United States Department of Labor
Employees' Compensation Appeals Board

ARNOLD STEVENS, Appellant	)	
	)	**Docket No. 05-96**
and	)	**Issued: May 20, 2005**
	)	
U.S. POSTAL SERVICE, POST OFFICE, Bronx, NY, Employer	)	

Appearances:
Arnold Stevens, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On October 12, 2004 appellant filed a timely appeal of an August 12, 2004 nonmerit decision of the Office of Workers' Compensation Programs, denying his request for reconsideration, and October 21, 2003 merit decision of an Office hearing representative which affirmed the termination of appellant's compensation effective November 2, 2002. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation effective November 2, 2002 on the grounds that he no longer had any disability causally related to his January 26, 2000 employment injury; and (2) whether the Office properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On January 26, 2000 appellant, then a 58-year-old mail handler, filed a traumatic injury claim alleging that he hurt his back and experienced numbness in his right leg that date when he

slipped on a patch of ice while entering a trailer. He stopped work on January 27, 2000. By letter dated February 28, 2000, the Office accepted appellant's claim for right hand, low back and right knee sprains and he received appropriate compensation. Appellant underwent vocational rehabilitation counseling after the employing establishment was unable to offer him limited-duty work.

By letter dated February 26, 2001, the Office referred appellant, together with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. Harvey A. Levine, a Board-certified orthopedic surgeon, for a second opinion medical examination. In a March 26, 2001 medical report, Dr. Ricardo Santiago, a Board-certified physiatrist, noted appellant's complaint that he was still having a lot of pain. He reviewed appellant's medical background, listed findings on physical examination and reviewed the medical records. Dr. Santiago diagnosed lumbar herniated nucleus pulposus with radiculopathy.

Dr. Levine submitted a March 15, 2001 medical report which provided a history of appellant's January 26, 2000 employment injury and medical treatment. He noted appellant's complaint of pain in his back and right leg which was aggravated by walking, bending, sleeping and lifting. Dr. Levine reviewed appellant's medical records and reported his findings on physical examination. He diagnosed a lumbosacral sprain which had resolved. Dr. Levine opined that no medical treatment was necessary and that appellant could return to his date-of-injury job. His work capacity evaluation dated March 14, 2001 revealed that appellant could work eight hours a day with no physical restrictions. In response to the Office's June 7, 2001 request that he address whether appellant's right wrist and knee sprains had resolved, Dr. Levine stated in a June 21, 2001 addendum letter that appellant had no complaints regarding his right wrist and knee and these conditions had resolved.

The Office found a conflict in the medical opinion evidence between Dr. Santiago and Dr. Levine as to appellant's diagnosis and whether he had any continuing residuals or disability causally related to the January 26, 2000 employment injury. To resolve the conflict, the Office referred appellant, together with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. Lawrence E. Miller, a Board-certified orthopedic surgeon, for an impartial medical examination by letter dated July 18, 2001.

In a July 16, 2002 medical report, Dr. Miller reopened a history of appellant's January 26, 2000 employment injury and medical treatment. On physical examination of appellant's lumbar spine, Dr. Miller reported no muscle spasm or loss of the cervical or lumbar lordotic curve. Appellant was able to fully move his head in various directions without any restriction and he had no restriction of motion of the lumbar spine. Dr. Miller further reported negative results from the Spurling and Adson, Bechterew and Linders, Romberg and Trendelenburg and Ely and Yeoman tests. Dr. Miller found no restrictions regarding range of motion of the upper extremities and negative results concerning the lower extremities. He further found that appellant's strength in his upper and lower extremities was within normal limits and his hand grip was good. Appellant's deep tendon reflexes were bilaterally symmetrical and active in his upper and lower extremities and he walked without a guarded gait or a limp. He could sit up easily from a supine position and he could get off and on the table without assistance. At the conclusion of the examination, appellant stated that he did not have

any additional complaints of pain or areas of concern. Based on his examination, Dr. Miller diagnosed a resolved right hand and knee and lumbosacral strain/sprain.

Dr. Miller opined that the January 26, 2000 employment injury caused a temporary exacerbation of an underlying and preexisting osteoarthritis. He noted that appellant's subjective complaints were not supported by objective findings. Dr. Miller stated that, even though the results of a magnetic resonance imaging (MRI) scan were positive, there was no clinical evidence of disc herniation or a radicular component regarding the lumbosacral spine. He noted that, although appellant experienced tingling in his hands, there was no clinical evidence of a herniated disc in the cervical spine. Dr. Miller opined that there was no orthopedic disability demonstrated on clinical examination. He found opined that appellant was capable of pursuing gainful employment on a full-time basis and resume his normal daily activities with no orthopedic restrictions or limitations. Dr. Miller concluded that there were no residual deficits demonstrated on clinical examination with respect to the January 26, 2000 employment injury and, thus, no medical treatment or a work hardening program was warranted. He stated that appellant had reached maximum medical improvement regarding his accepted employment injury. In an accompanying work capacity evaluation of the same date, Dr. Miller reiterated that appellant was able to work eight hours a day with no physical restrictions.

