U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DELYNN M. GRUDE and DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, Yellowstone, WY

Docket No. 02-1917; Submitted on the Record;
Issued April 9, 2003

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation; and (2) whether the Office abused its discretion in refusing to reopen appellant's claim for merit review.

Appellant's claim,[1] filed on February 20, 1992 after he hurt his back while operating a snowmobile, was initially accepted for a strain. The Office later accepted aggravation of thoraco-lumbar degenerative disc disease caused by appellant's work duties over a long time. On June 15, 1992 appellant's treating physician, Dr. Lowell M. Anderson, a Board-certified orthopedic surgeon, diagnosed a compression fracture at T11-12 and stated that the aggravation was permanent and that appellant would continue to experience significant limitation and pain.

The Office referred appellant for vocational rehabilitation, but his case was closed on July 29, 1994 due to limited employment prospects. Appellant's application for disability retirement was approved on August 22, 1994.

On March 16, 1998 the Office asked appellant to provide an updated medical report on his condition. Dr. Anderson stated in a May 6, 1998 report that the prognosis was progressive degenerative changes and deterioration. Appellant had relatively good motion and mild limitations of flexion and extension. He should refrain from significant lifting and high-impact activities, with no prolonged sitting or standing.

On November 24, 1999 the Office again asked for an updated medical report. Appellant was referred for vocational rehabilitation[2] and a functional capacity evaluation. Dr. Anderson agreed with the results of the evaluation that appellant could work in light physical demand

[1] Appellant's previous claims included: a March 25, 1987 back injury accepted for sacrococcygeal contusion; July 17 and August 6, 1990 back injuries; and an August 6, 1990 wrist injury.

[2] The file was again closed due to poor employment prospects in appellant's commuting area.

positions, with functional limiting factors of increasing and progressive back pain and tightness as well as a left leg limp.

On June 23, 2000 the Office referred appellant, a statement of accepted facts, the medical evidence and a list of questions to Dr. Boyd Max Iverson, a Board-certified orthopedic surgeon, for a second opinion evaluation. Dr. Iverson concluded in his August 10, 2000 and supplemental November 9, 2000 reports that objective findings and test results were not confirmatory or supportive of appellant's subjective complaints and that there was no real objective evidence to support unequivocally that appellant's employment injuries caused or accelerated his preexisting degenerative disc disease. He added that appellant's degenerative changes over the years were not out of proportion to what would ordinarily be expected with a natural progression of the aging process.

Because Dr. Iverson's opinion conflicted with that of Dr. Anderson that appellant still had residuals of the work injuries, the Office referred appellant to Dr. James R. Burton, a Board-certified orthopedic surgeon, to resolve the conflict.[3] Based on his April 6, 2001 report, the Office issued a notice of proposed termination of compensation on June 11, 2001.

Appellant's attorney disagreed, stating that the opinions of Drs. Iverson and Burton fell short of the evidence provided by Dr. Anderson, who had been treating appellant for more than a decade. On July 13, 2001 the Office terminated appellant's compensation, effective August 11, 2001, on the grounds that he had no residuals of the 1992 injury.

Appellant requested a hearing, which was later changed to a review of the written record. On January 14, 2002 the hearing representative affirmed the termination of compensation, finding that the weight of the medical opinion evidence established that appellant has no further residuals of his work injuries.

By letter dated April 25, 2002, appellant requested reconsideration and submitted reports from Dr. Anderson. The Office denied modification of its prior decision on April 29, 2002.

The Board finds that the Office met its burden of proof in terminating appellant's compensation.

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[4] 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.[5]

In situations where opposing medical opinions on an issue are of virtually equal evidentiary weight and rationale, the case shall be referred for an impartial medical examination

[3] 5 U.S.C. § 8123(a) states in pertinent part: "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."

[4] *Betty Regan*, 49 ECAB 496, 501 (1998).

[5] *Raymond C. Beyer*, 50 ECAB 164, 168 (1998).

to resolve the conflict in medical opinion.[6] The opinion of the specialist properly chosen to resolve the conflict must be given special weight if it is sufficiently well rationalized and based on a proper factual background.[7]

In this case, the Office properly determined that a conflict of medical opinion existed over whether appellant's work-related back strain and aggravation of degenerative disc disease had resolved.[8] Dr. Anderson indicated in his July 20, 2001 report that appellant's degenerative disc disease had progressed over the years since 1992 and that he had had no complaints or symptoms prior to the 1987 back injury. Dr. Anderson concluded that the work-related injuries exacerbated appellant's degenerative disc disease, which was now progressing naturally and contributed to its present level, causing at least a significant proportion of his symptoms. He added: "As to how much of the disc damage was caused by the injuries, one could only speculate."

