U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANTHONY L. MELCHIONNA and U.S. POSTAL SERVICE,
POST OFFICE, Boston, MA

Docket No. 02-564; Oral Argument Held September 10, 2003;
Issued December 17, 2003

Appearances: *Daniel McNeil*, for appellant; *Miriam D. Ozur, Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits effective September 18, 1994; (2) whether appellant had any continuing disability or residuals after September 18, 1994; and (3) whether the Office properly denied appellant's request for reconsideration of the merits of his claim.

This case was previously before the Board.[1] Appellant sustained a work-related injury on May 18, 1980 which the Office accepted for a lumbosacral strain. He returned to work in a light-duty position on September 6, 1980. On June 7, 1983 appellant filed a claim alleging that he injured his back while in the performance of light-duty work. He stopped work on that date and did not return. The Office accepted the condition of low back strain. In an August 23, 1994 decision, the Office terminated appellant's compensation benefits. In a December 14, 1999 decision, the Board affirmed a December 17, 1998 decision of the Office which denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant further merit review. The law and facts of the case, as set forth in the Board's prior decision, are incorporated herein by reference.

Following the Board's December 14, 1999 decision, appellant requested reconsideration. By decision dated February 12, 2001, the Office denied modification of its August 23, 1994 termination decision. In a decision dated November 1, 2001, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was of cumulative nature

[1] Docket No. 99-976 (issued December 14, 1999).

and insufficient to warrant a merit review. As the Office conducted a merit review in its decision of February 12, 2001, the Board has jurisdiction over the merits in this case.[2]

The Board finds that the Office properly terminated appellant's compensation benefits effective September 18, 1994.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[3] 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.[4] Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.[5] To terminate authorization for medical treatment the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.[6]

The Office accepted the condition of a lumbosacral strain sustained on June 7, 1983 and for a lumbosacral strain on May 18, 1980. The evidence of record at the time that the Office terminated compensation included: a May 20, 1980 x-ray report, which showed no spinal fracture or dislocation, a transitional vertebra was present with sacralization and pseudoarthrosis on the left with no interspace narrowing; mild marginal spurring on the third lumbar vertebra; a November 29, 1983 electromyogram (EMG) and nerve conduction study revealed no abnormality; and a May 15, 1985 computerized axial tomography (CAT) report noted a diffuse bulge of the annulus at the L3-4 and L4-5 level with impingement of the neural foramen and degenerative changes in the facet joints and osteophytes, which encroached the lateral recesses.[7]

The contemporaneous medical reports from appellant's treating physician, Dr. Jayasankar dated March 1, 1993 to July 28, 1994 addressed the condition of appellant's lumbosacral spine, which was noted to have a loss of lumbar lordosis. Although her periodic reports supported total disability, she cited few physical findings to support a finding of temporary total disability to a lumbosacral strain of either 1980 or 1983. The periodic reports further failed to explain how the degenerative disease process was caused or aggravated by the accepted work injuries.

[2] The Board only has Jurisdiction over those issues decided by the Office within one year from the date of appellant's appeal. 20 C.F.R. 501.3(d)(2).

[3] *Lawrence D. Price*, 47 ECAB 120 (1995).

[4] *Id; see Patricia A. Keller*, 45 ECAB 278 (1993).

[5] *Furman G. Peake*, 41 ECAB 361, 364 (1990).

[6] *Id.*

[7] An August 10, 1983 progress report from Dr. Premala Jayasankar, an orthopedic surgeon, noted that x-rays of the lumbosacral spine revealed partial lumbarisation of S1. Degenerative joint disease with traction spurs, especially at L4-5.

In an August 12, 1992 fitness-for-duty examination, Dr. Manoucher Shirazi found no low back muscle spasm and an inconsistent straight leg raising examination. He found that appellant was not totally disabled, but capable of performing limited duty.