By letter dated September 9, 2002, the Office issued a notice of proposed termination of compensation based on Dr. Miller's July 16, 2002 medical report. The Office provided 30 days in which appellant could respond to this notice.

In a September 26, 2002 report, Dr. Brad Ratsprecher, a chiropractor, stated a diagnosis of herniated nucleus pulposus and lumbar intervertebral disc syndrome. In a September 26, 2002 report, Dr. Ratsprecher reiterated this diagnosis. On September 30, 2002 he indicated that appellant had lumbar intervertebral disc syndrome with radiculopathy. Dr. Ratsprecher stated that it was difficult for him to comment on the permanency of appellant's condition as he had never treated him. He then stated that appellant sustained a partial permanent injury to his lumbar spine based on an MRI scan, an electromyogram (EMG) test, a current perception threshold (CPT) examination and his findings on physical examination. A September 26, 2002 report from Dr. Suellen Levy, an attending physiatrist, indicated that appellant had lumbosacral radiculopathy and that he was moderately to severely permanently disabled.

In an October 22, 2002 decision, the Office terminated appellant's compensation effective November 2, 2002. It found the evidence submitted by appellant was insufficient to establish that he was totally disabled for work and accorded special weight to Dr. Miller's impartial medical report.

By letter dated November 11, 2002, appellant requested an oral hearing before an Office hearing representative. In a September 30, 2002 report, Dr. Levy noted appellant's complaint of pain and her findings examination. She diagnosed lumbar intervertebral disc syndrome with radiculopathy. Dr. Levy stated that it was difficult for her to comment on the permanency of appellant's condition as she had never treated him.

In a May 6, 2003 medical report, Dr. Olivera Pekovic, a Board-certified physiatrist, provided a history of appellant's lower back including the accepted work-related back injury he

sustained on January 26, 2000. She reported her findings on physical examination and diagnosed lumbar spine derangement, herniated nucleus pulposus at L4-5 and L5-S1 with foraminal narrowing and right L5-S1 radiculopathy. She recommended physical therapy and pain medication. Dr. Pekovic opined that appellant was partially disabled and that he was cleared for light-duty work with restrictions which limited him to lifting no more than 15 pounds.

By letter dated July 2, 2003, appellant advised the Office that he wanted a review of the written record.

In an October 22, 2003 decision, the Office hearing representative affirmed the October 22, 2002 decision. The hearing representative found that the medical evidence submitted was insufficient to overcome the weight accorded to Dr. Miller's impartial medical opinion.

In a January 22, 2004 letter, appellant requested that the Office reconsider the hearing October 22, 2003 decision and resubmitted duplicate copies of medical treatment notes.

By decision dated August 12, 2004, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was cumulative, repetitious and irrelevant.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to her employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.[1] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[2] If the Office, however, meets its burden of proof and properly terminates compensation, the burden for reinstating compensation benefits properly shifts to appellant.[3] To prevail appellant must establish by the weight of the reliable, probative and substantial evidence that he or she had an employment-related disability, which continued after termination of compensation benefits.[4]

Section 8123(a) of the Federal Employees' Compensation Act provides: "[i]f there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[5] When a case is referred to an impartial medical specialist for the purpose of

[1] *Jason C. Armstrong*, 40 ECAB 907 (1989).

[2] *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

[3] *See Virginia Davis-Banks*, 44 ECAB 389 (1993); *Joseph M. Campbell*, 34 ECAB 1389 (1983).

[4] *Talmadge Miller*, 47 ECAB 673, 679 (1996); *see also George Servetas*, 43 ECAB 424 (1992).

[5] *Richard L. Rhodes*, 50 ECAB 259 (1999); *Noah Ooten*, 50 ECAB 283 (1999); *Rosita Mahana* (*Wayne Mahana*), 50 ECAB 331(1999); *Richard Coonradt*, 50 ECAB 360(1999); *Gwendolyn Merriweather*, 50 ECAB 411 (1999); *Marsha R. Tison*, 50 ECAB 535(1999).

resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[6]

ANALYSIS -- ISSUE 1

The Board notes that a conflict in the medical opinion evidence was created between Dr. Santiago, an attending physician, and Dr. Levine, an Office referral physician, as to whether appellant had continuing residuals or disability causally related to January 26, 2000 employment-related right hand, low back and right knee sprains. Dr. Santiago opined that appellant sustained a lumbar herniated disc and was disabled. Dr. Levine opined that appellant's employment-related back and right hand and knee conditions had resolved and that he could work eight hours a day with no restrictions.

