U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HENRY L. MINTER and DEPARTMENT OF THE NAVY, PUBLIC WORKS CENTER, Great Lakes, IL

Docket No. 99-1580; Submitted on the Record;
Issued September 13, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation benefits effective January 7, 1998; and (2) whether the Office properly refused to reopen appellant's claim for a merit review under 5 U.S.C. § 8128.

On June 24, 1969 appellant, then a 38-year-old electrician helper, injured his back pounding holes in a concrete floor. The Office accepted the claim for a low back strain. Appellant returned to work intermittently but continued filing new injury and recurrence of disability claims. The Office accepted appellant's claims for episodic aggravation of cervical and lumbar degenerative osteoarthritis with recurrent lumbosacral sprains and strains.[1] Appellant stopped work around September 10, 1987 and did not return. He received appropriate compensation benefits.

In 1984, appellant came under the treatment of Dr. Galo L. Tan, a neurologist. In a January 3, 1986 report, Dr. Tan noted that appellant complained of continuing low back pain but advised that appellant continued to work. He advised that an October 19, 1984 computed tomography (CT) scan revealed an L4-5 protruded disc, and L5-S1 spur formation. Dr. Tan questioned whether appellant might have a herniated disc and also reported hypertrophic changes and facet joint arthritis at L4-5 and L5-S1. He continued submitting reports noting appellant's disability status and that his condition was employment related.

In a May 13, 1997 report, Dr. Stuart M. Meyer, a Board-certified orthopedic surgeon and an Office referral physician, noted examining appellant that date. Dr. Meyer reviewed appellant's history and advised that examination revealed slight pain at the extremes of range of

[1] The record contains several references to protruded lumbar or cervical discs being accepted conditions. However, the context of the record appears to indicate that the Office never accepted any specific lumbar or cervical disc conditions as being employment related.

motion of the neck, tenderness and muscle tightness in the low back, with straight leg raising to 45 degrees bilaterally. Lumbar spine x-rays revealed degenerative changes and evidence of lumbar spondylosis. Dr. Meyer diagnosed degenerative lumbar disc disease with spondylosis of the lumbar spine. He noted that the only objective findings were muscle tightness. Dr. Meyer opined that appellant's current condition resulted from deconditioning and that appellant was disabled from performing his previous duties.

In an August 22, 1997 supplemental report,[2] Dr. Meyer advised that the objective finding of tight muscles would not disable appellant from his former position as an electrician. He opined that appellant had recovered from his work injury and that his current condition was due to deconditioning. Dr. Meyer noted that the accepted lumbar strain was no longer present.

On September 17, 1997 the Office referred appellant to Dr. Richard Sidell, a Board-certified orthopedic surgeon, to resolve a conflict in the medical evidence between Drs. Tan and Meyer regarding whether appellant had any continuing employment-related condition or disability.

In a September 30, 1997 report, Dr. Sidell noted appellant's injury history, treatment and testing. Cervical spine examination revealed full ranges of motion with no evidence of discomfort. Appellant's back appeared normal to inspection; appellant walked with a normal gait without an antalgic component. Range of motion was slightly restricted with forward flexion (standing) to 45 degrees, extension to 10 degrees, lateral bending to 30 degrees and internal rotation to 30 degrees. While sitting, appellant fully flexed the lumbar spine and placed his fingertips within six inches of his toes. Dr. Sidell opined that examination was "relatively normal" with the exception of slight low back stiffness "typical of a 66-year-old male with spondylosis." He opined that there were "no objective findings upon examination to demonstrate that the strain and aggravation with [the] underlying condition that occurred initially are still active." Dr. Sidell opined that appellant's current condition was "simply the normal degenerative process of the lumbar spine with gradual onset of stiffness from years of minor stress and strain." Based on this, he opined that there was not "any medical connection between [appellant's] current condition and his work injury." Dr. Sidell continued:

> "Following my review of the file and physical examination …, it is my medical opinion that [appellant] is medically capable of performing the physical requirements of his former position based solely upon the accepted strain and aggravation. It is noted that [appellant] has findings of spondylosis of his spine, which would probably preclude him from being able to comfortably perform duties as an electrician. These, however, are not related to any specific work injury."

