United States Department of Labor
Employees' Compensation Appeals Board

R.T, Appellant	)	
and	)	**Docket No. 09-534**
	)	**Issued: November 6, 2009**
TENNESSEE VALLEY AUTHORITY, JOHN SEVIER STEAM PLANT, Rogersville, TN, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 18, 2008 appellant filed a timely appeal from the July 28 and September 22, 2008 decisions of the Office of Workers' Compensation Programs that modified his wage-earning capacity to zero and terminated his medical benefits and from a November 19, 2008 decision denying merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office met its burden of proof to modify appellant's wage-earning capacity determination; (2) whether the Office met its burden of proof to terminate appellant's medical benefits; and (3) whether the Office properly refused to reopen appellant's claim for further review of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On October 10, 1972 appellant, then a 31-year-old assistant unit operator, injured his lower back and legs in the performance of his federal duties. He stopped work on October 12, 1972.[1] The claim was accepted for lumbosacral strain. Appellant was placed on the periodic rolls. In December 1972, a vocational rehabilitation plan was approved for college studies and he enrolled at East Tennessee State University, ultimately receiving bachelor's and master's degrees in special education. By decision dated March 22, 1978, the Office reduced appellant's wage-loss compensation based on his capacity to earn wages as a special education teacher. On August 17, 1978 it amended the decision to reflect that he was entitled to compensation until August 14, 1978, when he began teaching in the Bristol, Virginia city schools.[2]

In April 2001, the Office referred appellant to Dr. Stephen R. Shaffer, a Board-certified orthopedic surgeon, for a second opinion evaluation. By report dated April 30, 2001, Dr. Shaffer noted findings on examination diagnosed status post L4-5 discectomy and residual signs of L5 radiculopathy with lumbosacral strain aggravating the condition. He provided permanent restrictions to appellant's physical activity and advised that he could continue teaching.[3] Appellant retired from teaching sometime in 2004 or 2005. On April 4, 2006 the Office requested that he submit a narrative medical report. In an April 20, 2006 response, appellant advised that Dr. Shaffer had provided permanent restrictions in 2001 and he had not been treated since that time, other than with the Department of Veterans Affairs. In a May 10, 2006 report, Dane Harden, a physician's assistant, diagnosed depression, anxiety disorder, tinnitus, hearing loss, hypertension and prostatic cancer. In March 2007, appellant resubmitted the same report.

In April 2008, the Office referred appellant to Dr. Michael J. Goebel, Board-certified in orthopedic surgery, for a second opinion evaluation.[4] By report dated June 3, 2008, Dr. Goebel noted appellant's complaint of low back pain and occasional lower extremity pains. He reviewed the statement of accepted facts and medical record and noted that appellant's past medical history was significant for two back surgeries in 1963 and 1971 that preceded the October 10, 1972 employment injury, high blood pressure and prostate cancer. On physical examination appellant had a normal stance and gait and could forward flex 90 degrees and stand

[1] The record indicates that appellant had disc surgery in the 1960s while he was in the Navy and again on October 5, 1971. He did not file a claim for the October 1971 condition, although he later stated that he began to feel back and leg pain in September 1971 while at work.

[2] On June 26, 1990 and January 23, 1991, the Office proposed to reduce appellant's compensation. The proposed decisions were not finalized.

[3] Appellant could not reach above the shoulder, twist, squat, kneel or climb, could sit, walk and stand one hour at a time with five-minute breaks each hour and a 35-pound restriction on pushing, pulling and lifting. The medical record from the time appellant began his teaching career until seen by Dr. Shaffer is sparse and only includes reports dated April 27, 1982 and October 11, 1985 from Dr. Harry W. Bachman, a Board-certified orthopedic surgeon, a November 18, 1986 report from Dr. Robert C. Henderson, a Board-certified orthopedist and reports dated March 26 and 27, 2001 from Dr. Fred Greear, an attending Board-certified internist.

[4] The statement of accepted facts provided Dr. Goebel advised that the accepted conditions were lumbosacral sprain and lumbosacral neuritis/radiculitis.

to the neutral position. Hip and knee range of motion were full and symmetric bilaterally with 5/5 motor strength and intact and symmetric sensation to light touch in all dermatomal distributions. Dr. Goebel advised that appellant had reached maximum medical improvement on or about October 11, 1985 and had no residuals of his October 10, 1972 employment injury, with no radiculopathy or objective impairment of his back condition and no objective findings to support a diagnosis of lumbosacral sprain, lumbosacral neuritis or radiculitis. In an attached work capacity evaluation, he advised that appellant could work eight hours a day with a permanent 35-pound restriction on pushing, pulling and lifting, stating that these were placed following appellant's spinal surgery in 1971.

