U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICK T. WILLIAMS and DEPARTMENT OF THE NAVY, NAVAL AIR REWORK FACILITY, Alameda, CA

Docket No. 00-528; Submitted on the Record;
Issued September 7, 2001

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation effective October 16, 1998 on the grounds that he had no disability due to his March 18, 1986 employment injury after that date; and (2) whether the Office properly refused to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a).

On March 18, 1986 appellant, then a 27-year-old temporary electrical worker, filed a traumatic injury claim (Form CA-1) alleging that he injured his back on March 18, 1986 while lifting a receiver/transmitter. The Office accepted the claim for a lumbosacral strain with subluxation and aggravation of his lumbar disc disease.

On September 3, 1986 appellant filed a claim for a recurrence of total disability due to his March 18, 1986 employment injury.[1] By letter dated December 16, 1986, the Office placed appellant on the automatic rolls for temporary total disability. Subsequently, appellant was referred to vocational rehabilitation.

On October 19, 1994 the Office issued a loss of wage-earning capacity decision finding that appellant was reemployed as a security guard with actual wages of $283.25 per week. The Office adjusted his compensation benefits.

By report dated June 3, 1997, Dr. Ramon H. Bagby, a second opinion Board-certified orthopedic surgeon, based upon a review of the medical records, history of the employment injury and physical examination diagnosed degenerative arthritis at L4-S1 and mild central disc herniation at L4-5 without extrusion. A physical examination revealed no evidence of significant low back pathology and range of motion included flexion of 70 degrees with a 7 inch gape

[1] On September 26, 1986 the employing establishment terminated appellant's employment as his temporary appointment had expired.

between the fingertips and the floor, extension of 30 degrees with pain in the lower back, 45 degrees of right lateral flexion and 45 degrees of left lateral flexion. Dr. Bagby noted that appellant's physical examinations since 1986 revealed no hard neurologic or physical finding which "would indicate a significant back pathology beyond mechanical low back pain." He concluded that based upon appellant's "essentially unchanged physical examinations" since the 1986 employment injury and the alternating lower extremity complaints that appellant suffered a temporary aggravation of his preexisting low back problems due to his January 22, 1986 automobile accident. In addition, Dr. Bagby opined that appellant's current complaints were unrelated to his accepted employment injury as there was no supporting objective evidence, that appellant's total disability due to his accepted employment injury had ceased by April 1, 1986 and appellant had no residual disability due to his March 18, 1986 employment injury as the temporary aggravation had ceased. The physician also opined that any current physical limitations appellant had were due to his preexisting January 22, 1986 automobile accident.

On August 21, 1998 the Office issued a proposed notice to terminate appellant's compensation benefits.

By decision dated October 16, 1998, the Office terminated appellant's wage loss and medical compensation benefits on the basis that he had no continuing residual disability due to his accepted employment injury.

Appellant requested on oral hearing which was held on May 20, 1999.

In a February 2, 1999 report, Dr. D. Scott McCaffrey, an attending physician, diagnosed disc herniation at L5-S1, radicular nerve root impingement in the right leg and reactive depression. Under past medical history, Dr. McCaffrey noted appellant's January 1986 automobile accident. A lumbosacral examination revealed tenderness over the L5-S1 and L4-5 levels, minimal tenderness of a myofascial nature and mild tenderness over the right sciatic notch. Range of motion in the low back was inhibited approximately 30 percent flexion, extension was down 50 percent and lateral bending was down about 30 percent.

In a May 18, 1999 report, Dr. Eugene Kitt, an attending chiropractor, opined that appellant had a chronic pain problem since his accepted March 18, 1986 employment injury and that Dr. McCaffrey concurred in his diagnosis of a discogenic pain problem. Dr. Kitt diagnosed a broad-based bulging disc at L4-5 without neural formina encroachment and a dehydrated and herniated disc at L5-S1.

By decision dated July 29, 1999, the Office hearing representative affirmed the termination of benefits on the basis that appellant no longer suffered from residuals of his accepted employment injury.

In a letter dated September 15, 1999, appellant requested reconsideration of the May 20, 1999 decision affirming termination of his benefits.

On September 24, 1999 the Office denied appellant's request for a merit review.

The Board finds that appellant had no disabling residuals of the accepted work injury and, therefore, the Office properly terminated appellant's compensation.

