

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MILDRED GAFFNEY and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Lyons, NJ

*Docket No. 02-790; Submitted on the Record;
Issued March 18, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration.

On October 16, 1980 appellant, then a 33-year-old food service worker, filed a traumatic injury claim alleging that on that date she injured her back when she fell while walking to the parking lot. The Office accepted her claim for a lumbosacral strain with left sciatica.

In notes dated September 29, 1998, Dr. Ravi J. Patel, appellant's attending physician, indicated that she was totally disabled due to the October 16, 1980 employment injury.

In a report dated March 11, 1999, Dr. Gary R. Loveless, a Board-certified orthopedic surgeon and an Office referral physician, provided findings on examination and opined that appellant had no continuing or medical condition causally related to her October 16, 1980 employment-related lumbosacral strain.

Due to the conflict in the medical opinion evidence between appellant's attending physician and the Office referral physician, the Office referred appellant, together with the case record and statement of accepted facts, to an impartial medical specialist for an examination and evaluation in order to resolve the conflict.

In a report dated February 23, 2000, Dr. Frederick M. Laun, a Board-certified orthopedic surgeon selected as the impartial medical specialist, provided findings on examination and found that appellant had no remaining disability or medical condition causally related to her October 16, 1980 employment-related lumbosacral strain.

By decision dated September 20, 2000, the Office terminated appellant's compensation effective October 8, 2000, finding that the weight of the medical evidence of record was represented by the report of Dr. Laun which established that appellant had no remaining disability or medical condition causally related to her October 16, 1980 employment injury.

By letter dated September 18, 2001, appellant through her attorney, requested reconsideration. Appellant argued that the reports of the Office referral physician, Dr. Loveless, and the impartial medical specialist, Dr. Laun, were based on an incomplete and inaccurate statement of accepted facts. She argued that questions presented by the Office to Drs. Loveless and Laun mentioned a 1979 injury but records regarding a 1979 injury were not provided to them and therefore their medical opinions were not based on a complete record. Appellant argued that the statement of accepted facts sent to Dr. Laun was altered from the statement of accepted facts sent to Dr. Loveless. She argued that there was no conflict in the medical opinion evidence between Dr. Loveless and her treating physician, Dr. Patel, and therefore no reason to refer her to an impartial medical specialist. Appellant also argued that Dr. Laun opined that she had no work limitations but Dr. Loveless and other physicians found appellant capable of only sedentary work. She argued that Dr. Laun made conflicting statements; he confirmed that she had arthritis but indicated that she had no work limitations and he stated that he had no way of knowing the origin of the arthritis but that it was consistent with appellant's age. She asserted that appellant could not rule out the arthritis as a developmental consequence of her accepted lumbosacral strain with sciatica. Appellant argued that the Board's disposition in *Douglas M. McQuaid*¹ was applicable to her case.

By decision dated January 7, 2002, the Office denied appellant's request for reconsideration on the grounds that the arguments submitted by appellant in support of her request were not relevant to the issue on which the case was denied.²

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.³ As appellant filed her appeal with the Board by letter postmarked February 5, 2002, the only decision properly before the Board is the Office's January 7, 2002 decision denying appellant's request for reconsideration. The Board has no jurisdiction to consider the Office's September 20, 2000 decision terminating appellant's compensation benefits.⁴

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

The Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.⁵

¹ Docket No. 99-2212 (issued May 24, 2001).

² The record contains additional evidence that was not before the Office at the time it issued its January 7, 2002 decision. Therefore the Board has no jurisdiction to review this evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c); *Robert D. Clark*, 48 ECAB 422, 428 (1997).

³ 20 C.F.R. §§ 501.2(c); 501.3(d)(2).

⁴ *See Leon D. Faidley, Jr.*, 41 ECAB 104, 108-09 (1989).

⁵ 20 C.F.R. § 10.606(b).