On June 19, 2008 the Office proposed to modify appellant's wage-earning capacity to zero wage loss and terminate his medical benefits, based on Dr. Goebel's June 3, 2008 opinion. On July 1, 2008 appellant disagreed and submitted an October 13, 1972 letter describing his condition in 1971 and 1972.

By decision dated July 28, 2008, the Office terminated appellant's medical benefits and modified his wage-earning capacity to zero.

On August 25, 2008 appellant requested reconsideration. In an August 25, 2008 work capacity evaluation Dr. Greear advised that appellant could not work eight hours a day due to back and right lower extremity pain, but could work four hours daily with permanent restrictions of minimal twisting, bending, stooping, pulling, lifting, squatting, kneeling and climbing, no reaching overhead and one hour sitting, walking, standing, operating a motor vehicle, repetitive movements of the wrist and elbow and pushing with a 20-pound weight restriction.

By decision dated September 22, 2008, the Office denied modification of the July 28, 2008 decision, finding that, as Dr. Greear provided no objective medical findings to support his conclusions, the weight of the medical evidence continued to rest with the opinion of Dr. Goebel.

On November 11, 2008 appellant again requested reconsideration and submitted evidence previously of record.[5] He noted that on July 20, 1972 an employing establishment physician placed a 35-pound lifting restriction, that was verified by the plant superintendent on January 19, 1973. Appellant argued that Dr. Goebel's report supported that he could not return to his former employment.

In a November 19, 2008 decision, the Office denied appellant's reconsideration request, finding that the evidence and argument submitted were duplicative.

LEGAL PRECEDENT -- ISSUE 1

A wage-earning capacity decision is a determination that, a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages. Compensation payments are based on the wage-earning capacity determination and it

[5] This consisted of correspondence dated January 19, 1973, Dr. Shaffer's April 30, 2001 work capacity evaluation, Dr. Goebel's June 3, 2008 report and work capacity evaluation and Dr. Greear's August 25, 2008 work capacity evaluation.

remains undisturbed until properly modified.[6] The Office's procedure manual provides that, "[i]f a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In this instance the [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity."[7] Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was, in fact, erroneous.[8] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[9]

In addition, Chapter 2.814.11 of the Office's procedure manual contains provisions regarding the modification of a formal loss of wage-earning capacity. The relevant part provides that a formal loss of wage-earning capacity will be modified when: (1) the original rating was in error; (2) the claimant's medical condition has changed; or (3) the claimant has been vocationally rehabilitated. Office procedures further provide that the party seeking modification of a formal loss of wage-earning capacity decision has the burden to prove that one of these criteria has been met. If the Office is seeking modification, it must establish that the original rating was in error, that the injury-related condition has improved or that the claimant has been vocationally rehabilitated.[10]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a lumbosacral sprain and lumbosacral neuritis and radiculitis caused by an October 10, 1972 employment injury. The Board finds that the Office presented sufficient medical evidence to modify appellant's wage-earning capacity effective August 3, 2008. In a comprehensive report dated June 3, 2008, Dr. Goebel, Board-certified in orthopedic surgery, reviewed the complete record and appellant's complaints. He advised that there were no objective findings of the accepted conditions, noting physical examination findings of a normal stance and gait and that appellant could forward flex 90 degrees and stand to the neutral position. Hip and knee range of motion were full and symmetric bilaterally with 5/5 motor strength and sensation to light touch was intact and symmetric in all dermatomal distributions. Dr. Goebel concluded that appellant had reached maximum medical improvement with regard to the employment injuries on or about October 11, 1985 and did not require further medical treatment. He advised that appellant could work eight hours a day with a 35-pound weight restriction, due to back surgery in 1971 that predated the employment injury.

[6] *Katherine T. Kreger*, 55 ECAB 633 (2004).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

[8] *Stanley B. Plotkin*, 51 ECAB 700 (2000).

[9] *Id.*

[10] *See* Federal (FECA) Procedure Manual, *supra* note 7 at Chapter 2.814.11 (June 1996).

