U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EDDIE K. STANLEY and DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, Washington, DC

Docket No. 02-817; Submitted on the Record;
Issued August 26, 2002

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs has met its burden of proof to justify termination of all the employee's benefits effective May 1, 2001; and (2) whether the Office properly refused to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a).

On May 20, 2000 appellant, then a 34-year-old census crew leader, was struck by an automobile and sustained injuries to his shoulder, neck and back. He stopped work on May 20, 2000 and did not return. The Office accepted appellant's claim for cervicalgia, neuritis and lumbago lumbar spine. He was paid appropriate compensation.

In a letter dated August 3, 2000, the Office requested detailed factual and medical evidence from appellant, stating that the information submitted was insufficient to establish that he sustained an injury as alleged.

In a decision dated September 7, 2000, the Office denied appellant's claim for compensation on the grounds that the evidence submitted was insufficient to establish that appellant sustained an injury as alleged.

By letter dated September 12, 2000, appellant requested reconsideration of the Office's decision dated September 7, 2000 and submitted additional medical evidence. He submitted several reports from Dr. David M. Paul, a family practitioner, who noted a history of appellant's injury on May 20, 2000. He diagnosed appellant with cervicalgia, neuritis and lumbago of the lumbar spine, which was causally related to his work injury of May 20, 2000.

In a decision dated October 17, 2000, the Office vacated its decision of September 7, 2000 and accepted appellant's claim for cervicalgia, neuritis and lumbago of the lumbar spine.

Thereafter, appellant submitted several reports from Dr. Paul dated July 25 to February 13, 2001. He indicated that appellant continued to experience neck pain radiating to

his legs. His note of October 10, 2000 indicated that appellant was progressing while undergoing physical therapy. Dr. Paul indicated that appellant could return to work light-duty status on October 11, 2000. In his attending physicians reports dated November 7, 2000 and January 8, 2001, he diagnosed appellant with a cervical and back injury and indicated with a check mark "yes" that appellant's condition was caused or aggravated by an employment activity, specifically driving during working hours. Dr. Paul's work capacity evaluation dated February 13, 2001 indicated that appellant was status post motor vehicle accident with neck and back conditions. He noted that appellant could return to work eight hours a day without restrictions on February 15, 2001. Dr. Paul noted that prolonged sitting might increase low back pain due to an increase in intradiscal pressure.

On March 27, 2001 the Office issued a notice of proposed termination of compensation on the grounds that Dr. Paul's February 13, 2001 report recommended appellant return to work without restrictions and established no continuing disability as a result of the May 20, 2000 employment injury.

Appellant submitted three magnetic resonance imaging (MRI) scans of the lumbosacral spine, thoracic spine and cervical spine dated November 7, 2000. The lumbosacral MRI revealed a focal disc herniation at L5-S1 level; the thoracic MRI revealed no abnormalities; and the cervical MRI revealed bulging discs at C4-5 and C5-6 and a focal disc herniation at C6-7.

By decision dated May 1, 2001, the Office terminated all of appellant's benefits effective May 1, 2001 on the grounds that the weight of the medical evidence established that he had no continuing disability resulting from his May 20, 2000 employment injury.

On September 20, 2001 appellant requested reconsideration of the Office decision dated May 1, 2001 and submitted additional medical evidence. He submitted an MRI dated November 7, 2000; an electromyogram (EMG) dated December 18, 2000; and two reports from Dr. Paul dated April 24 and May 2, 2001.[1] The MRI revealed a focal disc herniation at L5-S1 level. The EMG revealed mild right C7 radiculopathy with evidence of denervation. Dr. Paul's report dated April 24, 2001 noted a history of appellant's work-related injury of May 20, 2000 and his subsequent treatment. He noted a slow progression of improvement in appellant's symptoms. Dr. Paul provided a summary of appellant's office visits and noted that the treatment was medically necessary and reasonable. His work capacity evaluation of May 2, 2001 noted that appellant was status post motor vehicle accident with neck and back conditions. Dr. Paul noted that appellant could work eight hours a day without restrictions. He noted that a back support would be beneficial to appellant.

In a decision dated November 13, 2001, the Office denied appellant's application for review without conducting a merit review on the grounds that the evidence submitted was cumulative in nature and insufficient to warrant review of the prior decision.

The Board finds that the Office has met its burden of proof to terminate benefits effective May 1, 2001.