* * *

[2] This report was sent in response to a July 23, 1997 request by the Office for the doctor to explain why he felt that appellant was disabled in view of limited objective findings noted on examination.

> "[Appellant] does not continue to experience residuals of his work injury, but more likely is experiencing residuals of a gradual deterioration process of his lumbar spine compatible with his age."

On November 24, 1997 the Office advised appellant that it proposed to terminate his compensation benefits.

In a December 15, 1997 report, Dr. Tan stated that appellant had been disabled since 1989 and that he experienced "cervical, lumbosacral herniated disc and degenerative arthritis, bilateral median carpal tunnel syndrome and hypertensive cardiovascular disease." He questioned how practical it would be to expect such a person to return to work. Dr. Tan advised that current examination revealed neck and low back pain and stiffness, sciatica in both legs and degenerative arthritis in the back. He diagnosed severe cervical and lumbosacral spondylosis with radiculopathy and sciatica, associated with multiple protruded discs in the neck and low back. Dr. Tan stated that appellant was totally and permanently disabled due to his neck and back injury that resulted from his employment.

In a January 7, 1998 decision, the Office terminated appellant's compensation benefits effective that date.

Appellant requested a review of the written record and submitted a January 30, 1998 report from Dr. Tan, who related appellant's injury history, diagnosed recurrent cervical and lumbosacral strain with radiculopathy, progressive spondylosis, following accumulative trauma at work and protruded discs. Dr. Tan questioned why the Office terminated appellant's benefits, and asserted that appellant was unable to work.

In a March 30, 1998 decision and finalized March 31, 1998, an Office hearing representative affirmed the Office's January 7, 1998 decision. The hearing representative found that the report of Dr. Sidell represented the weight of the medical evidence.

Appellant continued submitting reports from Dr. Tan noting appellant's status. In an undated report received April 13, 1998, Dr. Tan reiterated appellant's diagnoses and asserted that appellant remained disabled. He also questioned why Dr. Sidell's opinion was the basis of the Office's decision to terminate benefits. In a July 13, 1998 report, Dr. Tan listed appellant's diagnoses opined that appellant remained disabled and disagreed with the Office basing its termination on a "one time consultation" by Dr. Sidell. Dr. Tan also forwarded a July 7, 1998 lumbar CT scan report Dr. A. Saltiel, a Board-certified radiologist. The report listed degenerative findings, including a right lateral herniation at L2-3 and mild diffuse bulging at L3-4, but did not address the cause of any such conditions.

In an August 2, 1998 letter, appellant requested reconsideration.

In a September 25, 1998 decision, the Office denied appellant's reconsideration request, without conducting a merit review of the record, on the grounds that insufficient evidence was submitted.

In a February 22, 1999 letter, appellant requested reconsideration and submitted a November 2, 1998 report in which Dr. Tan maintained that appellant remained disabled due to his work injury.

In a March 9, 1999 decision, the Office denied appellant's reconsideration request, without conducting a merit review of the record, on the grounds that insufficient evidence was submitted.

The Board finds that the Office met its burden of proof in terminating appellant's compensation benefits effective January 7, 1998.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[3] After it has determined that there is disability causally related to an employee's federal employment, the Office may not terminate or modify compensation without establishing that the disabling condition has ceased or that it is no longer related to the employment.[4]

The Office accepted that appellant sustained a low back sprain and an aggravation of preexisting cervical and lumbar osteoarthritis and paid appropriate benefits. In developing the medical evidence, the Office referred appellant to Dr. Meyer who, in May 16 and August 22, 1997 reports, found that appellant had no continuing employment-related condition or disability. As the Office also had reports from Dr. Tan indicating that appellant remained disabled due to his employment injury, the Office found a conflict in the medical evidence with regard to whether appellant had any continuing employment-related condition or disability. Thus, the Office properly referred appellant to Dr. Sidell to resolve the conflict.[5]