To obtain an updated examination of appellant, the Office referred him to Dr. Louis Meeks, a Board-certified orthopedic surgeon, for a second opinion. In a February 21, 1994 report, he reviewed appellant's history of injury injuries and medical treatment. After examining appellant and the medical evidence of record, Dr. Meeks diagnosed chronic cervical spondylosis without myelopathy and degenerative disc disease with chronic lumbar arthrogenic low back pain without radiculopathy. He opined that appellant's lumbosacral back sprain on June 7, 1983 would have resolved within one year, at which point appellant would have returned to his preinjury level. Dr. Meeks further opined that the positive objective findings of decreased range of motion of the neck was secondary to degenerative disc disease and a preexisting cervical spondylosis and was not attributable to his work injuries. He opined that appellant's marked limitation of motion of the low back, with mild to moderate spasms and positive straight leg raising was related to the degenerative condition in his back and, perhaps, to a mild spinal stenosis. Dr. Meeks opined that the degenerative spondylosis of the lumbar spine and cervical spine were preexisting conditions. He opined that appellant's permanent work restrictions were due to degenerative spondylosis, which resulted in stiffhess and limitation of motion, but was not related to the work injury. Dr. Meeks concluded that appellant had reached an end result with respect to the work injury of June 7, 1983, one year following the injury. In a report of April 1, 1994, he advised that his opinion regarding degenerative spondylosis was based on the fact that the intervertebral discs start to degenerate and lose water content by age 20, which result in decreased intervertebral disc space height and associated subluxation of the posterior facets. Dr. Meeks stated that appellant was 54 years old and that degeneration, by definition, meant wear and tear and not an acute traumatic incident. He advised that, although he did not see appellant on June 7, 1984 his opinion that appellant's back strain had resolved within one year following the June 7, 1984 work injury was based on his experience as a Board-certified orthopedic surgeon treating lumbosacral strains, his experience that soft-tissue injuries heal within one year and upon the orthopedic literature.

In assessing medical evidence, the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of the analysis manifested and the medical rationale expressed in support of the physician's opinion are facts which determine the weight to be given each individual report.[8]

The Board finds that the second opinion reports of Dr. Meeks were based upon a detailed and accurate factual and medical history and objective findings on examination. He provided a well-rationalized opinion regarding causality of appellant's current back condition and his opinion represented the weight of the medical evidence. The Board, therefore, finds that the weight of the medical evidence at the time of termination was properly based on the well

[8] *See Connie Johns*, 44 ECAB 560 (1993).

rationalized reports from Dr. Meeks and the Office properly terminated appellant's compensation benefits effective September 18, 1994.

The Board finds that appellant did not establish any continuing disability causally related to his accepted employment injuries after September 18, 1994.

As the Office met its burden of proof to terminate appellant's compensation benefits, the burden shifted to appellant to establish that he had disability causally related to his accepted injury.[9] To establish a causal relationship between the condition, as well as any attendant disability claimed and the employment injury, an employee must submit rationalized medical evidence, based on a complete factual and medical background, supporting such a causal relationship.[10]

In a report dated September 13, 1994, Dr. Jayasankar noted that appellant had been treated in her office since August 11, 1980. She advised that he sustained a chronic low back strain with traumatic arthritis of the lumbosacral spine and a left shoulder soft-tissue strain, with rotator cuff injury. Dr. Jayasankar opined that appellant remained totally disabled due to these conditions. She opined that both the conditions and disability resulted from the injuries sustained by appellant on May 16, 1980 while lifting a sack of mail, a shoulder injury in 1979 and a further low back injury at work on June 7, 1983. The Board finds that Dr. Jayasankar failed to provide a well-rationalized medical opinion addressing how appellant's current conditions and disability were causally related to his soft-tissue employment injuries. She provided no explanation addressing how appellant's arthritic condition of the lumbosacral spine developed due to the accepted injuries. Absent these explanations with objective findings, the Board finds that Dr. Jayasankar' s opinion is of diminished probative value.[11]

In a January 26, 1995 report, Dr. Dewitt C. Brown, an orthopedic surgeon, advised that he saw appellant on three occasions, once in late 1994 and twice in January 1995. Following a review of his notes, together with various medical reports from appellant's file, Dr. Brown indicated that prior to 1983 appellant had no history of low back discomfort. The work injury of 1983 was described as appellant noting the onset of low back pain while lifting a sack of mail and falling from a swivel chair sustaining trauma to his back. Dr. Brown diagnosed a low back pain syndrome, tight hamstrings with generalized deconditioning as well as a right shoulder impingement syndrome. He opined that, as it was 10 years after the accepted injury, it was medically impossible to separate the degenerative changes and the discomfort associated with degenerative disease from appellant's injury. Dr. Brown noted that appellant had no back discomfort prior to the injuries and the ongoing back discomfort subsequent to the injuries. He opined that even if he was able to implicate a specific episode or degenerative disease as the specific causation, appellant was on an off-duty status for more than 10 years and was unlikely to return to work in any meaningful capacity. Appellant's examination was compatible with

[9] *See George Servetas,* 43 ECAB 424 (1992).

