U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LORI PINE and U.S. POSTAL SERVICE,
POST OFFICE, Hermiston, OR

Docket No. 03-1150; Submitted on the Record;
Issued November 25, 2003

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for review on the merits pursuant to section 8128(a) of the Federal Employees' Compensation Act.

On December 15, 1999 appellant, then a 37-year-old distribution clerk, filed a traumatic injury claim alleging that on December 14, 1999 she turned her ankle and twisted her back by stepping and slipping on a pair of cutters. On February 14, 2000 the Office accepted appellant's claim for lumbar strain and paid appropriate compensation benefits. She also had a previous traumatic injury claim on May 3, 1999 which the Office accepted for lumbar strain and combined the two files under the December 1999 injury.

In a report dated February 28, 2000, Dr. Toomas Eisler, a Board-certified psychiatrist and neurologist, indicated that appellant had weakness of the left hamstring with sensory decrease, but that there were no objective biophysiological findings and the result of a December 1999 magnetic resonance imaging (MRI) scan was normal. He stated that he expected appellant's soft tissue strain to be resolved with physical therapy and spinal rehabilitation. In a second report Dr. Eisler noted that appellant was concerned because she had numbness in her left big toe and the top of the second and third toes of the left foot and also numbness over the right lateral thigh. He diagnosed lumbosacral sprain, left L-5 radiculopathy, right ankle sprain and excess weight. Dr. Leroy I. Meharry diagnosed lumbar strain in a May 3, 2000 attending physician's report; and indicated "abnormal MRI scan." He noted that appellant was totally disabled beginning April 24, 2000 and checked "yes" that her condition was aggravated or caused by an employment activity. Appellant began undergoing physical therapy three times a week for the lumbar strain and numbness and tingling in her toes. In a follow-up report dated April 18, 2000, Dr. Eisler stated that he believed the magnetic resonance imaging (MRI) scan performed on December 20, 1999 was abnormal and diagnosed lumbar sprain. In an electromyogram (EMG) report, dated August 17, 2000, he stated: "There is no electrodiagnostic evidence for a specific cause of [appellant's] pain or reason for her MRI scan muscle abnormality." An MRI scan of the lumbar spine performed on November 6, 2000 was also normal.

Second opinion physician and Board-certified orthopedic surgeon, Dr. Neal H. Shonnard, indicated in a November 10, 2000 report that appellant still had pain radiating down into the right foot and that standing made it worse. He diagnosed lumbar sprain and right leg pain and answered "yes" that they were related to the industrial lumbar strain of December 14, 1999. Dr. Shonnard noted: "[Appellant] continues to complain of low back pain and right leg pain despite multiple normal MRI scan and EMGs." Last, he stated that no work limitations or restrictions were advised based on the absence of objective abnormalities.

On December 18, 2000 the employing establishment offered appellant a limited-duty job as a part-time clerk, which appellant accepted on that date.

In a report dated January 24, 2001, Dr. Hans Carlson, Board-certified in physical medicine and rehabilitation, stated: "A one and one-half year history of low back pain. Today's examination is not suggestive of a clinically significant lumbosacral radiculopathy. [Appellant] apparently does have an abnormality on her MRI scan of the paraspinal musculature from her history with workup ongoing." An EMG and electroencephalogram (EEG) study performed on March 28, 2001 indicated normal results with no evidence of neuropathy or radiculopathy in the right lower extremity.

In a note dated October 24, 2001, Dr. Karleen Swarztrauber, a Board-certified psychiatrist and neurologist, stated: "According to [appellant] her lumbar strain is not resolved. It is my opinion that [she] is truthful." Dr. Swarztrauber noted that there was a small osteophyte at S1 that may cause her symptoms shown on a CT myelogram. She further noted that there was very limited objective evidence of disability (CT myelogram, MRI scan) and that other factors such as appellant's weight and carrying children could be contributing to her back pain.

On November 20, 2001 the Office issued a notice of proposed termination of compensation benefits on the grounds that the medical evidence did not establish that appellant had residuals from the December 14, 1999 work injury. By decision dated December 27, 2001, the Office terminated appellant's medical and wage-loss compensation benefits on the grounds that there were no objective findings to support a continuing injury or disability.