[1] The Board notes that Dr. Paul's reports dated April 24 and May 2, 2001 were received by the Office on May 7, 2001 after the Office issued its May 1, 2001 decision.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[2] 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.[3]

In this case, the Office accepted that appellant sustained cervicalgia, neuritis and lumbago of the lumbar spine on May 20, 2000 and paid appropriate compensation. Dr. Paul, appellant's treating physician, submitted several progress notes and attending physician reports which indicated that appellant was being treated for neck and back injuries. Dr. Paul diagnosed appellant with cervicalgia, neuritis and lumbago of the lumbar spine. He indicated that appellant continued to experience neck pain radiating to his legs. Dr. Paul's note of October 10, 2000 indicated that appellant was progressing and should continue with physical therapy. He indicated that appellant could return to work light-duty status on October 11, 2000. Dr. Paul prepared a work capacity evaluation dated February 13, 2001, which noted that appellant was status post motor vehicle accident with neck and back conditions. He further indicated that appellant could return to work eight hours a day without restrictions on February 15, 2001.

As appellant's attending physician, Dr. Paul had early knowledge of the relevant facts and had numerous opportunities to examine appellant and to evaluate the course of his condition. At the time wage-loss benefits were terminated Dr. Paul had clearly opined that appellant could return to his regular duties. His opinion, therefore, must be considered reliable. The Board finds that Dr. Paul's opinion is probative on the issue of appellant's ability to work.[4] As the record contains no medical evidence to the contrary, the Board further finds that Dr. Paul's opinion constitutes the weight of the medical evidence and is sufficient to justify the Office's termination of benefits. Although he indicated that prolonged sitting "may" increase low back pain due to an increase in intradiscal pressure this opinion is speculative in nature and the Board has found that opinions which are speculative and equivocal in character have little probative value.[5]

Following issuance of the Office's notice of proposed termination of compensation appellant submitted several MRI reports, however, these reports merely noted results but did not mention the causal relationship between the disc herniation and the May 20, 2000 work-related injury.

Consequently, the Office properly met its burden of proof in terminating appellant's compensation benefits.

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[2] *Harold S. McGough*, 36 ECAB 332 (1984).

[3] *Vivian L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

[4] *See generally Melvina Jackson*, 38 ECAB 443, 450 (1987) (discussing the factors that bear on the probative value of medical opinions).

[5] *See Leonard J. O'Keefe*, 14 ECAB 42, 28 (1962).

The Board further finds that the Office in its November 13, 2001 decision properly denied appellant's request for reconsideration on the merits under 5 U.S.C. § 8128(a) on the basis that his request for reconsideration did not meet the requirements set forth under section 8128.[6]

Under section 8128(a) of the Act,[7] 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 regulations,[8] 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
>
> "(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.[9]

In the present case, the Office denied appellant's claim without conducting a merit review on the grounds that the evidence submitted was cumulative and insufficient. In support of his request for reconsideration, appellant submitted various documents including: a duplicative MRI report dated November 7, 2000; an EMG dated December 18, 2000; and two reports from Dr. Paul dated April and May 2, 2001.[10] The EMG revealed mild right C7 radiculopathy with evidence of denervation and the MRI revealed a focal disc herniation at L5-S1 level. However, neither report mentioned the causal relationship between the radiculopathy, denervation and disc herniation with the May 20, 2000 work-related incident. Therefore, these reports are of no probative value in determining appellant's continued disability as a result of the May 20, 2000 work-related injury. Dr. Paul's report dated April 24, 2001 noted a slow progression of improvement in appellant's complaints. He provided a summary of appellant's office visits and noted that the treatment was medically necessary and reasonable. However, this information is duplicative of Dr. Paul's previous reports, which were considered by the Office in its decision dated May 1, 2001 and found deficient.[11] Dr. Paul's May 2, 2001 work capacity evaluation

[6] *See* 20 C.F.R. § 10.606(b)(2)(i-iii)

[7] 5 U.S.C. § 8128(a).

[8] 20 C.F.R. § 10.606(b) (1999).

[9] 20 C.F.R. § 10.608(b).

[10] *Supra* note 1.

[11] *See Daniel Deparini*, 44 ECAB 657 (1993).

noted appellant was status post motor-vehicle accident with neck and back conditions. His note did not support total disability, rather he indicated that appellant could work eight hours a day without restrictions. This information is also cumulative of information already in the record, specifically the February 13, 2001 work capacity evaluation previously considered by the Office. Appellant neither showed that the Office erroneously applied or interpreted a point of law; advanced a point of law or fact not previously considered by the Office; nor did he submit relevant and pertinent evidence not previously considered by the Office."[12]

The decisions of the Office of Workers' Compensation Programs dated November 13 and May 1, 2001 are hereby affirmed.

Dated, Washington, DC
August 26, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[12] 20 C.F.R. § 10.606(b) (1999).