U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CALVIN L. LOVETT and U.S. POSTAL SERVICE, POST OFFICE, Fort Worth, TX

Docket No. 02-869; Submitted on the Record; Issued October 10, 2002

DECISION and ORDER

Before COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issues are: (1) whether appellant had a condition or disability after December 31, 1991 causally related to the June 14, 1991 employment injury; and (2) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for reconsideration.

This case is on appeal for the fourth time. On June 14, 1991 appellant, then a 41-year-old postal clerk sustained a back injury when he lifted a 50-pound parcel from a hamper in the performance of duty. On July 5, 1991 the Office accepted the claim for lumbar strain. Appellant returned to work on August 15, 1991, however he later stopped work. By decision dated September 25, 1991, the Office terminated appellant's monetary and medical benefits effective August 15, 1991. The Office found that the weight of the medical evidence established that appellant was no longer disabled due to the June 14, 1991 injury. Several appeals later, involving appellant's entitlement to compensation,[1] the Board addressed the issue of whether appellant had any continuing disability after August 15, 1991 causally related to his June 14, 1991 employment injury. In a decision dated February 13, 1995, the Board remanded the case to the Office for further development of the medical evidence.[2]

On remand, the Office developed the medical record further and, in a decision dated October 18, 1995 found that appellant's June 14, 1991 employment injury resolved no later than December 31, 1991. In a decision dated July 12, 1999 the Board remanded the case for further

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[1] Appellant requested an oral hearing of the September 25, 1991 decision and an Office hearing representative affirmed the prior decision on April 28, 1992. He disagreed with the decision and filed numerous requests for reconsideration. By decisions dated July 14 and September 10, 1992, the Office denied modification of the April 28, 1992 decision. By decision dated May 26, 1993, the Office denied appellant's application for review. On July 1, 1993 appellant requested review by the Board.

[2] Docket No. 93-2038.

development of the medical evidence.[3] The Board found that the medical evidence was insufficient to establish that appellant's injury resolved within six months. It further found that the issue in the case was not limited to lumbar strain as the evidence suggested that a lumbar disc or possible fracture at L4 might be attributed to the employment injury.

On remand, the Office developed the evidence and issued a decision dated December 15, 1999. The Office found that the weight of the medical evidence established that appellant had no condition or disability from work beyond December 31, 1991 related to the June 14, 1991 injury. The Office determined that Dr. Daniel Foster, an osteopath and impartial specialist resolved a conflict in the medical record and determined that there were no objective findings of ongoing back trauma.

In the third appeal of this case, the Board issued a decision on April 2, 2001,[4] which found that a question remained regarding whether appellant had a condition or continued to have residual disability related to the June 14, 1991 employment injury. The Board determined that Dr. Foster was unable to sufficiently explain whether appellant had residuals of the lumbar strain or a possible lumbar fracture causally related to the accepted employment injury. The Board set aside the December 15, 1999 decision and remanded the case for further development.

On remand, the Office referred appellant to Dr. John Strasikowski, a Board-certified orthopedist. In a report dated July 10, 2001, Dr. Strasikowski discussed appellant's history of the injury, medical treatment and current complaints of constant low back pain and also indicated that he previously reviewed appellant's medical records. He discussed that x-rays of the lumbar spine performed in 1995 were reviewed as well as x-rays taken at that time. Dr. Strasikowski noted that appellant's x-rays revealed that the spine was stable, the discs well aligned and the height of the vertebral bodies were well maintained and further that there was a slight increase in the subchondral bone of the L5-S1 facets. On examination, he noted that he found good alignment of the lumbar spine with comfortable range of motion. Dr. Strasikowski further indicated that there was no evidence of muscle spasm, atrophy or dermatomal sensory deficits or edema. He diagnosed history of lumbar strain and lumbar facet arthrosis unrelated to the injury. In response to Office questions posed regarding appellant's back condition, Dr. Strasikowski indicated that there were no clinical or objective findings supportive of a lumbar strain on examination. He further stated that the clinical picture was compatible with generalized facet arthrosis in the lumbar spine and opined that it was not a traumatic or job-related condition. Dr. Strasikowski reiterated that the changes in the bone scan were in his opinion due to the arthrosis. He stated that based on the medical evidence of record and his examination appellant was not disabled from work beyond December 31, 1991 due to the June 14, 1991 injury. Dr. Strasikowski further indicated that the effects of appellant's June 14, 1991 injury ceased after six months or earlier. He reasoned that the injury to the soft tissues such as those which may have been involved, takes at maximum six months to resolve or improve to the point that an individual can return to full-duty work. Dr. Strasikowski also noted that appellant's arthrosis condition was diagnosed at the time of the injury, however, upon

[3] Docket No. 98-462.

[4] Docket No. 00-1009.

review of x-rays taken during his examination, Dr. Strasikowski did not find evidence that the original injury caused any permanent aggravation of the arthritic condition. He indicated that the arthrosis condition also returned to the preexisting status within six months of the injury. Dr. Strasikowski concluded that appellant therefore had no restrictions related to the June 14, 1991 incident.

