U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RAJ B. THACKURDEEN and DEPARTMENT OF THE TREASURY, CUSTOMS OFFICE, Jamaica, NY

Docket No. 02-2392; Submitted on the Record;
Issued February 13, 2003

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for reconsideration.

Appellant's claim filed on November 25, 1998 was accepted for cervical and lumbosacral radiculopathies after appellant, then a 34-year-old operational analyst, was injured in an automobile accident on November 24, 1998. Magnetic resonance imaging (MRI) scans on December 28 and 30, 1998 showed a herniated disc at C6-7 but no significant bulging disc or focal herniation in the lumbar spine.

On January 8, 1999 Dr. Jagga Rao Alluri, a neurologist, released appellant to light duty for four hours a day. Dr. Alluri diagnosed cervical pain syndrome due to a herniated disc and lumbar pain syndrome, but indicated that these conditions were not due to the employment injury. Nerve conduction studies and an electromyography (EMG) showed no cervical or lumbosacral radiculopathy according to Dr. Alluri.

On March 5, 1999 Dr. Alluri released appellant for full-time light duty with specified restrictions and referred him to Dr. Fred Montas, a Board-certified orthopedic surgeon, for treatment of his cervical disc. Dr. Montas indicated that appellant's cervical disc condition was due to his employment and sent appellant to Dr. Richard M. Swanson, a neurosurgeon, who also indicated that appellant's condition was due to the work injury and required surgery.

On May 11, 1999 the Office referred appellant for a second opinion to Dr. Daniel J. Feuer, Board-certified in neurology. After examining appellant on May 18, 1999 and reviewing the medical history, Dr. Feuer stated that appellant's complaints were causally related to the November 24, 1998 automobile accident, but that he demonstrated no objective deficits consistent with cervical radiculopathy that would require surgery. He noted subjective mechanical and nonspecific sensory deficits and concluded that appellant had no objective neurological disability or permanent effects of the work injury.

On July 23, 1999 Dr. Feuer stated that an EMG on May 27, 1999 revealed no evidence of cervical radiculopathy or polyneuropathy. However, the study demonstrated bilateral median nerve dysfunction at the wrists, consistent with carpal tunnel syndrome.

On August 25, 1999 the Office referred appellant to Dr. Alfred Bannerman, Board certified in neurology, to resolve a conflict in medical opinion evidence.[1]

On September 28, 1999 the Office issued a notice of proposed termination of compensation based on the September 4, 1999 report of Dr. Bannerman. Appellant disagreed with the notice and noted several factual errors in Dr. Bannerman's report. He contended that Dr. Feuer had found a causal relationship between his complaints and the work injury, and submitted an October 26, 1999 report from Dr. Montas.

On October 29, 1999 the Office terminated appellant's compensation, noting that Dr. Montas' latest report repeated his earlier conclusions regarding causal relationship and the need for surgery.

Appellant requested a hearing, but withdrew the request and sought reconsideration on September 18, 2000. He submitted reports from Dr. Lawrence C. Hurst, a Board-certified orthopedic surgeon, Dr. Carl Saint Martin, a neurologist, and Dr. Thomas J. Mango, an orthopedic surgeon.

On December 11, 2000 the Office denied modification of the October 29, 1999 decision on the grounds that the medical evidence was insufficient to overcome the special weight accorded to Dr. Bannerman's opinion as an impartial medical specialist. The Office noted that Dr. Hurst did not provide a reasoned opinion on the causal relationship of appellant's carpal tunnel syndrome and the work injury, Dr. Mango's opinion was nonspecific and speculative, and Dr. Saint Martin noted only subjective complaints without any objective evidence of disability.

On December 7, 2001 appellant again requested reconsideration and submitted a settlement reached with the Office of Personnel Management (OPM) regarding his disability retirement and a decision by the Social Security Administration awarding disability benefits. The Office denied review of the December 11, 2000 decision on December 14, 2001 on the grounds that the submitted evidence was immaterial and, therefore, insufficient to warrant review.

The Board finds that the Office properly denied appellant's request for reconsideration.

The only Office decision before the Board on appeal is dated December 14, 2001, denying appellant's request for reconsideration. Because more than one year has elapsed between the last merit decision dated December 11, 2000 and the filing of this appeal on September 26, 2002, the Board lacks jurisdiction to review the merits of appellant's claim.[2]

[1] Dr. Feuer's opinion of no disability due to the work injury conflicted with that of Drs. Swanson and Montas, that appellant's continuing disability was due to the work injury.

