

FACTUAL HISTORY

The Office accepted that on September 15, 1988, appellant, then a 51-year-old warehouse worker and forklift operator, sustained a lumbosacral strain and an aggravation of preexisting degenerative lumbar disc disease while unloading 50-pound sacks from a truck. Following a brief return to work in light-duty status from November 21, 1988 to late January 1989, he stopped work and did not return. Appellant received appropriate compensation on the daily and periodic rolls beginning October 1988, as well as medical benefits.

Appellant sought care from the employing establishment health clinic, then from Dr. Rama T. Pathi, a Board-certified orthopedic surgeon. He submitted reports through November 1988 diagnosing lumbar radiculopathy. Beginning in January 1989, appellant was treated by Dr. Edmund T. Dombrowski, an attending Board-certified orthopedic surgeon. In reports dated through October 26, 1989, he noted a nonoccupational lumbar injury requiring two decompressive lumbar laminectomy in approximately 1976. Dr. Dombrowski diagnosed a chronic lumbar sprain superimposed on spinal stenosis from L4-S1 and a reverse spondylolisthesis L4 on L5. He explained that appellant's two prior lumbar surgeries rendered the September 15, 1988 injury as "considerably more significant than a lumbosacral sprain." In a February 6, 1996 report, Dr. Richard M. Swengel, an attending Board-certified neurosurgeon, found increasing lumbar pain and recommended a rehabilitation program. Appellant also submitted form reports by employing establishment physicians Dr. Timothy J. Flock and Dr. Werner Mark dated 1996 to 1999.

The Office referred appellant, the medical record and a statement of accepted facts to Dr. Kenneth R. Sebby, a Board-certified orthopedic surgeon, for a second opinion examination. He submitted a June 15, 1999 report diagnosing spinal stenosis secondary to the two lumbar laminectomy, with a superimposed lumbosacral strain. Dr. Sebby opined that the September 15, 1988 aggravation had resolved without residuals.

In a July 26, 1999 report, Dr. Michael T. Eckstrom, an attending Board-certified orthopedic surgeon, diagnosed a reverse spondylolisthesis at L4-5 and lateral recess stenosis from L5-S1 causing sensory loss in the left foot. He opined that the September 15, 1988 injury aggravated appellant's degenerative spinal condition and permanently disabled him for work.

In August 1999, the Office found a conflict of medical opinion between Dr. Dombrowski, for appellant, and Dr. Sebby, for the government. To resolve the conflict, the Office referred appellant, the medical record and a statement of accepted facts to Dr. M. Clayton Vaughan, a Board-certified orthopedic surgeon. He submitted an October 15, 1999 report opining that the September 15, 1988 injury caused a "significant aggravation to [the] lumbosacral spine" that had not yet resolved. On examination Dr. Vaughan found a slightly diminished left ankle reflex, inability to walk on his left heel and "significant weakness in the left great toe (extensor hallucis longus) extension." Dr. Vaughan opined that appellant was unable to operate a forklift or perform other medium to heavy labor. He stated in a December 14, 1999 report, that his symptoms were real and that "all of the findings were anatomic."

In January 14, 2002 reports, Dr. Jeffrey T. Verhey, an attending Board-certified pulmonologist, opined that appellant was permanently and totally disabled due to a reverse

spondylolisthesis at L4-5 and spinal stenosis at L4-5 and L5-S1, causing diminished deep tendon reflexes and hip extensor weakness. He also diagnosed “chronic lumbosacral pain secondary to injury on September 15, 1998.” In an April 11, 2003 report, Dr. Verhey attributed appellant’s disability to the two lumbar laminectomies. He opined that he had reached maximum medical improvement as of July 22, 2004.

On July 21, 2004 the Office referred appellant, a list of questions, the medical record and a statement of accepted facts to Dr. James F. Johnson, a Board-certified orthopedic surgeon, for a second opinion evaluation. He submitted an August 16, 2004 report noting significant foraminal and spinal stenosis at the previous operative site, “causing [appellant’s] continued discomfort.” In an August 18, 2004 letter, Dr. Johnson opined that a 2003 magnetic resonance imaging (MRI) scan showed “objective findings that the accepted conditions of back strain and aggravation of preexisting degenerative changes [were] still active,” although appellant’s “present condition [was] primarily related to his previous spinal surgeries.” Dr. Johnson also opined that it was “hard to comment” as to whether the accepted aggravation was temporary or permanent, as appellant initially responded to conservative treatment. In an accompanying work capacity evaluation, he found him totally disabled for work due to progressive spinal stenosis and cardiac conditions.

