U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FRED W. SIGMAN, JR. and U.S. POSTAL SERVICE,
POST OFFICE, Lancaster, PA

Docket No. 00-2316; Submitted on the Record;
Issued April 24, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,
DAVID S. GERSON

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective May 10, 1993 on the grounds that he refused suitable work; and (2) whether the Office properly refused to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a).

This is the second appeal in the present case. In a May 13, 1998 decision, the Board affirmed the Office's decisions dated September 20 and April 24, 1995. The Board found that appellant did not submit sufficient medical opinion evidence to establish that his refusal of the offered position was suitable. The facts and circumstances of the case up to that point are set forth in the Board's prior decision and incorporated herein by reference.[1]

In a letter dated August 3, 1998, appellant requested reconsideration of the Board's decision dated May 13, 1998 and submitted additional medical evidence. He submitted a report from Dr. George Kent, a family practitioner, dated June 8, 1998 and a report from Dr. Daniel West, a chiropractor, dated July 6, 1998.

In a decision dated April 15, 1999, the Office denied appellant's application for reconsideration on the grounds that the request was not timely and that appellant did not present clear evidence of error by the Office.

In a decision dated August 17, 1999, the Office vacated the decision dated April 15, 1999 finding appellant's request for reconsideration timely and ordered a merit review of the case.

By decision dated August 17, 1999, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted in support of the request for reconsideration was insufficient to warrant modification of the previous decision.

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[1] Docket No. 96-171 (issued May 13, 1998).

In a letter dated September 2, 1999, appellant requested reconsideration of the decision dated August 17, 1999. He submitted additional medical evidence including treatment notes from Dr. Kent dated June 8, 1998, a report from Dr. West dated July 6, 1998, a functional capacity evaluation (FCE) dated July 15, 1998; and a report from Dr. Kent dated April 27, 1999. The treatment notes from Dr. Kent indicated that appellant's condition remained unchanged and that he still experienced persistent severe pain in his low back and down his legs. He noted that appellant was unable to walk more than one block or to be on his feet for more than one-half hour. Dr. Kent indicated that appellant had difficulty managing activities of daily living. The report from Dr. West dated July 6, 1998 diagnosed appellant with failed low back syndrome, posterior element defect, facet syndrome and myofascial component. He noted that appellant had restrictions which would put him into a light to light/medium category. Dr. Kent, in his report of April 27, 1999, indicated that the FCE performed by Dr. Cohen was inaccurate and believed that the FCE performed by Dr. West on July 6, 1998 was well reasoned and a fair evaluation of appellant's capacity.

In a merit decision dated November 16, 1999, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted in support of the request for reconsideration was insufficient to warrant modification of the previous decision.

By letter dated March 28, 2000, appellant requested reconsideration and submitted additional medical evidence, most of which was duplicative and new report's from Dr. West dated January 18, 2000 and Dr. Kent dated February 3, 2000; and progress notes dated February 9 to March 16, 2000. Dr. West's report dated January 18, 2000 noted that at this time appellant could not meet the functional standards that he performed at the time of the FCE on June 15, 1998. Dr. Kent's report dated February 3, 2000 provided a summary of his treatment of appellant since 1991. He diagnosed appellant with failed back syndrome and noted appellant was progressively worse than on previous examination. Dr. Kent opined that appellant was totally disabled even from light-duty work at this time. The progress notes indicate appellant's continued treatment for lumbar pain; however, it is unclear who is the author of the notes.

By decision dated April 12, 2000, 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 met its burden of proof to terminate appellant's compensation based on his refusal of suitable work where his attending physician, Dr. Bruce Silverstein, an osteopath supported the suitability of the offered position. The burden then shifted to appellant to establish that his refusal was justified.

The implementing regulation[2] provides that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of showing that such a refusal or failure to work was reasonable or justified and shall be provided with the opportunity to make such a showing before entitlement to compensation is terminated.[3] To

[2] 20 C.F.R. § 10.124(c).

[3] *John E. Lemker*, 45 ECAB 258, 263 (1993).

justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of her refusal to accept such employment.[4]

Appellant submitted evidence from Dr. Kent indicating that he was disabled due to low back pain. Dr. Kent's report dated June 8, 1998 indicated that appellant's condition remained unchanged and that he still experienced persistent severe pain in his low back and down his legs. His April 27, 1999 report indicated that the FCE performed by Dr. Cohen was inaccurate and believed that the FCE evaluation performed by Dr. West on July 6, 1998 was well reasoned and a fair evaluation of appellant's capacity. This was insufficient to establish that the position offered was unsuitable, as the physician did not explain why appellant's low back condition prevented him from performing the duties of the job at the time it was offered. Further, Dr. Kent did not provide any medical reasoning explaining why he felt that the FCE did not demonstrate appellant's ability to return to work and did not explain why appellant's accepted employment injury resulted in appellant's total disability for work.

Other reports from appellant's chiropractor, Dr. West, five years after the termination, diagnosed appellant with failed low back syndrome, posterior element defect, facet syndrome and myofascial component. Section 8101(2) of the Act provides that chiropractors are considered physicians "only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulation by the Secretary."[5] Section 10.400(e) of the implementing federal regulations provides:

> "The term 'subluxation' means an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae anatomically which must be demonstrable on any x-ray film to individuals trained in the reading of x-rays. A chiropractor may interpret his or her x-rays to the same extent as any other physician defined in this section."

Thus, where x-rays do not demonstrate a subluxation (a diagnosis of a subluxation based on x-rays has not been made), a chiropractor is not considered a "physician," and his or her reports cannot be considered as competent medical evidence under the Act.[6]

In the present case, Dr. West did not diagnose a subluxation as demonstrated by x-ray to exist, and therefore his reports are not those of a physician.

The Board further finds that the Office in its April 12, 2000 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.[7]

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[4] *Maggie L. Moore*, 42 ECAB 484, 487 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[5] 5 U.S.C. § 8101(2).

[6] *See Susan M. Herman*, 35 ECAB 669 (1984).

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

Under section 8128(a) of the Federal Employees' Compensation Act,[8] 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,[9] 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.[10]

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 medical records from Dr. West and Dr. Kent. This evidence was duplicative of evidence already contained in the record,[11] and was previously considered by the Office and found deficient. Appellant also submitted a January 18, 2000 report from Dr. West and a February 3, 2000 report from Dr. Kent. The report from Dr. West, as indicated previously, is not considered a report from a physician as he did not diagnosis a subluxation by x-ray to exist. Dr. Kent's report of February 3, 2000 was similar to his other reports submitted, specifically his reports of November 14 and December 28, 1994 and June 21, 1995, which were previously considered by the Office and found deficient. Therefore, the Office properly determined that this evidence did not constitute a basis for reopening the case for a merit review. 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] Therefore, appellant did not submit relevant evidence not previously considered by the Office.

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[8] 5 U.S.C. § 8128(a).

[9] 20 C.F.R. § 10.606(b) (1999).

[10] 20 C.F.R. § 10.608(b).

[11] 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; *see Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

[12] 20 C.F.R. § 10.606(b).

The decisions of the Office of Workers' Compensation Programs dated April 12, 2000 and November 16, 1999 are hereby affirmed.

Dated, Washington, DC
April 24, 2002

Michael J. Walsh
Chairman

Alec J. Koromilas
Member

David S. Gerson
Alternate Member