United States Department of Labor
Employees' Compensation Appeals Board

G.B., Appellant	)	
and	)	**Docket No. 08-2399**
	)	**Issued: September 16, 2009**
DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Lawndale, CA, Employer	)	

Appearance:
Steven E. Brown, Esq., for the appellant
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 September 2, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated July 17, 2008, which affirmed the denial of his claim for a recurrence of disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained a recurrence of disability beginning February 22, 2006, causally related to his accepted employment injury.

FACTUAL HISTORY

On February 24, 2004 appellant, then a 58-year-old air traffic control specialist, injured his neck and low back when his chair broke at work and he fell. He stopped work that date and

returned to light duty on March 2, 2004. The Office accepted his claim for cervical and lumbar strains and paid appropriate compensation.

In a March 11, 2004 report, Dr. Peter Chiu, a Board-certified internist and treating physician, diagnosed cervical strain and ruled out a cervical disc herniation. In a May 13, 2004 report, Dr. Fulton S. Chen, a Board-certified physiatrist and a treating physician, noted a history of the February 24, 2004 injury and advised that appellant reported having low back pain since the "mid-1990s secondary to hoeing in the garden." He advised that magnetic resonance imaging (MRI) scans of the low back and neck showed nonspecific degenerative changes. Dr. Chen noted that appellant also had a history of major depression and listed current diagnoses as cervical and lumbar disc disease. He indicated that appellant's February 24, 2004 fall aggravated his low back and cervical spine pain. On February 28, 2006 Dr. Chen diagnosed spondylolisthesis at L5-S1, cervical disc degeneration at C6-7 and chronic pain syndrome. He advised that appellant was totally disabled. Dr. Chen indicated that he was concerned that appellant was entering into chronic pain syndrome.

On March 3, 2006 appellant filed a recurrence of disability claim (Form CA-2a) commencing February 22, 2006. He noted being on limited duty since his 2004 injury; however, in January 2006, his employer changed his duties. Appellant stopped work on February 22, 2006. The employing establishment confirmed that appellant was assigned to administrative duties since his return to work. In an undated statement, appellant advised that the employing establishment accommodated him by allowing him to work in an oceanic control position, which enabled him to stand as needed to alleviate his discomfort. He stated that his recurrence began on February 22, 2006 and, a few days prior, he attempted to perform his duties in the domestic sector which required more movement than he had been performing the previous two years in the oceanic control position. Appellant noted that he was not able to get up to relieve his muscle spasms and he went home.

Appellant filed Form CA-7 claims for disability commencing February 22 to April 19, 2006. In a February 22, 2006 report, Dr. Chiu diagnosed neck pain, low back pain, sciatica and radiculopathy. He placed appellant off work from February 22 to March 1, 2006.

In a statement received on March 30, 2006, Bradley Bachman, administrative front line manager, stated that appellant's restrictions had been accommodated, including that he was unable to sit or stand for extended periods. He indicated that appellant was recertified to the oceanic control position. In 2006, appellant was assigned to recertify on a radar associate position that he had previously been checked out on. The position allowed him the latitude to sit or stand at his discretion. Mr. Bachman advised:

> "[That the] only 'other duties' that [appellant] claims the employer assigned him would be to be placed in the training program to recertify. This is a condition of employment. I advised him that he would have the same flexibility to sit or stand during his training program that he has had on all operational positions that he has been working since 2004."

In a March 13, 2006 report, Dr. William Clauson, a Board-certified anesthesiologist, diagnosed lumbar L5-S1 spondylolisthesis Grade 1, early degenerative disc disease at L4-5,

cervical degenerative disc disease at C5-6 and C6-7, obesity, high cholesterol and high blood pressure. In an April 19, 2006 report, Dr. Clauson indicated that appellant had increased symptomatology from lumbar degenerative disc disease and spondylolisthesis at S1 and that he was unable to work.