The Office referred appellant to Dr. Miller selected as the impartial medical specialist. In his report, Dr. Miller provided an accurate factual and medical background. He conducted a thorough medical examination which provided normal results and provided a detailed review of appellant's medical records. Dr. Miller diagnosed a resolved right hand and knee and lumbosacral strain/sprain. He found that the January 26, 2000 employment injury temporarily exacerbated appellant's underlying osteoarthritis. He stated that appellant's subjective complaints were not supported by objective findings and despite positive results of an MRI scan, there was no clinical evidence of disc herniation or a radicular component regarding the lumbosacral spine. He stated that, although appellant experienced tingling in his hands, there was no clinical evidence of a herniated disc in the cervical spine. Dr. Miller opined that there was no orthopedic disability demonstrated on clinical examination and that appellant was capable of pursuing gainful employment on a full-time basis and resume his normal daily activities with no orthopedic restrictions or limitations. He concluded that there were no residual deficits demonstrated on clinical examination with respect to appellant's January 26, 2000 employment injury. Dr. Miller concluded that appellant had reached maximum medical improvement regarding his accepted employment injuries.

The Board finds that Dr. Miller's opinion is entitled to special weight in finding that appellant no longer has any disability due to his January 26, 2000 employment injury as it is sufficiently rationalized and based on a proper factual and medical background.

After the Office's October 22, 2002 decision terminating his compensation, appellant submitted additional medical evidence. Given that the Board has found that the Office properly relied on the opinion of Dr. Miller in terminating his compensation effective November 2, 2002, the burden shifts to appellant to establish that he is entitled to compensation after that date.

Appellant submitted Dr. Levy's September 30, 2002 report which stated that he had lumbar intervertebral disc syndrome with radiculopathy. Dr. Levy noted, however, that it was difficult for her to comment on the permanency of appellant's condition as she had never treated him. She concluded that appellant's condition would be subjected to further exacerbation by various aggravations. Dr. Levy's report failed to explain how or why appellant's diagnosed

[6] *James R. Driscoll*, 50 ECAB 146 (1998).

condition was causally related to the January 26, 2000 employment injury. The report is vague in that she stated that she had not treated appellant. He opined that appellant's back condition would be subjected to further exacerbation by various aggravations is indicative of a possibility of a future injury. The Board has held that restrictions which are based on a fear of future injury are not compensable; there must be medical evidence that a claimant is currently disabled for work due to an employment-related condition.[7] The Board finds that her reports are of diminished probative value.

Dr. Pekovic's May 6, 2003 medical report listed a diagnosis of lumbar spine derangement, herniated nucleus pulposus at L4-5 and L5-S1 with foraminal narrowing and right L5-S1 radiculopathy. She opined that appellant was partially disabled and that he could perform light-duty work with the restriction of lifting no more than 15 pounds. Dr. Pekovic failed to address whether his partial disability for work was caused by his accepted employment injury. The report is of diminished probative value and her medical treatment notes concerning appellant's back condition also do not address whether his condition was caused by the accepted employment injury.

The Board finds that the evidence submitted by appellant after the Office's October 22, 2002 decision does not provide a rationalized medical opinion establishing that his disability for work is causally related to his accepted injury and, is insufficient to create a conflict with Dr. Miller's opinion. Appellant has not submitted additional probative medical opinion evidence establishing that he had continuing disability causally related to his accepted January 26, 2000 employment injury he has not met his burden of proof.[8]

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128 of the Act,[9] 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) constitute relevant and pertinent new evidence not previously considered by the Office.[10] 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.[11] 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.

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[7] *Mary Geary*, 43 ECAB 300 (1991).

[8] As Dr. Ratsprecher, a chiropractor did not diagnose a subluxation by x-ray, he is not a physician as defined in the Act and his report is of no probative value. *See*, respectively, 5 U.S.C. § 8101(2); and *John E. Cannon*, 55 ECAB ___ (Docket No. 03-347, issued June 24, 2004); *Kathryn Haggerty*, 45 ECAB 383 (1994).

[9] 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).

[10] 20 C.F.R. § 10.606(b)(1)-(2).

[11] *Id*. at § 10.607(a).

ANALYSIS -- ISSUE 2

The Office hearing representative affirmed the October 22, 2002 decision terminating appellant's compensation on the grounds that he was no longer disabled due to his January 26, 2000 employment injuries. Appellant disagreed with this decision and requested reconsideration by letter dated January 22, 2004. Submitted were duplicate copies of Dr. Pekovic's May 6, 2003 medical treatment notes. The Board has held that the submission of evidence or argument which repeats or duplicates that which is already in the case record does not constitute a basis for reopening a case.[12] The medical evidence submitted by appellant in support of his request for reconsideration was previously considered by the Office and, therefore, is duplicative of evidence already of record. As such, this evidence is insufficient to warrant further merit review of his claim. Appellant has not submitted any other evidence in support of his request for reconsideration.

Appellant has not shown that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office. Further, he failed to submit relevant new and pertinent evidence not previously considered by the Office. As appellant did not meet any of the necessary regulatory requirements, the Board finds that he was not entitled to a merit review.[13]

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation effective November 2, 2002 on the grounds that he was no longer disabled due to his January 26, 2000 employment injuries. The Board further finds that the Office properly refused to reopen appellant's claim for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[12] *Edward W. Malaniak*, 51 ECAB 279 (2000).

[13] *See James E. Norris*, 52 ECAB 93 (2000).

ORDER

IT IS HEREBY ORDERED THAT the August 12, 2004 and October 21, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 20, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member