United States Department of Labor
Employees' Compensation Appeals Board

JAMES HILTS, Appellant	)	
and	)	**Docket No. 04-419**
	)	**Issued: May 18, 2004**
DEPARTMENT OF THE NAVY, NAVAL SUPPLY CENTER, Oakland, CA, Employer	)	

Appearances:
James Wright, Esq., for the appellant
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member

JURISDICTION

On December 4, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated June 18, 2003 and a nonmerit decision dated November 13, 2003. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over these decisions.

ISSUES

The issues are: (1) whether the Office met its burden of proof to terminate appellant's compensation; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On September 1, 1987 appellant, then a 34-year-old tool and parts attendant, injured his wrist while pulling the tailgate on a truck. In support of his claim, Dr. Jay B. Hann, an orthopedist, who stated that x-rays showed a marked navicular lunate disassociation with fairly

profound arthritis between the radius and the navicular. He added that this was obviously a long-standing problem. The claim was accepted for right wrist sprain and later for an aggravation of preexisting navicular lunate disassociation and osteoarthritis.[1] Appellant returned to light duty eight days later, was terminated as part of an agency reduction-in-force in 1997, returned to total temporary disability in 1998, worked in the private sector from September 1999 until February 2000, when he returned to total temporary disability. He also received a schedule award for 49 percent impairment for his right upper extremity.

In a September 15, 1998 report, Dr. John Lavorgna, a Board certified-orthopedic surgeon and Office referral physician, stated that appellant presented with swelling and crepitus about his right wrist and fluid within the wrist joint, especially around the radial portion of the wrist joint in the area of the navicular and radius. He noted that appellant's wrist had extension of 20 degrees, flexion of 0 degrees, radial deviation of 0 degrees, ulnar deviation of 10 degrees, supination of 65 degrees and pronation of 90 degrees. Dr. Lavorgna diagnosed degenerative arthritis of the right wrist and opined that this condition was not a residual of the accepted injury. He based his opinion on the fact that x-rays showed a preexisting congenital anomaly with significant arthritis in the right wrist that was aggravated, but not irreversibly altered by the accepted injury.

On November 5, 1999 the Office referred appellant to Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon, for a second opinion. In a December 17, 1999 report, she stated that appellant presented with pain in the right wrist and the base of the right thumb with numbness in the right hand as well. Dr. Swartz noted that on examination she found no swelling, warmth, discoloration or atrophy; and that appellant voluntarily made no effort on strength testing. She noted mild, diffuse tenderness and that he refused to move his wrist due to pain. Dr. Swartz stated that she could find no work injury-related objective factors; noting that appellant's complaints of pain and inability to use his right arm were subjective. She diagnosed degenerative arthritis in the right wrist and stated this condition was not causally related to appellant's accepted injury of 12 years prior as an aggravation would have resolved years ago.

In a March 21, 2000 progress note, Dr. Scott Taylor, a Board-certified orthopedic surgeon and appellant's attending physician, stated that appellant presented wearing a right wrist brace and complaints of constant pain, especially with the wrist movement of the wrist and fingers. He stated that x-rays showed advanced degenerative joint disease.

In a March 19, 2002 report, Dr. Jerrold Sherman, a Board-certified orthopedic surgeon and Office referral physician, stated that appellant presented with right wrist pain. On examination he found no swelling, but severe tenderness about the radial aspect of the wrist. Dr. Sherman noted that appellant could make a fist with his right hand and had normal sensation. He stated that his wrist had five degrees dorsiflexion, five degrees of palmar flexion and zero degrees of radial and ulnar deviation with pain during the entire range of motion. Dr. Sherman opined that appellant's condition was not related to the accepted condition, noting that the accepted condition would have been symptomatic for one week, after which his advanced

[1] Appellant had a preexisting bilateral congenital lunate triquetral fusion.

osteoarthritis would have relentlessly and spontaneously worsened to the point where it is today absent the August 14, 1987 sprain.

In a May 1, 2002 letter, the Office proposed terminating appellant's compensation and provided him procedural rights. In a July 8, 2002 progress report, Dr. Taylor stated that he was in receipt of appellant's previous medical records for the first time and that in his opinion appellant's right wrist condition was attributable to the accepted work injury because he was working without restrictions before the injury and he never regained his preinjury status. In a July 25, 2002 progress report, Dr. Taylor stated that appellant wished to proceed with right wrist fusion surgery for a condition that he (Dr. Taylor) considered to be related to his work injury.[2] In an August 9, 2002 decision, the Office terminated compensation for wage-loss and medical benefits effective August 11, 2002, finding the weight of the medical evidence rested with Drs. Lavorgna, Swartz and Sherman, who each found appellant had no residuals to his accepted right wrist condition.

In an August 16, 2002 letter, appellant requested a hearing. In a February 2, 2003 report, Dr. Robert E. Lieberson, a Board-certified neurological surgeon, stated that appellant told him that prior to the accepted injury his wrist was entirely and completely well. However, he noted that the x-rays show that appellant had a preexisting condition that may well have rendered him more susceptible to a wrist injury. Dr. Lieberson added that many individuals with significant degenerative disease of the wrist do not have functional disabilities. He further stated that it seemed unlikely and was speculative to conclude that appellant would have become disabled on August 14, 1987 absent the accepted injury. Commenting on previous medical opinions, he stated that the previous doctors agreed that the accepted injury aggravated the preexisting condition, but the doctors are inconsistent on the date that the aggravation ceased and; therefore, these opinions are speculative. Dr. Lieberson further noted that the atrophy in appellant's right wrist would not have occurred had he used his arm normally over the years and that the three centimeter difference in his bicep and two centimeter difference in his forearm is somewhat greater than expected and it is within medical probability that the accepted condition contributed to this. He concluded that appellant is permanently partially disabled and could only work with restrictions precluding any significant use of the right arm.