When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.⁶

The Office's September 20, 2000 decision to terminate appellant's compensation was based on the February 23, 2000 report of Dr. Laun, the impartial medical specialist selected to resolve the conflict in the medical evidence between Dr. Patel and Dr. Loveless. Appellant argued that there was no conflict of opinion between Drs. Patel and Loveless. However, in reports dated September 29, 1998 and August 9, 1999, Dr. Patel stated that appellant was totally disabled but Dr. Loveless, in his March 11, 1999 report, found that appellant had no continuing disability. Therefore, a conflict existed and the Office properly referred appellant for an impartial medical examination.

Appellant argued that Drs. Loveless and Laun based their opinions on an incomplete and inaccurate statement of accepted facts. She noted that the Office had asked Drs. Loveless and Laun to opine as to the effect of the 1980 injury on a 1979 injury. She also argued that Dr. Laun was not provided with the same statement as Dr. Loveless. However, the record shows that Dr. Loveless mentioned appellant's November 1979 left leg S1 nerve root irritation in his report on his review of the record. Additionally, Dr. Laun received the entire case file that included prior statements of accepted facts.⁷ Both Dr. Loveless and Dr. Laun mentioned the 1979 injury in their reports. As the 1979 injury was not an accepted employment injury, it is not relevant to the issue of whether appellant's accepted lumbosacral strain of 1980 had resolved. Therefore, these arguments regarding the statement of accepted facts do not constitute relevant legal arguments not previously considered by the Office.

Appellant argued that Dr. Laun made conflicting statements; he confirmed that she had arthritis but indicated that she had no work limitations and he stated that he had no way of knowing the origin of the arthritis but that it was consistent with appellant's age. She contended that Dr. Laun did not rule out the arthritis as a developmental consequence of her accepted lumbosacral strain with sciatica. However, although Dr. Laun noted minimal arthritic changes shown on x-ray, his physical examination did not indicate that appellant's arthritis was disabling. Furthermore, the issue in this case is whether appellant's accepted condition, a lumbosacral strain with left sciatica, had resolved; not the cause of appellant's arthritis. Therefore, this argument does not constitute relevant and pertinent evidence not previously considered by the Office.

Appellant argued that the Board's decision in *Douglas M. McQuaid*⁸ was applicable to her case. In *McQuaid*, the Board found that the report of the referral physician that was the basis of the Office's termination decision was not based on a complete and accurate factual and medical background because the referral physician did not address the relationship of a prior

⁶ 20 C.F.R. § 10.608(b).

⁷ Two statements of accepted facts indicate that appellant experienced left leg S1 nerve root irritation in November 1979.

⁸ See *supra* note 1.

work-related injury (a herniated disc)⁹ to the later employment injury. The statement of accepted facts provided to the referral physician did not mention the prior accepted herniated disc. The Board stated that the physician briefly noted the prior accepted injury but did not indicate sufficient knowledge of the previous medical condition. The Board also found that the referral physician incorrectly stated that there were no objective findings and failed to provide sufficient medical rationale for his opinion that the claimant had no continuing work-related condition or disability. The Board stated, “The preexisting herniated disc was an accepted employment injury; there must be a medical explanation as to why the continuing herniated disc is not causally related to the employment, or in the alternative why it was not disabling.” The *McQuaid* case is not applicable to the case on appeal. Appellant does not allege, nor does the record show, that the 1979 injury was an accepted work-related condition. Additionally, the referral physician’s report in *McQuaid*, in addition to being based on an incomplete factual background, was further flawed in that it erroneously stated that there were no objective findings and also contained insufficient medical rationale. In contrast Dr. Laun was provided the case record and his report reflected a complete factual history of the case. As the facts in *McQuaid* are not similar to those in the case on appeal, appellant’s citation to *McQuaid* does not constitute relevant legal argument not previously considered by the Office.

Appellant has failed to show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, or submit relevant and pertinent evidence not previously considered by the Office. The Office properly denied her request for reconsideration.

The decision of the Office of Workers’ Compensation Programs dated January 7, 2002 is affirmed.

Dated, Washington, DC
March 18, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

⁹ In *McQuaid*, the Office originally accepted that the second employment injury was a herniated disc but later rescinded its acceptance of this condition and accepted instead a lumbosacral sprain/strain.