The second opinion physician, Dr. Iverson, disagreed with Dr. Anderson, stating that the degenerative changes in appellant's spine over the years were not any different than would be expected in the normal aging process, based on a comparison of the 1999 magnetic resonance imaging scan and current x-rays. He found no objective evidence that the employment injuries caused or accelerated the preexisting disc disease and concluded that the work-related aggravation had ceased.

Chosen to resolve the conflict, Dr. Burton diagnosed degenerative disc disease but found no objective signs of a work-related sacrococcygeal contusion, lumbosacral strain, or aggravation of appellant's degenerative disc disease. He stated that residuals of the work injuries had disappeared and aggravation of the preexisting disc disease had reached baseline and the normal progression of the disease. Dr. Burton added: "In other words, the conditions that [appellant] has at this time are normal for someone of his age group." While Dr. Burton found appellant to be disabled from his preinjury job, there was no evidence that this disability was due to a work-related condition. His pain from too much activity stemmed from his preexisting degenerative disc disease and not from the work injuries.

Dr. Burton reviewed the case record, a statement of accepted facts and various reports on appellant's medical treatment since the 1987 and 1992 injuries. He examined appellant thoroughly, discussed the diagnostic testing, explained his clinical findings and provided medical rationale for his conclusion that appellant's work-related strain and aggravation had resolved. Thus, Dr. Burton provided an opinion that was sufficiently well rationalized to support his conclusion that appellant had no residuals of his work injuries. The Board finds that

[6] *Richard L. Rhodes*, 50 ECAB 259, 263 (1999).

[7] *Sherry A. Hunt*, 49 ECAB 467, 471 (1998).

[8] 5 U.S.C. § 8123(a) provides in pertinent part: "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."

Dr. Burton's report represents the weight of the medical opinion evidence and establishes that appellant's accepted work injuries had resolved.[9]

The Board finds that the Office acted within its discretion in refusing to reopen appellant's claim for merit review.

Section 8128(a) of the Federal Employees' Compensation Act[10] vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[11] Thus, the Act does not entitle a claimant to a review of an Office decision as a matter of right.[12]

Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).[13] The application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.[14]

Section 10.608(b) provides that, when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review of the merits.[15]

With his request for reconsideration, appellant submitted April 10, 2002 and July 20, 2001 reports from Dr. Anderson. The latter was considered in the hearing representative's decision and thus is not new medical evidence. Dr. Anderson stated in the former report that prior to appellant's work-related injuries he had no leg or back symptoms. Thereafter, he developed degenerative disc disease and spondylosis. Dr. Anderson agreed that appellant's x-rays and discomfort were consistent with the natural aging process, but opined that the injuries to his discs accelerated the process, resulting in significant symptoms that may not have otherwise developed.

[9] *See Jimmie H. Duckett*, 52 ECAB ___ (Docket No. 99-1858, issued April 6, 2001) (opinion that appellant's back condition was due to the natural progression of his spondylitis was sufficiently rationalized to establish that his work-related back condition had resolved and to meet the Office's burden of proof in terminating compensation).

[10] 5 U.S.C. §§ 8101-8193.

[11] 5 U.S.C. § 8128(a) ("the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application").

[12] *Veletta C. Coleman*, 48 ECAB 367, 368 (1997).

[13] 20 C.F.R. § 10.608(a) (1999).

[14] 20 C.F.R. § 10.606(b) (1)-(2).

[15] 20 C.F.R. § 10.608(b).

Dr. Anderson stated that the Office's question regarding objective evidence was "illogical" and "impossible to answer" because a physician would be "hard-pressed" to determine unequivocally the objective relationship between x-ray findings and symptoms in appellant's spine. He added that Drs. Iverson and Burton noted the possibility of a connection between the work injuries and appellant's degenerative changes. Dr. Anderson concluded that injuries to the back during the course of the natural progression could cause increased damage to the discs that would not have otherwise developed.

The April 10, 2002 report repeats Dr. Anderson's earlier conclusions that appellant's residuals from the 1987 and 1992 injuries had not resolved. The report does not add any new findings or evidence that could offset or counter the opinion of the impartial medical examiner. Thus, this report constitutes cumulative evidence, substantially similar to the documents already considered in terminating appellant's compensation. Therefore, appellant has failed to meet the subsection (iii) requirement of relevant and pertinent new evidence.[16]

Further, appellant has failed to show that the Office erred in interpreting the law and regulations governing schedule awards. Nor has he advanced any relevant legal argument not previously considered by the Office. Inasmuch as appellant failed to meet any of the three requirements for reopening his claim for merit review, the Office properly denied his reconsideration request.[17]

The April 29 and January 14, 2002 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
April 9, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

[16] *See Eugene L. Turchin*, 48 ECAB 391, 397 (1997) (finding that appellant's failure to submit new and relevant evidence on reconsideration justified the Office's refusal to reopen his case for merit review).

[17] *See Khambandith Vorapanya*, 50 ECAB 490, 492 (1999) (finding that appellant failed to demonstrate that the Office abused its discretion in denying his request for reconsideration).