[10] *See Kathryn Haggerty*, 45 ECAB 383 (1994).

[11] *Gary L. Fowler,* 45 ECAB 365 (1994).

decreased range of motion which was compatible with degenerative disease and of deconditioning.

Dr. Brown's finding that appellant's current back condition was causally related to his work injuries is speculative as he stated it was medically impossible to separate the degenerative disease from appellant's injury due to the length of time that had passed.[12] Moreover, Dr. Brown failed to provide an unequivocal opinion regarding the causal relationship between the employment injuries and appellant's degenerative disc disease. His report is of diminished probative value in determining the causal relationship between appellant's condition on or after September 18, 1994 and the employment injuries he sustained on May 16, 1980 or on June 7, 1983. Additionally, Dr. Brown related a new history of injury, specifically a fall from a swivel chair which differs from appellant's allegation on the CA-1 form, which related that he was "putting postage due envelopes in box on floor (sic)." Dr. Brown's opinion is not based on an accurate factual basis and his opinion is of diminished probative value to establish causal relationship.[13]

Appellant also submitted reports from Drs. Robert R. Pennell, a Board-certified orthopedic surgeon, and Dr. Joseph Abate, also a Board-certified orthopedic surgeon, along with a December 13, 2000 letter from the National Association Letter Carriers.

In a June 6, 1995 report, Dr. Pennell noted the history of the work injuries as described by appellant. Appellant related that he was sitting on a chair, leaning far forward trying to put something on the floor with his spine flexed to its maximum. At that moment, appellant's chair slipped out from beneath him and he fell directly on the floor landing on his buttocks, resulting in a forceful flexion of the spine. Dr. Pennell stated that this was a severe forceful injury which would easily convert a condition of spondylosis of the spine to spondylitis. He stated that this process, once set in motion, could not be reversed because of the poor condition of the tissues in appellant's back. Dr. Pennell expressed his disagreement regarding the findings of Dr. Meeks.

In his reports from February 20, 1997 to September 14, 1998, Dr. Pennell attributed the history of injury appellant obtained to a lack of accurate history taken by prior physicians of record and contended that appellant was consistent in relating a history of falling from a swivel chair on June 7, 1983 accepting a lumbosacral strain, the disagreement as to whether or not Dr. Pennell asserted that, because more details regarding the injury had been added over the years, it did not affect the fact that appellant injured his back on June 7, 1983.

Dr. Pennell noted that, although appellant had degenerative changes of the spine, he continued to have residuals of the accepted injury as the fact that his pain had improved over the prior 10 years indicated that appellant had a healing injury and not a progressive degenerative condition. He stated that the degenerative changes were aggravated by the injury of June 7, 1983

[12] *Ricky S. Storms*, 52 ECAB 349 (2001) (while the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, the opinion must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty).

[13] *See Earl David Seal*, 49 ECAB 152, 155 (1997) (finding that medical opinions based on an inaccurate history provided by appellant is insufficient to establish causal relationship).

and the fact that appellant had degenerative changes prevented him from making a full recovery. Dr. Pennell found that appellant continued to be totally disabled as a result of the residuals of the June 7, 1983 injury.

The Board notes that Dr. Pennell diagnosed degenerative spondylitis and opined that appellant sustained a forceful injury to his back that was capable of converting his condition of spondylosis to one of spondylitis.[14] The Board notes that, although Dr. Pennell opined that appellant's underlying degenerative changes were aggravated by the work injury and the forceful nature of the work-injury converted the degenerative spondylosis into a degenerative spondylitis, the physician's opinion is based on an inaccurate history of injury. Medical opinions based on an inaccurate or incomplete history of disability are of diminished probative value.[15] Appellant reported on his CA-1 form that his traumatic injury was caused by "putting postage due envelopes in box on floor (sic)." Dr. Pennell, however, was provided a history by appellant, which significantly differed from what was reported at the time of injury and which served as the basis for the Office's acceptance of his lumbosacral strain. Appellant reported to Dr. Pennell, who did not have the benefit of the statement of accepted facts, that his injury was caused when a chair slipped from beneath him and he fell directly on the floor. The Board finds that the opinion of Dr. Permell is not based on an accurate factual history and is of diminished probative value.