By decision dated July 24, 2001, the Office denied compensation beyond December 31, 1991 secondary to appellant's June 14, 1991 employment injury. On July 30, 2001 appellant requested reconsideration, contending that he had not medically recovered and still experienced pain on a daily basis. Appellant argued that although he had an excellent work record before, he had not been able to work since his injury. He contended that he had no back problems until the injury and had never been diagnosed with arthritis prior to the injury. Appellant further indicated that he had never received compensation from the Office regarding this injury prior to December 31, 1991 and that he utilized his own health insurance for medical treatment. He submitted a copy of a computerized tomography scan dated May 16, 1997, a diagnostic report of the upper body dated May 7, 1997 and a bone scan dated May 1, 1992, which is previously of record. Appellant also submitted prescription requests, a letter requesting light duty, a medical report from Dr. Brian Rutledge, an internist dated August 26, 1997 and treatment notes from Dr. Rutledge dated from June 21, 1989 to March 19, 2001.

By decision dated September 24, 2001, the Office denied appellant's request for review of the merits on the grounds that the evidence submitted was found to be of a repetitious nature and insufficient to warrant review. Appellant thereafter filed his fifth appeal with the Board.

The Board finds that appellant had no condition or continuing disability after December 31, 1991, causally related to his June 14, 1991 lumbar soft tissue muscular strain injury.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[5] 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.[6] Further, the right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for wage loss.[7] To terminate authorization for medical

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

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

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

treatment, the Office must establish that appellant no longer has residuals of an employment-related condition that require further medical treatment.[8]

The Office referred appellant to Dr. Strasikowski, a Board-certified orthopedist, who examined appellant on July 9, 2001. In his report, he discussed the history of appellant's injury, his medical treatment, subjective complaints and clinical findings and provided an opinion regarding whether appellant had any condition or continuing disability causally related to the June 14, 1991 employment injury. Dr. Strasikowski indicated that clinical findings established that appellant had generalized facet arthrosis-arthritis, unrelated to the employment injury and that changes on the bone scan were related to that condition only. He also found that appellant's injury, one involving soft tissue takes a maximum of six months to resolve or at least improve to the point where the individual can return to full-time work. Dr. Strasikowski also indicated based on clinical findings that appellant's injury did not cause any permanent aggravation of the arthritic condition, which would have also returned to preexisting status within six months of the injury. The report of Dr. Strasikowski constitutes the weight of the rationalized medical evidence because it was based upon a complete factual and medical history and a complete examination of appellant, because it was consistent with examination findings and of reasonable medical certainty and because it was well rationalized and supported by physical evidence noted in the record.[9] Dr. Strasikowsky sufficiently explained how appellant's employment-related injury could have resolved in six months and he provided clinical findings, which were only remarkable for generalized facet arthritis-arthrosis, unrelated to appellant's injury. Accordingly, the Office has discharged its burden of proof to justify termination of appellant's compensation after December 31, 1991.

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

Under section 8128(a) of the Federal Employees' Compensation Act[10] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,[11] which provides that a claimant may obtain review of the merits of the claim by:

> "(i) Showing that the Office erroneously applied or interpreted a specific point of law, or
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> "(ii) Advancing a relevant legal argument not previously considered by the Office, or

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

[9] *See Anna C. Leanza*, 48 ECAB 115 (1996); *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996); *Clara T. Norga*, 46 ECAB 473 (1995).

[10] 5 U.S.C. § 8128(a).

[11] 20 C.F.R. § 10.606(b)(2) (1999).

"(iii) Constituting relevant and pertinent new evidence not previously considered by the Office."

Section 10.608(b) provides that any application for review of the merits of the claim which fails to meet at least one of the standards described in section 10.606(b)(2) will be denied by the Office without reopening the case for a review of the merits.[12]

In the present case, appellant has not shown that the Office erroneously applied or interpreted a specific point of law; he has not advanced a relevant legal argument not previously considered by the Office; and he has not constituted relevant and pertinent new evidence not previously considered by the Office. Although he submitted Dr. Rutledge's August 26, 1997 medical report with his request for reconsideration, this report is cumulative and repetitive of previous reports because it merely states summarily that he treated appellant for back pain due to his disc disease and arthritis. Appellant also submitted treatment notes from the physician beginning in 1989, which discuss appellant's 1991 injury, his severe pain complaints, his history of degenerative disc disease and medication regimen and treatment. Dr. Rutledge's treatment notes, therefore, are not sufficient to establish that the Office erred in finding that appellant no longer had an employment-related condition or continuing disability on or after December 31, 1991 related to the June 14, 1991 employment injury. Thus, appellant's request did not contain any relevant and pertinent new evidence for the Office to review. All the other medical evidence submitted by appellant was either irrelevant or previously of record and considered by the Office in reaching prior decisions. Additionally, appellant's July 30, 1999 letter did not show the Office erroneously applied or interpreted a specific point of law nor did it advance a legal argument not previously considered by the Office. Although he generally contended that he still suffers residuals causally related to the June 14, 1991 employment injury, which requires medical treatment, he failed to submit relevant and pertinent new medical evidence in support of this contention.[13] Therefore, the Office did not abuse its discretion in refusing to reopen appellant's claim for a review on the merits.[14]

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[12] 20 C.F.R. § 10.608(b) (1999).

[13] The Board notes that appellant also argued in his reconsideration request that he did not receive any compensation benefits for his accepted claim prior to December 31, 1991, the date entitlement to benefits was terminated. The record reflects that appellant was advised of the procedure concerning the payment of bills and claims for compensation on the date his claim was accepted. The Office further advised appellant that his 45-day period of continuation of pay would expire on August 6, 1991 and that medical care or disability related to the accepted condition should be claimed by submitting a CA-7 form and appropriate medical evidence.

[14] The Board notes that this case record contains evidence, which was submitted subsequent to the Office's September 24, 2001 decision. The Board has no jurisdiction to review this evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952).

The September 24 and July 24, 2001 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
October 10, 2002

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member