In his September 30, 1997 report, Dr. Sidell reviewed appellant's history and reported examination findings. He advised that findings were essentially normal, except for some low-back stiffness that would be typical for a 66-year-old male with spondylosis. Dr. Sidell found no objective basis to demonstrate that the employment-related strain and aggravation of the underlying condition were still active. Instead, he opined that appellant's condition was simply part of the normal degenerative process of the lumbar spine. Dr. Sidell found no medical connection between appellant's current condition and his work injury. He concluded that appellant was medically capable of performing the physical requirements of his former job based on the accepted conditions. While, Dr. Sidell noted that appellant's spondylosis would likely preclude him from his regular duties, he advised that this condition was not employment related. He found no basis on which to attribute any continuing symptoms or disability to appellant's employment.

[3] *Bettye F. Wade*, 37 ECAB 556 (1986); *Ella M. Garner*, 36 ECAB 238 (1984).

[4] *John Wilkes, Jr.*, 36 ECAB 451 (1985); *Betty J. Glover*, 34 ECAB 465 (1982); *Fred Foster*, 1 ECAB 21 (1947).

[5] 5 U.S.C. § 8123(a), in pertinent part, provides: "If there is a 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."

The Board finds that Dr. Sidell's opinion is based on a proper factual background and is sufficiently well rationalized such that it is entitled to special weight and establishes that appellant's employment-related conditions and disability ceased no later than January 7, 1998.[6]

Dr. Tan continued submitting medical reports supporting that appellant had continued employment-related disability. However, he did not provide any detailed rationale explaining the medical basis by which any continuing conditions or disability would be due to appellant's employment and not solely due to aging or conditions not accepted as being employment related.[7] Furthermore, the Board has held that, when a physician creates a conflict in the medical evidence, the same physician cannot, on subsequent review of the record, create another conflict in the medical evidence.[8]

Consequently, the Office met its burden of proof in terminating compensation benefits effective January 7, 1998.

The Board further finds that the Office properly refused to reopen appellant's claim for a merit review under 5 U.S.C. § 8128.

Section 10.606(b)(2) of the Office's 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) submitting relevant and pertinent new evidence not previously considered by the Office.[9] Section 10.608(b) provides that, when an application for reconsideration does not meet at least one of the three 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]

Appellant's requests for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).

While appellant submitted new medical reports from Dr. Tan, these reports are not relevant and pertinent because they essentially repeat findings and conclusions stated in the

[6] Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight. *Aubrey Belnavis*, 37 ECAB 206 (1985).

[7] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

[8] *See Dorothy Sidwell*, 41 ECAB 857 (1990).

[9] 20 C.F.R. § 10.606(b)(2).

[10] 20 C.F.R. § 10.608(b).

doctor's previously submitted reports.[11] Although the doctor also critiqued the basis of the Office's decision to terminate benefits based on Dr. Sidell's report, it is well established that determination of legal standards in regard to medical questions presented by a case are outside the scope of expertise of physicians involved in a case.[12] Thus, his comments, to the extent that they may be considered a point of law or a legal argument on appellant's behalf, are without a reasonable color of validity[13] and are insufficient to require a merit review.

For these reasons, the Office properly refused to reopen appellant's claim for a review on the merits.[14]

The March 9, 1999, September 25 and March 31, 1998 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
September 13, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

[11] *See Eugene F. Butler*, 36 ECAB 393, 398 (1984) (where the Board held that material which is repetitious or duplicative of that already in the case record is of no evidentiary value in establishing a claim and does not constitute a basis for reopening a case).

[12] *See John W. Butler*, 39 ECAB 852 (1988).

[13] *John F. Critz*, 44 ECAB 788 (1993).

[14] On appeal, appellant has submitted new evidence. However, the Board may not consider new evidence for the first time on appeal. 20 C.F.R. § 501.2(c).