The Office received disability slips and progress reports from Dr. Chen placing appellant off work as of February 22, 2006 for six weeks. On April 13, 2006 Dr. Chen opined that appellant was "not able to perform his usual and customary duties due to functional deficits." He diagnosed chronic neck and low back pain and chronic pain syndrome. Dr. Chen noted that appellant reported that he was unable to work secondary to his neck and low back pain and placed him on temporary total disability.

In an April 3, 2006 statement, appellant noted that, on February 4, 2006, he was only able to work because he was sent home and used six hours of leave. He did not recertify on the radar position. In an April 4, 2006 statement, John Noblitt, a controller, indicated that appellant was asked to train on the radar position; however, he informed his supervisor that he could not work the radar position. On April 19, 2006 appellant distinguished between the oceanic and radar associated positions. His description was signed by several coworkers. On May 12, 2006 appellant provided a statement describing his medications and how they affected his ability to work.

In a June 2, 2006 decision, the Office denied appellant's claim on the grounds that the factual and medical evidence was insufficient to establish that he sustained a recurrence of disability causally related to the accepted employment injury.

On May 31, 2007 appellant's representative requested reconsideration. In a May 30, 2007 report, Dr. Clauson noted that he had treated appellant for approximately 15 months. He noted that the work-related injury of February 24, 2007 "was causal in regards to [appellant's] severe low back and neck pain. I am so stating that conclusion again today."[1] Dr. Clauson opined that the unexpected collapse of a chair could be catastrophic and noted that appellant weighed over 275 pounds. The finding at the time was spondylolisthesis of L5 anterior to S1. Dr. Clauson opined that the "forces of the collapse involved can easily fracture a pars in the facet joints and cause this type of spondylolisthesis with no way to protect yourself from such an unexpected collapse." Appellant experienced immediate pain shooting down his legs and arms and into his little fingers bilaterally along with the spondylolisthesis. Dr. Clauson advised that appellant's injury had permanently aggravated a chronic condition of multi-level lumbar disc disease and cervical degenerative disc disease.

By decision dated July 9, 2007, the Office denied modification of the June 2, 2006 decision. It also found that no medical rationale was provided to substantiate that appellant's chronic multi-level lumbar disc disease and cervical degenerative disc disease were related to the accepted cervical and lumbar strains.

In a letter dated April 18, 2008, appellant's representative requested reconsideration. He enclosed a copy of therapeutic drug guidelines for air traffic controllers. Because appellant was

[1] This appears to be a typographical error as the injury date is February 24, 2004.

taking medications for his accepted injury, he was disqualified from his duties as an air traffic controller.

In an April 10, 2008 report, Dr. Clauson reviewed appellant's history of injury and diagnosed degenerative disc disease. He stated that appellant returned to work full time until February 9, 2006. Dr. Clauson noted that appellant was placed in a different job "where the ergonomics were not the same as the other job where he did not have to twist, lean and change positions all the time, but, at this time in his work, he twisted and leaned every hour." Appellant's low back pain was aggravated and he examined sleep deprivation due to pain. Dr. Clauson advised that he was placed on chronic opioids and unable to work. As to appellant's degenerative disc disease, an MRI scan from 2004 showed minor Grade 1 spondylolisthesis at L5 and SI and minimal disc bulge at L4-5 and facet changes at L3-4, L4-5, and L5-S1 with some minor arthritis. He opined that appellant's physical condition was aggravated by the work-related injury and that there was no nonwork-related intervening cause for his low back pain. Dr. Clauson opined that "these two episodes obviously caused him to have pain flares, the last one the worse, so that he has been unable to return to work." He also advised that, while appellant had some degenerative changes in his back before the work injury, he was able to work with those changes without medication for many years until the 2006 episode.

By decision dated July 17, 2008, the Office denied modification of the July 9, 2007 decision.

LEGAL PRECEDENT -- ISSUE 1

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that he can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.[2]

Office regulations define the term "recurrence of disability" as an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition that had resulted from a previous injury or illness without an intervening injury or a new exposure to the work environment that caused the illness. This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury is withdrawn or when the physical requirements of such an assignment are altered so that they exceed the employee's physical limitations.[3]

[2] *Conard Hightower*, 54 ECAB 796 (2003).

[3] 20 C.F.R. § 10.5(x).

