U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD CHAPPELL and DEPARTMENT OF LABOR, EMPLOYMENT TRAINING ADMINISTRATION, OFFICE OF JOB CORPS, Atlanta, GA

Docket No. 03-97; Submitted on the Record;
Issued March 11, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation; and (2) whether the Office abused its discretion in refusing to reopen appellant's claim for merit review under 5 U.S.C. § 8128(a).

On July 9, 1999 appellant, then a 60-year-old safety and health manager, filed an occupational disease claim alleging that on April 6, 1999 he first realized that his back condition was caused or aggravated by factors of his federal employment. Appellant stated that on April 6, 1999 he was performing one of his job performance standards, which required extensive typing in his office that was not ergonomically designed for typing.

By letter dated January 4, 2000, the Office accepted appellant's claim for aggravation of a preexisting degenerative disc disease at L5-S1, cervical spondylosis, lumbar spondylosis and spondylolisthesis at L5-S1 based on the second opinion report of Dr. Allan Levine, a Board-certified orthopedic surgeon.[1]

On July 31, 2000 Dr. Scott D. Boden, a Board-certified orthopedic surgeon, recommended that appellant undergo back surgery. On August 16, 2000 an Office medical adviser reviewed appellant's medical records and determined that appellant's back condition was not work related, rather it was associated with the aging process. The Office medical adviser further determined that the proposed back surgery should not be authorized without obtaining a second opinion.

In an August 17, 2000 letter, the Office advised appellant that the medical evidence of record was insufficient to grant authorization for the recommended surgery. The Office further advised appellant that a second opinion evaluation was necessary to make such a determination.

[1] The record reveals that appellant was terminated by the employing establishment on July 7, 2000 due to poor work performance.

By letter dated August 25, 2000, the Office referred appellant along with medical records, a statement of accepted facts and a list of specific questions to Dr. Vincent Boswell, a Board-certified orthopedic surgeon, for a second opinion examination. By letter of the same date, the Office advised Dr. Boswell of the referral.

Dr. Boswell submitted a September 18, 2000 report providing a history of appellant's employment injury and medical treatment and his findings on physical and objective examination. He diagnosed degenerative disc disease at L5-S1, Isthmic Grade I spondylolisthesis at L5-S1 and bilateral foraminal stenosis at L5-S1. Dr. Boswell opined that these conditions resulted from aging and were not caused by appellant's job or on-the-job injury. He noted that appellant admitted to him that his pain preceded his assignment to the position of safety and health specialist. Appellant stated that the change in position worsened his pain and after obtaining ergonomic furniture he noted no improvement. Dr. Boswell stated that appellant's present symptoms were the natural progression of his disease process and the pathology in his low back was not caused or progressed in severity because of his job. He also stated that the proposed surgery only addressed the underlying disease process and was needed to stabilize appellant's spine at L5-S1. Dr. Boswell noted that the surgery was a reasonable option, but that it might not relieve all of appellant's symptoms.

The Office found a conflict in the medical opinion evidence between Drs. Boden and Boswell and referred appellant to Dr. John Day, an orthopedic surgeon, for an impartial medical examination.

Dr. Day submitted a May 2, 2001 report indicating a review of records, which included a history of appellant's employment injury and medical treatment. He also provided a history of appellant's social and family background and his findings on physical examination. Dr. Day diagnosed chronic low back pain secondary to degenerative disc disease at L5-S1 associated with isthmic spondylolisthesis at this same level. He stated that the proposed surgery was a reasonable treatment option, but concurred with Dr. Boswell's assessment that appellant's back pain was the result of a degenerative condition that was part of the normal aging process. He further stated that there was no objective evidence relating the aggravation of appellant's neck and back pain to his work as a safety and health specialist. Dr. Day concluded that he concurred with Dr. Boswell that appellant's current condition was related to the natural progression of the degenerative disease process.

In an August 13, 2001 decision, the Office denied appellant's request for back surgery based on Dr. Day's opinion that his back condition was not employment related.

On the same date, the Office issued a notice of proposed termination finding that the weight of the medical evidence, as represented by the opinion of Dr. Day, established that appellant no longer suffered from residuals of his accepted employment injury.

By letter dated September 4, 2001, appellant, through his attorney, requested an oral hearing before an Office representative regarding the Office's August 13, 2001 decision. Subsequently, appellant submitted several reports from Dr. Christopher R. Edwards, a Board-certified orthopedic surgeon, which included a January 31, 2002 report noting appellant's

surgery on December 11, 2001 and a diagnosis of acute spondylolysis.[2] He opined that appellant likely had a progression of his condition as a result of his work.