In his December 8, 2000 report, Dr. Abate noted a history that appellant was performing light duty on the basis of a previous unrelated work injury and injured his low back when he bent to deposit a postage due letter in a box under the table while sitting on a swivel chair. He also reported that appellant fell to the floor when the swivel chair spun out from under him. Dr. Abate diagnosed a traumatic aggravation of degenerative disc disease and degenerative lumbar spondylosis. He opined that, on the basis of history, physical examination and review of the submitted medical records, appellant sustained a traumatic injury to his low back at work on June 7, 1983, which caused aggravation of an underlying lumbar spondylosis and disc degeneration to the point of causing permanent restrictions, limitation and disability. Dr. Abate noted that Dr. Meeks found that appellant had an injury at work on June 7, 1983 aggravating the underlying degenerative spondylosis of the lumbar spine, but that the condition resolved within one year. He noted that Dr. Meeks found that appellant had permanent restrictions, due to the degenerative spondylosis and not to the accepted injury. Dr. Abate opined that Dr. Meeks opinion was not within the medically accepted standards of causality and continuation of disability.

The Board finds that as Dr. Abate also relied on a history of appellant falling from a swivel chair. As this history of injury, has not been accepted as factual his opinion is based on an inaccurate history of diminished probative value.[16] He opined that the work injury caused an aggravation of degenerative disc disease and degenerative lumbar spondylosis, but failed to present a well-rationalized explanation of how the work injury could cause these conditions.

[14] *Id*.

[15] *Vaheh Mokhtarians*, 51 ECAB 190 (1999).

[16] *Id*.

Dr. Abates opinion is based on an inaccurate medical history and is devoid of a well-rationalized opinion regarding causal relationship. His report is accorded limited probative value.[17]

The Board finds that appellant has failed to establish that he had disability or residuals after September 18, 1994 was causally related to his accepted employment injuries.

The Board further finds that the Office properly refused to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

Under section 8128(a) of the Federal Employees' Compensation Act,[18] the Office may reopen a case for review on the merits.[19] In accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law, by advancing a relevant legal argument not previously considered by the Office or by submitting relevant and pertinent new evidence not previously considered by the Office.[20] Section 10.608(a) 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.[21]

In a July 17, 2001 reconsideration request, appellant repeated his contention that Dr. Jayasankar mistakenly reported that he was injured while lifting a mail sack, which was an action attributed to his prior injury of May 16, 1980. He stated that he had injured his back a second time while sitting on a swivel chair when he was on limited duty from a previous injury. Dr. Jayasankar advised that he was "cutting out coupons and postage due papers which were to be placed in boxes under [a] table. I bent down to deposit the papers under the table while sitting on a swivel chair and the chair 'spun out.'" Appellant further advised that since he was working at the employing establishment's annex at the time of the 1983 injury that shows he was on light duty.

Appellant's argument pertaining to the accuracy of his medical history has been previously made and considered by the Office. He did not advance a legal argument not previously considered by the Office, nor did he demonstrate that the Office erroneously applied or interpreted a specific point of law. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).

[17] *Delores C. Ellyett*, 41 ECAB 992, 994 (1990); *Ruthie M Evans*, 41 ECAB 416, 423-25 (1990).

[18] 5 U.S.C. §§ 8101-8193.

[19] 5 U.S.C. § 8128(a).

[20] 20 C.F.R. § 10.606(b)(2).

[21] 20 C.F.R. § 10.608(a).

With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office. Appellant provided copies of medical reports of Dr. Stephen Lipson, a Board-certified orthopedic surgeon, Dr. Craig Zwerling, Board-certified in occupational medicine and Dr. Charles Sanzone, which were duplicative of reports of the physicians already contained in the case record. The submission of evidence, which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[22] Appellant also submitted a May 14, 2001 report from Dr. Abate, who stated that Dr. Meeks opinion that appellant's symptoms should have resolved within a year was a judgment based on medical facts and not supported by any other medical consultant. The Board, however, finds that Dr. Abate's report is duplicative of his prior reports in the record. As such, the evidence is cumulative in nature and is insufficient to reopen appellant's case for merit review.[23] Accordingly, he is not entitled to a review of the merits of his claim based on the third requirement under section l0.606(b)(2).

The Board finds that the Office properly denied appellant's July 17, 2001 request for reconsideration.

The November 1 and February 12, 2001 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
December 17, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[22] *See James A. England*, 47 ECAB 115 (1995) (finding that material repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening a case).

[23] *Id.*