[2] 20 C.F.R. §§ 501.2(c); 501.3(d)(2). *See John Reese*, 49 ECAB 397, 399 (1998).

Section 8128(a) of the Federal Employees' Compensation Act[3] vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[4] Thus, the Act does not entitle a claimant to a review of an Office decision as a matter of right.[5]

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).[6] Section 10.606(b) provides that 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.[7] 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.[8]

With his request for reconsideration, appellant submitted two decisions of other federal agencies regarding his disability for work. The fact that his application for disability retirement was approved on December 5, 2000 is irrelevant to the issue in this case, which is whether his work-related radiculopathies had resolved, thus supporting termination of his compensation for these accepted injuries. Similarly, the fact that appellant is eligible for social security disability has no bearing on his entitlement to work-related disability under the Act. Decisions of other agencies regarding disability are not binding on the Office simply because the standards for establishing work-related disability under the Act, which governs the Office and the Board, are not the same as the standards set for disability retirement or social security benefits. For example, the Social Security Administration considers a person disabled if he or she is unable to engage in gainful employment.[9] OPM looks at an employee's inability to perform the duties of his or her position because of work or nonwork-related conditions.[10]

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[3] 5 U.S.C. §§ 8101-8193.

[4] 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.")

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

[6] 20 C.F.R. § 10.608(a) (1999).

[7] 20 C.F.R. § 10.606(b)(1)-(2).

[8] 20 C.F.R. § 10.608(b).

[9] *See Hazelee K. Anderson*, 37 ECAB 277 (1986); *see also Daniel Deparini*, 44 ECAB 657 (1993).

[10] *See Earl L. Swanson*, 29 ECAB 707 (1978).

The Act requires a causal relationship between a claimant's disability and the accepted work injury.[11] The decisions of other federal agencies do not establish a claimant's entitlement to federal workers' compensation. Conversely, a claimant may be considered partially disabled under the Act and receiving wage-loss compensation yet not qualify for social security disability under its gainful employment standard or meet the requirements for disability retirement. Therefore, because the Act has its own specific standard for determining disability, the decisions of other agencies are not determinative of the issue in this case.[12]

Appellant contends that the medical evidence reviewed by the administrative law judge in the social security case was sufficient to establish his disability. The medical reports dated October 10 and December 2, 1999 and December 4, 2000 from Dr. Montas are not of record and therefore could not be considered by the Office. Similarly, the reports of appellant's current treating neurologist and psychotherapist are not in the record. Inasmuch as appellant has failed to submit relevant and pertinent new evidence, the Office properly denied merit review under the subsection (iii) requirement of 20 C.F.R. § 10.606(b) (2).[13]

Appellant argues that the Office erroneously limited its acceptance of appellant's work injuries to cervical and lumbar radiculopathies and should have accepted his herniated disc at C6-7, which eventually led to his carpal tunnel syndrome and subsequent total disability. The record shows that the Office authorized MRI scans on December 17, 1998 and accepted the diagnosed radiculopathies on December 21, 1998. The cervical MRI scan on December 28, 1998 showed a herniated disc and the lumbar MRI scan on December 30, 1998 was normal. After reviewing these, Dr. Alluri, who treated appellant for his work injuries, indicated on January 8, 1999 that the herniated disc was not due to appellant's employment, that is, not work related. Therefore, there was no medical reason for the Office to accept this condition as caused by the work injury in November 1998.[14]

Appellant has failed to show that the Office erred in interpreting the law and regulations governing his entitlement to compensation under the Act, 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.

The December 14, 2001 decision of the Office of Workers' Compensation Programs is affirmed.

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[11] 5 U.S.C. § 8102(a).

[12] *See Blaine E. Bedeger*, 48 ECAB 418, 420 (1997), *citing Daniel Deparini*, 44 ECAB 657, 660 (1993) (under the Social Security Act, medical conditions that are not related to employment may be considered in determining eligibility for benefits).

[13] *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).

[14] *See Alice J. Tysinger*, 51 ECAB 638, 646 (2000) (finding that appellant had the burden of proof to establish that her rotator cuff problem was work related; the Office had no burden to disprove any such relationship).

Dated, Washington, DC
February 13, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member