Causal relationship is a medical issue and the medical evidence required to establish a causal relationship, generally, is rationalized medical evidence.[4] This consists of a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors.[5] The physician's opinion must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[6]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained cervical and lumbar strains on February 24, 2004. Appellant returned to modified duties after his work injury. He claimed a recurrence of disability beginning February 22, 2006. Appellant also contends that the degenerative disc disease of his spine was aggravated by his injury. The Board finds that this case is not in posture for decision.

In support of his claim for a recurrence of disability, appellant submitted reports from Dr. Clauson who diagnosed lumbar L5-S1 spondylolisthesis Grade 1, early degenerative disc disease at L4-5, cervical degenerative disc disease at C5-6 and C6-7, obesity, high cholesterol, and high blood pressure. Dr. Clauson stated that the collapse of the chair on February 24, 2004 could easily fracture a pars in the facet joints and cause this type of spondylolisthesis. He noted ergonomic differences in the new work sector and advised that appellant's chronic condition of multi-level lumbar disc disease and cervical degenerative disc disease had been permanently aggravated by the 2004 injury. As the ergonomics were not the same as the prior job, where appellant did not have to twist, lean, and change positions, in the new sector he twisted and leaned every hour. This aggravated appellant's back and he developed sleep deprivation because he could not sleep due to the pain. Dr. Clauson advised that appellant was placed on chronic opioids and was unable to work.

The Board finds that, while the medical evidence from Dr. Clauson is insufficiently rationalized to establish that appellant sustained a recurrence of disability or that his work injury caused an aggravation of a preexisting degenerative spine condition, this evidence raises an unrefuted inference of causal relationship sufficient to require further development of the case record by the Office.[7]

[4] *Elizabeth Stanislav*, 49 ECAB 540, 541 (1998).

[5] *Duane B. Harris*, 49 ECAB 170, 173 (1997).

[6] *Gary L. Fowler*, 45 ECAB 365, 371 (1994).

[7] *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978); *see also Cheryl A. Monnell*, 40 ECAB 545 (1989); *Bobby W. Hornbuckle*, 38 ECAB 626 (1987) (if medical evidence establishes that residuals of an employment-related impairment are such that they prevent an employee from continuing in the employment, he is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity).

Regarding appellant's light-duty job requirements, the Board also notes that the evidence requires clarification regarding the two positions. Appellant alleged that his light-duty requirements were changed by his employer in January 2006, when it required that he work in the domestic sector. He alleged that the new position required more movement than work in the oceanic control position. Appellant described certain ergonomic differences such that he was not able to relieve the muscle spasms he was having. He also submitted statements from several air traffic controllers who indicated that they agreed with his descriptions of the two positions. Although the employing establishment provided a statement from Mr. Bachman which indicated that appellant was allowed the latitude to sit or stand at his discretion to relieve pain, he also indicated that appellant was also placed in the training program to recertify. The evidence is not clear with regard to the ergonomic differences of the two positions. The Board finds that additional development is needed with regard to the changes in the nature and extent of the light-duty job requirements.

Proceedings under the Federal Employees' Compensation Act are not adversarial in nature, nor is the Office a disinterested arbiter.[8] While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.[9]

On remand the Office should further develop the factual and medical evidence as to whether there was a change in the nature and extent of appellant's work-related condition, including whether the work injury aggravated his preexisting degenerative disc disease, or a change in the nature and extent of his light-duty job requirements. Following this and such further development of the case record as it deems necessary, the Office should issue a *de novo* decision on the issue of whether appellant established a recurrence of disability as of February 22, 2006

CONCLUSION

The Board finds that this case is not in posture for decision.

[8] *Phillip L. Barnes*, 55 ECAB 426 (2004).

[9] *Donald R. Gervasi*, 57 ECAB 281 (2005); *William B. Webb*, 56 ECAB 156 (2004).

ORDER

IT IS HEREBY ORDERED THAT the July 17, 2008 decision of the Office of Workers' Compensation Programs is set aside and remanded for further action consistent with this decision.

Issued: September 16, 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