

**United States Department of Labor  
Employees' Compensation Appeals Board**

---

**G.P., Appellant**

**and**

**DEPARTMENT OF THE ARMY, ABERDEEN  
PROVING GROUND, Aberdeen, MD, Employer**

---

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

**Docket No. 08-27  
Issued: June 5, 2008**

*Appearances:*

*Gerard P. Uehlinger, Esq., for the appellant*

*No appearance, for the Director*

Oral Argument April 23, 2008

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On October 1, 2007 appellant, through his attorney, filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated May 4, 2007 terminating his wage-loss benefits and a nonmerit decision dated June 28, 2007 denying reconsideration. 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 met its burden of proof to terminate appellant's compensation for wage loss effective May 13, 2007; and (2) whether the Office properly denied further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

**FACTUAL HISTORY**

On September 19, 2000 appellant, then a 47-year-old pipe fitter, filed a traumatic injury claim alleging that on that date he injured his lower back while climbing out of a vault. The

Office accepted the claim for lumbar strain and paid appropriate compensation.<sup>1</sup> Subsequently, appellant was placed on the permanent rolls for temporary total disability.

On December 29, 2006 the Office referred appellant to Dr. Mark Rosenthal, a Board-certified orthopedic surgeon, for a second opinion evaluation to clarify the extent and cause of appellant's injury-related impairment. On January 31, 2007 Dr Rosenthal, based upon a review of medical evidence, a statement of accepted facts and physical examination, opined that appellant sustained a lumbar strain as a result of the September 19, 2000 employment injury. He also determined that appellant had preexisting lumbar degenerative disease and sustained a disc herniation in 2002.<sup>2</sup> Appellant related that he had sustained a second injury in 2002 when he allegedly injured his lower back while pulling a wrench at work and that he subsequently had back surgery. A physical examination revealed lumbosacral junction tenderness, no radiation of pain and back pain is worsened by extension and markedly worsened by rotation. As to the September 19, 2000 employment injury, Dr. Rosenthal opined that appellant was capable of performing his usual duties. However, he opined that appellant's 2002 injury restricted him to medium work capacity. Dr. Rosenthal stated that he found it "difficult to state that the lumbar strain has or has not resolved" since appellant continued to have pain from the 2000 lumbar strain until 2002. Thus, he opined "that most likely the patient had a chronic, lumbar strain ongoing." In concluding, Dr. Rosenthal opined that appellant had "no significant residual impairment due to the "accepted September 19, 2000 employment injury." In a February 8, 2007 work capacity evaluation form (OWCP-5c), he indicated that appellant had no restrictions as a result of his September 19, 2000 employment injury.

On February 13, 2007 the Office requested clarification from Dr. Rosenthal as to whether the lumbar strain had resolved. Dr. Rosenthal was also informed that no 2002 injury had been reported by appellant to the Office.

On February 20 and 21, 2007 Dr. Rosenthal opined that appellant sustained a chronic lumbar strain due to the September 19, 2000 employment injury. He further opined that appellant was capable of working full time with no restrictions based on this injury and that appellant continues to have mild residuals from the 2000 injury.

On March 1, 2007 the Office issued a notice of proposed termination of benefits.

In a letter dated March 27, 2007, appellant disagreed with the proposed termination and noted that he had sustained a second back injury in February 2001, which he reported to his supervisor.

On April 9, 2007 the Office requested clarification from Dr. Rosenthal as to whether appellant suffers from any residuals of his September 19, 2000 employment injury. In an April 12, 2007 supplemental report, Dr. Rosenthal opined that appellant was capable of performing his usual job duties as his September 19, 2000 employment injury had resolved.

---

<sup>1</sup> The employing establishment terminated appellant's employment effective September 4, 2004 as a result of a reduction-in-force.

<sup>2</sup> This appears to be a typographical error as this second injury allegedly occurred in 2001.

On May 4, 2007 the Office finalized the termination of appellant's wage-loss compensation effective May 13, 2007.

On June 1, 2007 appellant requested reconsideration and submitted statements by appellant and Gerald Eyet, Former Chief E.A. Building and Utilities, regarding appellant sustaining another back injury on February 9, 2001.

