further medical treatment.

The Federal Employees' Compensation Act, at 5 U.S.C. § 8123(a), in pertinent part, provides: "If there is a 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."

In this case, appellant was properly referred to such an impartial medical specialist, Dr. Loopesko, who, on the basis of a proper factual and medical background, opined in a

[9] *Harold S. McGough*, 36 ECAB 332 (1984).

[10] *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

[11] *Marlene G. Owens*, 39 ECAB 1320 (1988).

[12] *See Calvin S. Mays*, 39 ECAB 993 (1988); *Patricia Brazzell*, 38 ECAB 299 (1986); *Amy R. Rogers*, 32 ECAB 1429 (1981).

thorough and well-rationalized opinion based upon his own physical examination findings, that appellant had probable traumatic neurosis, but had no further lumbar strain injury-related disability for work or injury-related residuals requiring further orthopedic medical treatment.

Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.[13] In this case, Dr. Loopesko's thorough and well-rationalized medical report, based upon a proper factual and medical background, was entitled to that special weight and, therefore, constituted the weight of the medical evidence.

Thereafter appellant submitted further reports from Dr. Tauber which reiterated his opinions.

The Board has held that an additional report from appellant's physician, which essentially repeated his earlier findings and conclusions, is insufficient to overcome the weight accorded to an impartial medical examiner's report where appellant's physician had been on one side of the conflict in medical opinion that the impartial medical examiner resolved.[14] As Dr. Tauber was on one side of the conflict in opinion that was resolved by Dr. Loopesko, additional medical reports from Dr. Tauber stating the same general things were insufficient to overcome the weight of the impartial medical examiner's opinion or to create a new conflict.

Dr. Loopesko had recommended that any further treatment of appellant be in the realm of psychiatric evaluation, but an evaluation by Dr. Lifshitz resulted in no psychiatric diagnosis for appellant and no recommendation of further psychiatric care. Therefore, the Board cannot accept that appellant sustained any injury-related consequential psychiatric diagnosis.

Appellant submitted further reports in support of his request for a hearing from Drs. Cann, Dahi and Purne, none of whom identified any lumbar strain injury-related disability or residuals requiring further orthopedic treatment and in fact, they diagnosed other conditions not accepted by the Office as being injury related. Therefore, their reports are not probative regarding the issues in this case. The reports from Dr. Vandernoot addressed appellant's neck condition and were not obtained with regard to appellant's lumbar strain condition or any conflict in medical opinion arising therefrom; he diagnosed lumbar strain by history only and not by present objective symptomatology. His reports, therefore, are also not probative with regard to the issues in this case.

Appellant also submitted multiple radiologic analyses which diagnosed several spinal degenerative conditions, but no ongoing lumbar strain condition. As these reports did not discuss causal relation of the degenerative spinal conditions with the 1992 lumbar strain injury, and did not provide rationalized opinions regarding whether appellant continued to have injury-related disability or residuals, they have no probative value and are not relevant to the issues in this case.

[13] *Aubrey Belnavis*, 37 ECAB 206, 212 (1985).

[14] *Thomas Bauer*, 46 ECAB 257 (1994); *Virginia Davis-Banks*, 44 ECAB 389 (1993).

The weight of the medical evidence, therefore, remains the well-rationalized report of Dr. Loopesko, which establishes that appellant has no further lumbar strain injury-related disability for work or injury-related residuals requiring further medical treatment.

The Board further finds that the Office properly denied appellant's request for further consideration of his case on its merits under 5 U.S.C. § 8128(a).

To require the Office to reopen a case for reconsideration under 5 U.S.C. § 8128(a), section 10.606(b)(1), (2) of the Office's implementing regulations requires as follows:

> "(b) The application for reconsideration, including all supporting documents, must:
>
> (1) Be submitted in writing;
>
> (2) Set forth arguments and contain evidence that either:
>
> (3) Shows that [the Office] erroneously applied or interpreted a specific point of law;
>
> (4) Advances a relevant legal argument not previously considered by [the Office]; or
>
> (5) Constitutes relevant and pertinent new evidence not previously considered by [the Office]."[15]

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[16] The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Federal Employees' Compensation Act.[17] When a claimant fails to meet one of the standards contained in section 10.606(b), the Office will deny the application for reconsideration without reopening the case for review on the merits.[18]

In support of his reconsideration request, appellant submitted a duplicate copy of Dr. Cann's October 23, 1998 report which had been previously considered by the Office on its merits for the September 19, 2000 decision. As this evidence had been previously considered, it did not constitute relevant and pertinent new evidence not previously considered and was, therefore, insufficient to warrant reopening appellant's case for further review on its merits under 5 U.S.C. § 8128(a).

---

[15] 20 C.F.R. § 10.606(b)(1), (2).

[16] 20 C.F.R. § 10.607(a).

[17] *Diane Matchem*, 48 ECAB 532 (1997); *Jeanette Butler*, 47 ECAB 128 (1995); *Mohamed Yunis*, 46 ECAB 827 (1995); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[18] 20 C.F.R. § 10.608(b).

The Office found, therefore and the Board now agrees, that this evidence does not constitute a basis for reopening a claim for further merit review.

In the present case, appellant has not established that the Office abused its discretion by denying his request for review of its September 19, 2000 decision.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated November 2 and September 19, 2000 are hereby affirmed.

Dated, Washington, DC
October 1, 2002

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member