The relevant medical evidence submitted by appellant includes a May 10, 2006 report provided by Dane Harden, a physician's assistant. Registered nurses, licensed practical nurses and physicians' assistants are not "physicians" as defined under the Federal Employees' Compensation Act.[11] Their, opinions are therefore of no probative value.[12] In an August 25, 2008 report, Dr. Greear advised that appellant could work only four hours a day with permanent restrictions on his physical ability and a 20-pound weight restriction. However, he did not address whether the restrictions were due to appellant's accepted conditions or were caused by the October 10, 1972 employment injury. Appellant began private employment in 1978 and continued until he retired in 2004 or 2005. There is insufficient medical evidence to establish that his current conditions were caused by the October 10, 1972 employment injuries.

The Board finds that the Office properly modified the March 22, 1978 wage-earning capacity decision, as amended on August 17, 1978, on the grounds that appellant's employment-related condition had changed. The June 3, 2008 report of Dr. Goebel, who advised that appellant had no residuals of the October 6, 1984 employment injury, shows that there was a material change in the nature and extent of his employment-related conditions, *i.e.*, for the better, such that he no longer had wage loss due to his accepted conditions. He provided rationale for his opinion, explaining that appellant had no objective findings of his accepted conditions and that the 35-pound weight restriction predated the employment injury. The Office therefore properly reduced appellant's wage-loss compensation to zero effective August 3, 2008.[13]

LEGAL PRECEDENT -- ISSUE 2

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. 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. The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition, which require further medical treatment.[14]

ANALYSIS -- ISSUE 2

The Board finds that the Office met its burden of proof to terminate appellant's authorization for medical treatment for his accepted lumbosacral sprain and lumbosacral neuritis and radiculitis caused by an October 10, 1972 employment injury. As noted, in a well-rationalized opinion, Dr. Goebel advised that appellant had no current employment-related

[11] 5 U.S.C. §§ 8101-8193.

[12] *Roy L. Humphrey*, 57 ECAB 238 (2005).

[13] *L.C.*, 60 ECAB ____ (Docket No. 08-2271, issued August 6, 2009).

[14] *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

conditions and did not require further medical treatment.[15] Thus, the Office met its burden of proof to terminate appellant's medical benefits.[16]

LEGAL PRECEDENT -- ISSUE 3

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.[17] Section 10.608(a) of Office regulations provide 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).[18] This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[19] Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[20]

ANALYSIS -- ISSUE 3

With his request for reconsideration on November 11, 2008, appellant argued that Dr. Goebel's report supported that he could not return to his former employment. A review of Dr. Goebel's June 3, 2008 report, however, indicates that he advised that appellant could work eight hours a day with the only restriction that he not lift, push or pull greater than 35 pounds. Dr. Goebel added that the restrictions were placed after appellant's spinal surgery in 1971. The Board notes that the 1971 spinal surgery preceded appellant's October 10, 1972 employment injury and was not accepted as employment related. While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention, as in this case, does not have a reasonable color of validity.[21] Consequently, appellant was 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).[22]

---

[15] *E.J.*, 59 ECAB ___ (Docket No. 08-1350, issued September 8, 2008).

[16] *Kathryn E. Demarsh, supra* note 14.

[17] 5 U.S.C. § 8128(a).

[18] 20 C.F.R. § 10.608(a).

[19] *Id*. at § 10.608(b)(1) and (2).

[20] *Id*. at § 10.608(b).

[21] *M.E.*, 58 ECAB ____ (Docket No. 07-1189, issued September 20, 2007).

[22] 20 C.F.R. § 10.606(b)(2).

With respect to the third requirement under section 10.6069b)(2), the evidence appellant submitted with his November 11, 2008 reconsideration request was previously of record.[23] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[24] Appellant therefore did not submit relevant and pertinent new evidence not previously considered by the Office and the Office properly denied his reconsideration request.[25]

CONCLUSION

The Board finds that the Office met its burden of proof to modify the May 13, 1988 wage-earning capacity determination to zero and to terminate appellant's medical benefits. The Board further finds that the Office properly refused to reopen his claim for further consideration of the merits pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 19, September 22 and July 28, 2008 are affirmed.

Issued: November 6, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[23] *Supra* note 5.

[24] *D'Wayne Avila*, 57 ECAB 642 (2006).

[25] *See Johnnie B. Causey*, 57 ECAB 359 (2006).