In a June 18, 2003 decision, the hearing representative affirmed the August 9, 2002 termination, finding that the medical evidence rested with Dr. Sherman noting that Dr. Lieberson's report lacked sufficient rationalization to support even a conflict in the medical evidence.

In an August 18, 2003 letter, appellant requested reconsideration and submitted a June 30, 2002 report from Dr. Lieberson who wrote:

> Clearly, my report was weak. I believe it was weak based upon a weak case rather than upon a lack of effort. As you know,

[2] In a September 27, 1988 report, Dr. Hann had requested authorization to perform fusion surgery on appellant's right wrist. In a March 20, 1989 decision, the Office approved surgery, but appellant elected to not go forward with it; opting instead for more conservative treatments.

> [appellant] reported an injury in 1987. The injury did not sound very severe. [Appellant] did not require much medical care and did continue to work. He was able to work through 1997 though he did so with restrictions. [Appellant] discontinued only because of his layoff. I take it that [he] did receive disability benefits insofar as it was felt that [he] did not have an on going medical problem which would have prevented him from continuing work. I am not sure I would necessarily disagree. The examination was unusual, but not truly abnormal.… The circumference differences, though a little greater that would be expected based upon [appellant's] left dominance, were not striking. In short, beyond stated subjective, there was really nothing on examination that would have substantiated [appellant's] history and it remains unclear to me why [he] would have been able to work for some 10 years following the injury but would only now become disabled based upon the same injury.

In a November 13, 2003 decision, the Office denied reconsideration finding that the evidence submitted by appellant was neither pertinent nor relevant.

LEGAL PRECEDENT -- ISSUE 1

Under the Federal Employees' Compensation Act,[3] once the Office has accepted a claim it has the burden of justifying termination or modification of compensation benefits.[4] The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[5] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[6]

ANALYSIS -- ISSUE 1

In the present case, the Office relied on the medical reports of Drs. Lavorgna, Swartz and Sherman, who each opined that appellant's right wrist condition was not causally related to the 1987 accepted conditions. Dr. Lavorgna supported his opinion by stating that, while appellant's preexisting condition was aggravated by the accepted injury, his x-rays showed that the condition was not irreversibly altered by the aggravation.

In her December 17, 1999 report, Dr. Swartz stated that appellant's temporary aggravation would have resolved years before her examination. She noted that on examination she found no

[3] 5 U.S.C. § 8101 *et seq*.

[4] *Charles E. Minniss,* 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

[5] *Id.*

[6] *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

swelling, warmth, discoloration or atrophy and that appellant made no effort on strength testing. Dr. Swartz stated that she could find no work injury-related objective factors, adding that appellant's complaints of pain and inability to use his right arm were subjective.

In his March 19, 2002 report, Dr. Sherman stated that appellant's condition was not related to the accepted condition, noting that the August 14, 1987 injury condition would have been symptomatic for one week after which, his advanced osteoarthritis would have relentlessly and spontaneously worsened to the point where it is today absent the accepted sprain.

The Board finds these reports are well rationalized and demonstrate knowledge of appellant's medical and work history. They are supported with sufficient medical rationalization and objective evidence and are sufficient to meet the Office's burden of proof.

The reports of Drs. Taylor and Lieberson are insufficiently rationalized to create a conflict in the medical evidence. In his July 8, 2002 progress report, Dr. Taylor opined that appellant's right wrist condition was attributable to the accepted work injury because he was working without restrictions before the injury and he never regained his preinjury status. This is a statement unsupported by objective medical evidence. It does not explain why appellant could work for several years immediately following the injury then become disabled by it. Moreover, it does not explain the impact of his preexisting and progressive severe degenerative arthritis on his disability. Dr. Lieberson's report is also insufficiently rationalized. He acknowledges that appellant had a preexisting condition of severe degenerative arthritis, but says other doctors were speculative to conclude that he would have become disabled absent the accepted sprain. As that is a conclusion contrary to the medical evidence in the file that Dr. Lieberson reviewed to overcome the weight of the referral physicians he must explain that conclusion and support it with objective medical evidence. As with Dr. Taylor's report, Dr. Lieberson does not explain how appellant could work for more than 10 years after the injury and then become disabled from it. The Board accordingly finds that the Office met its burden of proof to terminate compensation for wage-loss and medical benefits effective August 11, 2002.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[7] 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.[8] 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.[9] When a claimant fails to meet one of the above standards, it is a matter

[7] 5 U.S.C. § 8101 *et seq.* 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).

[8] 20 C.F.R. § 10.606(b)(2).

[9] 20 C.F.R. § 10.607(a).

of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.[10]

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[11] The Board has also held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[12] While reopening a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.[13]

ANALYSIS -- ISSUE 2

The Board further finds that the Office properly denied appellant's request for reconsideration without merit review in its June 18, 2003 decision. He did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or submit relevant and pertinent new evidence not previously considered by the Office. The only evidence appellant submitted on reconsideration was Dr. Lieberson's June 30, 2003 report. While his report does constitute new evidence, it is neither pertinent nor relevant because it does not address the critical issue at this stage of the case; why and how appellant's 1987 accepted employment-related condition was causally related to his alleged ongoing disability.

CONCLUSION

The Office met its burden of proof to terminate appellant's compensation effective August 11, 2002 based on the weight of the medical evidence. The Board also finds that the Office properly denied merit review of its June 18, 2003 decision.

[10] *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

[11] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

[12] *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).

[13] *John F. Critz*, 44 ECAB 788, 794 (1993).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 13 and June 18, 2003 are affirmed.

Issued: May 18, 2004
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member