U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JACK E. HOWELL and DEPARTMENT OF THE ARMY, KNOX AHP, Fort Rucker, AL

Docket Nos. 99-1575 and 00-2596; Submitted on the Record;
Issued December 21, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, A. PETER KANJORSKI, PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant sustained lower back, leg and hip injuries on January 5, 1999 while in the performance of duty; and (2) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for further merit review.

On January 8, 1999 appellant, then a 55-year-old heavy equipment mechanic, filed a claim alleging that on January 5, 1999 he hurt his lower back, leg and hip when he stumbled over a step while entering the shop. Appellant stopped work on January 6, 1999.[1]

In support of his claim, appellant submitted a January 8, 1999 report signed by Dr. Otis D. Mitchum, a general surgeon, noting appellant's activity restrictions. Dr. Mitchum diagnosed lumbar disc degeneration/strain and advised that appellant could return to light-duty work on January 25, 1999 with no prolonged standing or sitting and no lifting over 10 pounds.

By letter dated February 17, 1999, the Office advised appellant that the evidence submitted was insufficient to establish that he sustained an injury as alleged and requested further factual and medical information, including a rationalized medical opinion supporting causal relation with the claimed injury.

In a February 25, 1999 report, Dr. Mitchum noted appellant's history of back trouble and indicated that he had undergone back surgery in December 1997. Dr. Mitchum opined that

[1] The Office noted that appellant had undergone approved lumbar surgery on May 12, 1999 related to a previous claim No. 10-478425, which was doubled into the present appeal. Appellant had evidently had another accident on June 7, 1995, No. 06-0630219, on which he had received a decision which he appealed to the Board. The appeal was assigned Docket No. 99-1575 and was dismissed by an order dated August 25, 2000. However, by request dated August 31, 2000 his appeal was reinstated. An order vacating the prior Board order and reinstating appellant's appeal was issued on March 26, 2001. The two back injury claims were then combined under one case No. 06-0720621.

appellant's condition seemed to be worsening since his fall but that a neurosurgeon should evaluate him. He added that he had treated appellant numerous times between January 8 and February 18, 1999.[2]

By decision dated June 21, 1999, the Office rejected appellant's claim, finding that the evidence of record failed to establish fact of injury. The Office found that the incident had occurred as alleged but that no related injury had been demonstrated.

On August 10, 1999 appellant requested an oral hearing but then withdrew his request and sought a review of the written record. He resubmitted the February 25, 1999 report from Dr. Mitchum.

By decision dated December 14, 1999, the Office hearing representative found that the medical evidence of record was insufficient to establish that appellant sustained an injury on January 5, 1999 while in the performance of duty.

On February 25, 2000 appellant requested reconsideration and submitted a postoperative February 16, 2000 magnetic resonance imaging (MRI) scan report from Dr. David A. Brink. He diagnosed mild L4-5 central canal stenosis but found nothing to explain appellant's right hip pain.

Appellant also submitted a March 7, 2000 report from Dr. Woodham, who stated that appellant had reported constant pain since January 1999 when he stumbled and fell at work. He also opined that an MRI scan indicated a possible lateral disc herniation with scar tissue. Dr. Woodham noted that appellant did not obtain relief by walking or by lying down, which one would expect with discogenic back pain, that he expected to get disability because he injured himself at work and that it was unlikely that a posterior lumbar interbody fusion had any chance of helping appellant.

In an April 17, 2000 surgical report, Dr. John Kenneth Burkus, a Board-certified orthopedic surgeon, stated that appellant underwent a lumbar myelogram and a computerized axial tomography (CAT) scan. He diagnosed L4-5 and L5-S1 lumbar disc protrusion, lumbar spinal instability of discogenic origin and sciatica.

In several reports dated April 27, 2000, Dr. Michael P. Schneider, a Board-certified orthopedic surgeon, noted myelogram and CAT scan findings, described a multiplane reconstruction, but offered no diagnosis.

By memorandum dated May 1, 2000, an Office medical adviser agreed with Dr. Woodham that surgery was not medically indicated. He added that a second-opinion examination was needed.