In a March 8, 2002 decision, the hearing representative affirmed the Office's decision.

By decision dated March 25, 2002, the Office terminated appellant's compensation benefits on the grounds that he no longer suffered from his work-related injury. In a July 1, 2002 letter, appellant, through his attorney, requested reconsideration. His request was accompanied by Dr. Edwards' April 20, 2002 letter providing that his opinions regarding this case were based on a complete history from appellant and a full review of the medical background. Dr. Edwards explained that there can be evidence of spondylolysis with listhesis present, but never become a contributing factor until there is an insightful event. He stated that such an event was described by appellant while working at his computer station with repetitive bending and leaning over the system he determined that he had back pain that became progressively worse.

In a decision dated September 11, 2002, the Office denied appellant's request for merit review on the grounds that the evidence submitted was cumulative and thus, insufficient to warrant a review of its prior decision.[3]

The Board finds that the Office properly terminated appellant's compensation.

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

The Office accepted that appellant suffered an aggravation of preexisting degenerative disc disease at L5-S1, cervical spondylosis, lumbar spondylosis and spondylolisthesis at L5-S1 as a result of the duties he performed as a safety and health manager. The Office, therefore, bears the burden of proof to justify the termination of compensation benefits for these medical conditions.

A conflict arose in this case between Dr. Boden, appellant's treating physician and Dr. Boswell, an Office referral physician, on whether appellant continued to suffer residuals of the accepted conditions. The Office referred appellant to Dr. Day, an orthopedic surgeon, to resolve the conflict. Dr. Day stated that he concurred with Dr. Boswell's assessment that appellant's back pain was the result of a degenerative condition that was part of the normal aging

[2] Dr. Edwards December 13, 2001 report reveals that appellant underwent back surgery on December 11, 2001.

[3] The Board notes that appellant has not appealed the hearing representative's March 8, 2002 decision affirming the Office's denial of his request for back surgery.

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

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

process. He further stated that there was no objective evidence relating the aggravation of appellant's neck and back pain to his work as a safety and health specialist. Dr. Day concluded that he concurred with Dr. Boswell that appellant's current condition was related to the natural progression of the degenerative disease process.

In situations when there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[6] Dr. Day's report was based on an accurate factual and medical background and expressed a well-rationalized opinion that appellant's current back and neck conditions were not related to his accepted employment injury. His report provided a sufficient basis for the Office's decision to terminate appellant's compensation.

Because the medical evidence shows that appellant no longer suffers from an aggravation of preexisting degenerative disc disease at L5-S1, cervical spondylosis, lumbar spondylosis and spondylolisthesis at L5-S1, the Office was justified in terminating compensation benefits for these conditions. The Board will affirm the Office's March 25, 2002 decision on the issue of termination.

The Board further finds that the Office did not abuse its discretion in refusing to reopen appellant's claim for merit review under 5 U.S.C. § 8128(a).

To require the Office to reopen a case for merit review under section 8128 of the Federal Employees' Compensation Act,[7] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.[8] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[9] 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 of the merits.

In support of his request for reconsideration, appellant submitted Dr. Edwards' April 20, 2002 letter. In this letter, Dr. Edwards explained the presence of spondylolysis with listhesis and how it may never become a contributing factor until there is an insightful event. He indicated that appellant's action of working at his computer station with repetitive bending and leaning over the system and suffering from back pain that became progressively worse constituted such an event. Dr. Edwards' letter is restating information already contained in the record, specifically, his January 31, 2002 report finding that appellant's back condition was caused by

[6] *James P. Roberts*, 31 ECAB 1010 (1980).

[7] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[8] 20 C.F.R. § 10.606(b)(1)-(2).

[9] *Id*. at § 10.607(a).

factors of his employment and thus, is cumulative in nature. The Board has held that evidence, which repeats or duplicates evidence already contained in the record has no evidentiary value and does not constitute a basis for reopening a case.[10]

Appellant has not established that the Office abused its discretion in its September 11, 2002 decision by denying his request for review on the merits because he did not 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 new evidence not previously considered by the Office.

The September 11 and March 25, 2002 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
March 11, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[10] *Paul Kovash*, 49 ECAB 350 (1998).