In an August 18, 2004 letter, the Office requested that Dr. Johnson clarify whether the September 15, 1988 aggravation had ceased and if the preexisting conditions had returned to baseline. He responded by September 24, 2004 letter, stating that any aggravation caused by the September 15, 1988 injury ceased “based on the fact that [appellant’s] primary symptomatology was one of soft tissue injury. The soft tissue injury included irritation to the previous operative site and scar tissue as well as to underlying nerve roots. There was no loss of reflexes or significant muscle strength indicating an acute surgical problem.” Dr. Johnson opined that “[t]his type of soft tissue irritation should certainly resolve within three months. Any remaining pain would be secondary to gradual progressive underlying stenosis.” He stated that appellant’s preexisting lumbar conditions had returned to their preinjury baseline.

By notice dated October 7, 2004, the Office advised appellant that it proposed to terminate his wage-loss and medical compensation benefits on the grounds that Dr. Johnson’s opinion as the weight of the medical evidence established that he had “no continuing disability as a result of” the September 15, 1988 injury.¹ The Office afforded him 30 days in which to submit additional evidence.

Appellant submitted a November 15, 2004 report from Dr. Dawn D. Mattern, an attending Board-certified family practitioner. She noted reviewing Dr. Johnson’s report, radiology reports and evaluations by Dr. Dombrowski, Dr. Eckstrom, Dr. Johnson and Dr. Vaughan. Dr. Mattern provided a history of injury and treatment including the 1976 laminectomies and the September 15, 1988 occupational injury. She found diminished ankle reflexes bilaterally and that appellant was unable to toe walk. Dr. Mattern opined that “the work injury of September 15, 1988 accelerated [appellant’s] course of spinal stenosis ... a gradual and

¹ At the end of a paragraph discussing Dr. Johnson’s examination and report, the Office referred to an examination by a Dr. Arnold. It appears that the reference to a Dr. Arnold was a nondispositive, typographical error and that the Office meant to refer to Dr. Johnson.

progressive disease with pain as the primary symptom.” She stated that the September 15, 1988 injury “progressed his disease,” as evidenced by a “marked and sustained” increase in symptoms which would not have occurred but for the injury.

By decision dated December 6, 2004, the Office terminated appellant’s wage-loss and medical compensation benefits effective that day on the grounds that all residuals of the September 15, 1988 injury had ceased. The Office found that the weight of the medical evidence rested with Dr. Johnson, who provided a well-rationalized report distinguishing the laminectomies and preexisting spinal stenosis from the accepted occupational soft tissue injury. The Office further found that Dr. Mattern’s opinion was speculative, incomplete and insufficiently rationalized.

In a letter dated May 19, 2005, appellant requested reconsideration, summarizing the findings of Dr. Dombrowski, Dr. Mattern and Dr. Vaughan. He also submitted duplicates of medical records previously of record and considered by the Office prior to issuance of the December 6, 2004 decision.²

By decision dated July 6, 2005, the Office denied reconsideration on the grounds that appellant’s May 19, 2005 request “neither raised substantive legal questions nor included new and relevant evidence.”

LEGAL PRECEDENT -- ISSUE 1

Once the Office has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.³ Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.⁴

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.⁵ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.⁶

² Appellant submitted duplicate copies of Dr. Dombrowski’s April 27 and May 11, 1989 reports, Dr. Eckstrom’s July 26, 1999 report, Dr. Vaughan’s October 15, 1999 report, Dr. Verhey’s January 14, 2002, April 11 and 15, 2003 and July 21 and 22, 2004 reports, Dr. Johnson’s August 16 and September 24, 2004 reports and Dr. Mattern’s November 15, 2004 report.

³ *Bernadine P. Taylor*, 54 ECAB 342 (2003).

⁴ *Id.*

⁵ *Roger G. Payne*, 55 ECAB ____ (Docket No. 03-1719, issued May 7, 2004); *Furman G. Peake*, 41 ECAB 361 (1990).

⁶ *Pamela K. Guesford*, 53 ECAB 726 (2002).