[2] By note dated February 18, 1999, Dr. Mitchum released appellant to light duty effective February 22, 1999 and restricted him from lifting more than 10 pounds. By note dated April 14, 1999, Dr. D. Bruce Woodham, a Board-certified neurosurgeon, indicated that appellant was scheduled for surgery on April 21, 1999 and would be disabled until further notice.

By decision dated April 3, 2000, the Office denied appellant's reconsideration request on the grounds that the evidence submitted was insufficient to warrant modification of its prior decision.

The Board finds that appellant has failed to establish that he sustained lower back, leg and hip injuries on January 5, 1999 while in the performance of duty.

Fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.[3] This component can be established by an employee's uncontroverted statement on the Form CA-1.[4] A consistent history of the injury as reported on medical records, to the claimant's supervisor and on the notice of injury can also be evidence of the occurrence of the incident. In this case, appellant did not provide a consistent history of injuring his back on the forms to his supervisor and physicians.

The second component is whether the employment incident caused a personal injury and can generally be established only by medical evidence. To establish a causal relationship between the condition and any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence based on a complete factual and medical background supporting such a causal relationship.

Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. Such an opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by appellant.[5]

In this case, appellant has failed to provide any rationalized medical evidence giving a discreet incident-related diagnosis, or identifying a specific injury or objective condition which resulted from the January 5, 1999 incident. None of the evidence submitted supports appellant's contention that the January 5, 1999 incident either caused or aggravated his back condition.

Dr. Mitchum initially noted a diagnosis of lumbar disc degeneration/strain but no objective symptomatology was identified and no precipitating factors or events were implicated. He merely checked "yes" to the question of whether the history as given him by appellant was consistent with the history appellant gave the employing establishment. No opinion on causal relation was provided. Thereafter, Dr. Mitchum noted appellant's history of back surgeries and problems and opined that appellant's condition seemed to be worsening since his fall but further evaluation was needed. However, again, no objective evidence of this worsening was identified

[3] For a detailed discussion of the components of an appellant's burden of proof in establishing fact of injury *see Elaine Pendleton*, 40 ECAB 1143 (1989).

[4] *John J. Carlone*, 41 ECAB 354 (1989).

[5] *See Donna Faye Cardwell*, 41 ECAB 730 (1990); *Lillian Cutler* 28 ECAB 125 (1976).

and no opinion addressing the pathophysiology of the causal relationship with specifically implicated work factors was provided. This opinion was couched in speculative terms and is thus insufficient to establish appellant's injury claim.[6] Moreover, as Dr. Mitchum's opinions are unrationalized, they are of insufficient probity to establish *prima facie* appellant's claim.[7]

Dr. Woodham merely reported that appellant claimed to have had constant pain since January 1999 when he stumbled and fell at work. However, this history was inconsistent with that on appellant's initial claim form, on which he claimed only that he had stumbled. Further, Dr. Woodham did not discuss causal relationship of any objective injury or condition with the specifically implicated employment factor, stumbling over the carpet. Moreover, Dr. Woodham did not distinguish what was due to the implicated incident and what was related to appellant's previous back surgeries and scar tissue. Therefore, his report is insufficient to establish appellant's claim.[8]

The remainder of the medical evidence was from orthopedic surgeons, which merely provided diagnoses but did not address causal relationship with any implicated employment factors. Therefore, they too are insufficient to establish appellant's claim.[9]

The Board further finds that the Office to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

The Federal Register dated November 25, 1998 announced that effective January 4, 1999, certain changes to 20 C.F.R. Parts 1 to 399 would be implemented.[10] These changes are specifically enumerated in the volume of 20 C.F.R. Parts 1 to 399 revised as of April 1, 1999. Regarding the revised Office procedures involving the requirements for obtaining a review of a case on its merits under 5 U.S.C. § 8128(a), effective January 4, 1999 provide that, to require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[11] a claimant must: (1) submit such application for reconsideration in writing; and (2) set forth arguments and contain evidence that either (i) shows that the Office erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not

[6] *See Philip J. Deroo*, 39 ECAB 1294 (1988) (although the medical opinion of a physician supporting causal relationship does not have to reduce the cause or etiology of a disease or condition to an absolute medical certainty, neither can such opinion be speculative or equivocal); *Jennifer Beville*, 33 ECAB 1970 (1982) (statement of a Board-certified internist that the employee's complaints "could have been" related to her work injury was speculative and of limited probative value).