By letter dated December 23, 2002, appellant requested reconsideration and submitted an October 16, 2002 report from Board-certified orthopedic surgeon, Dr. James Hazel. She also argued that a diagnosis of pyriformis muscle strain had been ignored and the medical reports of record were based on an inaccurate medical history. Dr. Hazel noted that appellant got hurt at work twice in 1999; and never completely recovered and then was involved in an automobile accident in November 2001, which significantly aggravated her condition. He indicated that she had low back pain radiating to the right buttock and slight pain to the left side but that the majority of the pain was on the right side. Dr. Hazel further noted that he reviewed an MRI scan performed on May 29, 2002 of the cervical and lumbar spine and that there were no significant abnormalities with the cervical spine other than some bulging discs in the midcervical spine section and that the lumbar spine failed to demonstrate any obvious disorder. He concluded: "It is my impression that [appellant] is definitely experiencing problems of a soft tissue nature and I don't think there is any clear-cut neurologic impingement that I can discern either on physical examination or on the radiographic analysis."

By decision dated January 2, 2003, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant merit review of the claim.

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.[1] Because more than one year has elapsed between the issuance of the Office's December 27, 2001 merit decision and April 2, 2003, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the December 27, 2001 decision and any preceding decisions. Therefore, the only decision before the Board is the Office's January 2, 2003 nonmerit decision denying appellant's application for a review of its December 27, 2001 decision.

The Board finds that the Office properly refused to reopen the case for further review of the merits of the claim.

Under section 10.606 of the Office's implementing regulations, a claimant seeking reconsideration must set forth argument or evidence which either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[2] If a claimant fails to submit relevant evidence not previously of record or advance legal contentions not previously considered, the Office has the discretion to refuse to reopen a case for further consideration of the merits.[3] However, the Board has noted that the requirement for reopening a claim for merit review does not include the requirement that a claimant submit all evidence which may be necessary to discharge his or her burden of proof. The requirement pertaining to the submission of evidence in support of reconsideration, only necessitates that the evidence be relevant and pertinent and not previously considered by the Office.[4] If the Office should determine that the new evidence lacks substantive probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.

In support of her request for reconsideration, appellant submitted a report from Dr. Hazel. Even though his report is new to the record, the report is not relevant and pertinent to the underlying issue, which is whether appellant still suffers from residuals from the December 14, 1999 work injury. Dr. Hazel only mentioned that appellant "apparently got hurt twice at work in 1999," but did not distinguish between the May and December injuries. He did not specifically address the issue of continuing residuals of the December 14, 1999 work injury. Dr. Hazel stated that appellant has problems "of a soft tissue nature" without providing a diagnosis or an opinion on causal relationship between a continuing condition and her employment injury. The Board finds that Dr. Hazel's report is not pertinent to the issue in this case and, therefore, the Office properly denied merit review.

[1] 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[2] 20 C.F.R. § 10.606(b)(2).

[3] *Pamela I. Holmes*, 49 ECAB 581 (1998).

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

Appellant also argued that the Office ignored a diagnosis of pyriformis muscle strain and suggested that the Office should have accepted conditions for pyriformis muscle strain and lumbar strain.[5] She further alleged that the statement of accepted facts was incorrect and, therefore, the medical reports of record carried no weight since they were based on an incorrect medical history. The Board finds that this argument is without merit and is insufficient to reopen the case for merit review. At the time of the Office's decisions on August 11 and February 14, 2000 accepting both claims for lumbar strain, the Office properly considered all the medical evidence of record and based their decision to accept certain conditions on this evidence. Appellant is essentially disagreeing with the outcome of the Office's decisions, which does not constitute a relevant legal argument and is not a reason for reopening the case. Appellant also argued that her claims should have been expanded to include pain disorder and depression since certain physicians made reference to these conditions. Dr. Swarztrauber noted that appellant had "a lot of social stressors" and should be evaluated for depression. Dr. Meharry noted that appellant was depressed about her work and pain and may have to quit work. Neither physician actually diagnosed depression or pain disorder in their reports. Further, neither Dr. Swarztrauber nor Dr. Meharry opined that appellant's depression was a direct result of the December 14, 1999 work injury. Appellant's contention that additional conditions should have been accepted as work related is insufficient to reopen the case for merit review.

Since appellant 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, the Office properly denied the request for reconsideration without merit review.

Accordingly, the January 2, 2003 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
November 25, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

[5] Appellant is referring to the May 3 and December 14, 1999 accepted work injuries.