ANALYSIS -- ISSUE 1

The Office accepted that on September 15, 1988, appellant sustained a lumbosacral sprain and an aggravation of preexisting degenerative lumbar disc disease. He received wage-loss compensation on the daily and periodic rolls beginning in October 1988, as well as appropriate medical benefits. The Office terminated appellant's wage-loss and medical compensation benefits effective December 6, 2004, based on the reports of Dr. Johnson, a Board-certified orthopedic surgeon and second opinion physician. He submitted August 16 and 18, 2004 reports opining that objective findings indicated that the September 15, 1988 injury was "still active," although appellant's symptoms were primarily due to the 1976 laminectomies and subsequent spinal stenosis. In response to the Office's request for clarification, Dr. Johnson submitted a September 24, 2004 letter stating that the September 15, 1988 aggravation had ceased. He explained this apparent shift of opinion, asserting that as appellant did not exhibit acute neurologic deficits following the September 15, 1988 injury, he had sustained only a soft tissue injury that should have resolved within three months. The Board finds that as Dr. Johnson's reports are adequately rationalized and based upon a complete and accurate history, his opinion is sufficient to represent the weight of the medical evidence in this case.

In response to Dr. Johnson's reports, appellant submitted a November 15, 2004 report from Dr. Mattern, an attending Board-certified family practitioner. She opined that the September 15, 1988 injury "accelerated [his] course of spinal stenosis" as he evinced a "marked and sustained" increase in lumbar pain which would not have occurred but for the injury. However, the Board notes that pain is considered a symptom, not a diagnosis and does not constitute a basis for payment of compensation.⁷ Also, Dr. Mattern is a family practitioner, a field of medicine not germane to the diagnosis and treatment of spinal conditions. Therefore, her opinion is entitled to lesser weight than that of Dr. Johnson, a Board-certified orthopedic surgeon.⁸

Thus, the Board finds that the Office properly terminated appellant's wage-loss and medical compensation benefits effective December 6, 2004, as the weight of the competent medical evidence established that the accepted September 15, 1988 lumbar strain and aggravation of degenerative lumbar disc disease had ceased without residuals.

LEGAL PRECEDENT -- ISSUE 2

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) instituting relevant and pertinent new evidence not previously considered by the Office.⁹ Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of the three

⁷ See *Robert Broome*, 55 ECAB ____ (Docket No. 04-93, issued February 23, 2004).

⁸ *Beverly A. Spencer*, 55 ECAB ____ (Docket No. 03-2033, issued May 3, 2004).

⁹ 20 C.F.R. § 10.606(b)(2).

requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.¹⁰

In support of his request for reconsideration, an appellant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.¹¹ Appellant need only submit relevant, pertinent evidence not previously considered by the Office.¹² When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.¹³

ANALYSIS -- ISSUE 2

The Office terminated appellant's authorization for medical benefits by decision dated December 6, 2004, finding that the weight of the medical evidence established that all work-related conditions had ceased. He then requested reconsideration by letter dated May 19, 2005, in which he summarized aspects of his medical treatment. The Board finds that this letter does not constitute relevant and pertinent new evidence as it merely summarizes previously submitted evidence. Also the letter did not establish an error of law or advance a new, relevant legal argument. Thus, the May 19, 2005 letter is insufficient to warrant a merit review of the claim.

Accompanying the May 19, 2005 letter, appellant submitted copies of medical evidence previously of record. The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening the case.¹⁴

Thus, the Office properly denied appellant's May 19, 2005 request for reconsideration as the evidence submitted in support thereof, was insufficient to warrant a merit review as it was repetitious.

CONCLUSION

The Board finds that the Office properly terminated appellant's wage-loss and medical compensation benefits effective December 6, 2004, on the grounds that his work-related condition had ceased with no residuals. The Board further finds that the Office properly denied his May 19, 2005 request for reconsideration.

¹⁰ 20 C.F.R. § 10.608(b).

¹¹ *Helen E. Tschantz*, 39 ECAB 1382 (1988).

¹² *See* 20 C.F.R. § 10.606(b)(3). *See also Mark H. Dever*, 53 ECAB 710 (2002).

¹³ *Annette Louise*, 54 ECAB 783 (2003).

¹⁴ *Denis M. Dupor*, 51 ECAB 482 (2000).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 6, 2005 and December 6, 2004 are affirmed.

Issued: February 21, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board