[7] *See e.g. Jeannine E. Swanson*, 45 ECAB 325 (1994); *Lourdes Davila*, 45 ECAB 139 (1993).

[8] *Id.*

[9] *Id.*

[10] The Board and the Office agree that January 4, 1999 became the effective date of the changes announced in the November 25, 1998 Federal Register as it was the first business day following the January 1, 1999 holiday and as there was no indication that there was any intended delay for implementation of these enumerated changes.

[11] 5 U.S.C. §§ 8101-8193.

previously considered by the Office.[12] 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.[13] The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[14] When a claimant fails to meet one of the above-mentioned standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.[15] However, the Office, through its implementing regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).

When an application for review is untimely, the Office undertakes a limited review to determine whether there is clear evidence of error pursuant to the untimely request.[16] Evidence that repeats or duplicates evidence already in the case record has no new evidentiary value and does not constitute a basis for reopening a case.[17] Evidence that does not address the particular issue involved also constitutes no basis for reopening a case.[18]

Section 10.608(a) states that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2). If reconsideration is granted, the case is reopened and the case is reviewed on its merits.[19] This section, however, continues to state in paragraph (b) that where the request is timely but fails to meet at least one of the standards described in section 10.606(b)(2), or where the request is untimely and fails to present any clear evidence of error, the Office will deny the application for reconsideration without reopening the case for a review on the merits. A decision denying an application for reconsideration cannot be the subject of another application for reconsideration. The only review for this type of nonmerit decision is an appeal to the Board[20] and the Office will not entertain a request for reconsideration or a hearing on this decision denying reconsideration.

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[12] 20 C.F.R. § 10.606 (b)(1), (2).

[13] 20 C.F.R. § 10.607(a).

[14] *Diane Matchem*, 48 ECAB 532 (1997); *Jeanette Butler*, 47 ECAB 128 (1995); *Mohamed Yunis*, 46 ECAB 827 (1995); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[15] *See Mohamed Yunis, supra* note 15; *Elizabeth Pinero*, 46 ECAB 123 (1994); *Joseph W. Baxter*, 36 ECAB 228 (1984).

[16] *Cresenciano Martinez*, 51 ECAB ___ (Docket No. 98-1743, issued February 2, 2000); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

[17] *Mary G. Allen*, 40 ECAB 190 (1988); *Eugene F. Butler*, 36 ECAB 393 (1984).

[18] *Jimmy O. Gilmore*, 37 ECAB 257 (1985); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

[19] 20 C.F.R. § 10.608(a); *see also* 20 C.F.R. § 10.609(a-c).

[20] *See* 20 C.F.R. § 10.625.

With his request for merit reconsideration under section 8128(a) appellant submitted only a February 16, 2000 lumbar MRI scan report. This report contained no definite diagnosis and lacked any history of injury or physician's opinion on the causal relationship between the MRI scan findings and the implicated employment incident. The Board finds this evidence not only cumulative but also irrelevant, because it fails to include a definite opinion on causal relation. Consequently, this evidence does not constitute a basis for reopening a claim for further merit review under 20 C.F.R. § 10.606(2)(i-iii).

Appellant has not established that the Office abused its discretion in its April 3, 2000 decision by denying his request for a review on the merits of its December 14, 1999 decision under section 8128(a) of the Act, because he has failed to show that the Office erroneously applied or interpreted a point of law, failed to advanced a point of law or a fact not previously considered by the Office or failed to submitted relevant and pertinent evidence not previously considered by the Office.

As the only limitation on the Office's authority is reasonableness, an abuse of discretion can generally only be shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.[21] Appellant has made no such showing here.

The April 3, 2000 and December 14, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
December 21, 2001

Michael J. Walsh
Chairman

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member

[21] *Daniel J. Perea*, 42 ECAB 214 (1990).