Under the Federal Employees' Compensation Act,[2] when employment factors cause an aggravation of an underlying physical condition, the employee is entitled to compensation for the periods of disability related to the aggravation.[3] When the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased,[4] even if the employee is medically disqualified to continue employment because of the effect work factors may have on the underlying condition.[5]

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.[6]

The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[7] After it has determined that an employee has disability causally related to his or 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.[8] The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.[9] To terminate authorization for medical treatment, the Office must establish that a claimant no longer has residuals of an employment-related condition, which require further medical treatment.[10]

In the present case, Dr. Bagby, a second opinion Board-certified orthopedic surgeon, provided a well-reasoned opinion indicating that appellant had sustained a temporary aggravation of a preexisting condition which had resolved and that no further medical treatment was required for his employment injury. In reaching this conclusion, Dr. Bagby relied on a review of the medical records and an extensive physical examination which revealed no supporting documentation and noted that appellant's physical examinations had remained unchanged since his 1986 employment injury. Dr. Bagby's opinion is therefore supported by his physical findings and the medical records.

In contrast, Dr. McCaffrey, appellant's treating physician, noted that appellant had an automobile accident, but makes no mention of his employment injury. Furthermore,

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[2] 5 U.S.C. §§ 8101-8193.

[3] *Richard T. DeVito*, 39 ECAB 668, 673 (1988); *Leroy R. Rupp*, 34 ECAB 427, 430 (1982).

[4] *Ann E. Kernander*, 37 ECAB 305, 310 (1986); *James L. Hearn*, 29 ECAB 278, 287 (1978).

[5] *John Watkins*, 47 ECAB 597 (1996); *Marion Thornton*, 46 ECAB 899, 906 (1995).

[6] *Jorge E. Sotomayor*, 52 ECAB ___ (Docket No. 99-452, issued October 6, 2000); *John W. Graves*, 52 ECAB ___ (Docket No. 98-511, issued December 7, 2000); *Mary A. Lowe*, 52 ECAB ___ (Docket No. 99-1507, issued January 19, 2001); *Gewin C. Hawkins*, 52 ECAB ___ (Docket No. 99-798, issued January 29, 2001).

[7] *Mary A. Lowe, supra* note 6; *Gewin C. Hawkins, supra* note 6.

[8] *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

[9] *Furman G. Peake*, 41 ECAB 361, 364 (1990).

[10] *Mary A. Lowe, supra* note 6.

Dr. McCaffrey provides no opinion supporting a causal relationship between appellant's current disability and his accepted employment injury. Therefore, his opinion is insufficient to contradict the well-reasoned opinion of Dr. Bagby. In addition, the report of Dr. Kitt, a chiropractor, lacks probative value because he makes no mention of x-ray evidence of a subluxation.[11]

Therefore, the Board finds that the weight of the medical evidence rests primarily with the opinion of Dr. Bagby, the second opinion specialist, who provided a rationalized medical explanation of why the accepted condition had resolved and why appellant had no continuing disability from the condition he sustained on March 18, 1986 and is sufficient to meet the Office's burden of proof in terminating appellant's compensation.[12]

The Board properly refused to reopen appellant's case for merit review under 5 U.S.C. § 8128(a).

Under section 8128(a) of the Act,[13] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulation,[14] which provides that a claimant may obtain review of the merits if her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

> "(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or
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> "(ii) Advances a relevant legal argument not previously considered by [the Office]; or
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> "(iii) Constitutes relevant and pertinent new evidence not previously considered by the [Office]."

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[15]

In the instant case, appellant submitted no new relevant and pertinent evidence in support of his September 15, 1999 request for reconsideration, nor did appellant show that the Office erroneously applied or interpreted a point of law. Accordingly, the Office properly denied appellant's request for review on the merits.

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[11] *Samuel Theriault*, 45 ECAB 586 (1994).

[12] *Id.* (finding that a physician's opinion was thorough, well rationalized and based on an accurate factual background and thus constituted the weight of the medical evidence that appellant's accepted injury had resolved).

[13] 5 U.S.C. § 8128(a).

[14] 20 C.F.R. § 10.606(b) (1999).

[15] 20 C.F.R. § 10.608(b).

The decisions of the Office of Workers' Compensation Programs dated September 24, and July 29, 1999 are hereby affirmed.

Dated, Washington, DC
September 7, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member