By nonmerit decision dated June 28, 2007, the Office denied appellant's request for reconsideration of the May 4, 2007 decision on the grounds that the evidence submitted was repetitious.<sup>3</sup>

### **LEGAL PRECEDENT -- ISSUE 1**

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.<sup>4</sup> After it has determined that an employee has disability causally related to 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.<sup>5</sup> The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>6</sup>

### **ANALYSIS -- ISSUE 1**

The Office accepted that appellant sustained a lumbar strain as a result of the September 9, 2000 employment injury. It based its decision to terminate his benefits upon medical evidence from Dr. Rosenthal, a second opinion physician.

The Board finds that the medical evidence of record supports the termination of appellant's wage-loss compensation benefits. The medical evidence consists of reports from Dr. Rosenthal, a Board-certified orthopedic second opinion physician, who reviewed the medical records, medical history, statement of accepted facts and performed a physical examination. He found that appellant continued to have mild residuals of his accepted lumbar strain and that he was capable of performing his usual job with no restrictions. Dr. Rosenthal explained that an injury of 2001, which appellant did not report and which the Office did not accept as employment related, restricted appellant. He provided a rationalized medical opinion, based on a complete and accurate medical history and thorough physical examination.<sup>7</sup> The Board finds that Dr. Rosenthal's opinion establishes that appellant has no continuing disability due to his

---

<sup>3</sup> The Board notes the record contains evidence from another claimant's file.

<sup>4</sup> *Paul L. Stewart*, 54 ECAB 824 (2003).

<sup>5</sup> *Elsie L. Price*, 54 ECAB 734 (2003).

<sup>6</sup> *See Del K. Rykert*, 40 ECAB 284 (1988).

<sup>7</sup> *See M.D.*, 59 ECAB \_\_\_\_ (Docket No. 07-908, issued November 19, 2007); *Steven S. Saleh*, 55 ECAB 169 (2003); *Victor J. Woodhams*, 41 ECAB 345 (1989).

accepted lumbar strain. The record is devoid of any medical evidence supporting that appellant is totally disabled as a result of his accepted September 19, 2000 lumbar strain.

### **LEGAL PRECEDENT -- ISSUE 2**

To require the Office to reopen a case for merit review under section 8128 of the Federal Employees' Compensation Act,<sup>8</sup> the Office's regulation 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.<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup>

### **ANALYSIS -- ISSUE 2**

The Office terminated appellant's wage-loss compensation effective May 13, 2007 on the grounds that he was capable of performing his usual duties. The Board finds that appellant's request for reconsideration met none of the regulatory requirements for a review of the merits of this decision.

Appellant's June 1, 2007 request for reconsideration did not allege that the Office erroneously applied or interpreted a specific point of law and did not advance a relevant legal argument not previously considered by the Office. He thus is not entitled to further review on the merits of his case under the first two sections of 10.606(b)(2).<sup>12</sup> In support of his request, appellant submitted his statement and a statement by Mr. Eyet regarding an alleged February 9, 2001 employment injury. The relevant issue is whether appellant is totally disabled by his accepted September 19, 2000 employment injury. The statements by appellant and Mr. Eyet are irrelevant as they are not medical opinions. Furthermore, the record contains no evidence that appellant filed a claim for a February 19, 2001 injury or that one had been accepted by the Office. As there was no new relevant or pertinent evidence for the Office to consider appellant was not entitled to review under the third section of 10.606(b)(2).<sup>13</sup>

---

<sup>8</sup> 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).

<sup>9</sup> 20 C.F.R. § 10.606(b)(1)-(2). See *Susan A. Filkins*, 57 ECAB 630 (2006).

<sup>10</sup> *Id.* at § 10.607(a).

<sup>11</sup> 20 C.F.R. § 10.608(b). See *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006) (when an application for review of the merits of a claim does not meet at least one of the three regulatory requirements the Office will deny the application for review without reviewing the merits of the claim).

<sup>12</sup> 20 C.F.R. § 10.606(b)(2)(i) and (ii).

<sup>13</sup> 20 C.F.R. § 10.606(b)(2)(iii).

Because appellant did not meet any of the statutory requirements for a review of the merits of his claim, the Office properly denied his June 1, 2007 request for reconsideration.

**CONCLUSION**

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective May 13, 2007. The Board further finds that the Office properly denied appellant's request for reconsideration as appellant failed to raise substantive legal questions or to submit pertinent new and relevant evidence not previously reviewed by the Office.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated June 28 and May 4, 2007 are affirmed.

Issued: June 5, 2008  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board