U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GARY P. LAPPLE and DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, San Diego, Calif.

Docket No. 97-764; Submitted on the Record;
Issued November 4, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant sustained a recurrence of disability as of February 17, 1996 causally related to his accepted January 18, 1994 lower back injury; and (2) whether appellant has established that he sustained a consequential injury causally related to his accepted employment injury.

On January 18, 1994 appellant, a 37-year-old air traffic controller, experienced pain in his lower back when he fell down while descending a staircase. Appellant filed a Form CA-1, claim for benefits based on traumatic injury to his lower back on January 19, 1994.

Appellant attempted to continue working, but went off work due to low back pain on January 20, 1994. Appellant returned to work on February 1, 1994, was off work from February 10 to 26, 1994 and, because he continued to suffer from low back pain, was referred on May 28, 1994 for a magnetic resonance imaging (MRI) scan by Dr. Michael A. Zirpolo, a general practitioner. The MRI results indicated a herniated disc at L4-5. Dr. Zirpolo referred appellant to Dr. Sam Assam, a Board-certified neurosurgeon, who confirmed Dr. Zirpolo's diagnosis after examining appellant on June 2, 1994, and performed a lumbar laminectomy on his lower back on June 13, 1994.

The Office of Workers' Compensation Programs accepted appellant's claim for an L4-5 herniated disc with L5 root compression by letter dated June 30, 1994.

Dr. Assam released appellant to return to work on August 20, 1994.

On March 9, 1996 appellant filed a Form CA-2, claim for recurrence of disability, alleging that on February 17, 1996 he experienced an exacerbation of his lower back pain, which he indicated had been constant since the occurrence of the January 18, 1994 employment injury.

Appellant submitted a March 27, 1996 report from Dr. Assam, who stated that, following his last evaluation, appellant had returned to his regular work as an air traffic controller and

apparently did well for a reasonable period of time. Dr. Assam stated, however, that within the past six months appellant had begun to experience recurrence of low back pain of a chronic nature, aggravated by any increase in physical activity. Dr. Assam noted that appellant had been off work since February 1996. Dr. Assam found that appellant's physical examination was noncontributory, with no definite sensory, motor or reflex change in the lower extremities, and some minor tenderness on palpation of the low back area around the L4-5 level. Dr. Assam reiterated that appellant had sustained a recurrence of symptoms and would need additional treatment.

Dr. Assam reexamined appellant on April 10, 1996, and stated in an April 10, 1996 report that x-rays were unremarkable and that an MRI demonstrated minimal postoperative changes at the L4-5 level. Dr. Assam added that there was a mild degree of stenosis at that level, but nothing obvious to account for persisting partially disabling low back pain that seemed evident on both studies.

On April 19, 1996 appellant filed a Form CA-2, claim for benefits based on occupational disease, contending that he began to suffer from insomnia caused by back pain resulting from the January 18, 1994 employment injury. In a handwritten letter accompanying the claim, appellant stated that the postoperative back pain made it difficult for him to sleep, resulting in insomnia. Appellant stated that he had recently realized that this insomnia condition was separate and needed to be addressed separately from his low back claim.

In a decision dated July 3, 1996, the Office denied appellant compensation for a recurrence of disability due to his accepted January 18, 1994 employment-related low back condition. In a memorandum incorporated by reference into the decision, the Office found that appellant failed to submit evidence sufficient to establish that the claimed recurrence of disability was caused or aggravated by the January 18, 1994 employment injury. In addition, the Office found that appellant failed to establish that his claimed sleep disturbance was causally related to his accepted condition, and advised appellant that he needed to submit well-rationalized medical evidence in support of the claimed condition.

In a letter received by the Office on September 25, 1996, appellant requested reconsideration of the Office's previous decision.

Appellant subsequently submitted a July 1, 1996 report from Dr. Zirpolo which discussed the history of appellant's low back condition and summarized Dr. Assam's previous findings. Appellant also submitted additional medical evidence pertaining to his recurrence claim which he had been previously submitted prior to the previous Office decision.

With regard to his claim for consequential injury, appellant submitted reports dated August 20 and 28, 1996 from Dr. Cheryl L. Spinweber, a staff psychologist with a sleep disorder clinic, who had treated appellant for his insomnia. In her August 20, 1996 report, Dr. Spinweber stated that appellant came to the clinic complaining of persistent sleep difficulties which began when he was injured at work in January 1994, and that he had experienced chronic pain which had not been alleviated by any form of treatment. Dr. Spinweber related that appellant informed her he had accumulated over 400 hours of sick leave in connection with his sleep problem, and that he had been a good sleeper with no sleep complaints prior to his back injury. Dr. Spinweber

further noted that appellant had been transferred from the night shift because his treating physician, Dr. Zirpolo, wrote a letter to the employing establishment requesting that he be transferred due to his severe sleep disorder. Dr. Spinweber had appellant undergo testing to determine the severity of his sleep apnea, the results of which were indicated in her August 28, 1996 follow-up report, in which she also described her course of treatment.

In a decision dated October 9, 1996, the Office denied appellant's request for reconsideration, finding that the evidence submitted was not sufficient to warrant modification. In a memorandum accompanying the decision, the Office found that the medical evidence appellant submitted did not provide a well-rationalized, probative medical opinion indicating a causal relationship between his accepted January 18, 1994 employment injury and his current condition or a complete and accurate history of appellant's current condition. In addition, the Office found that appellant failed to establish that his claimed sleep disturbance was causally related to his accepted conditions, and advised appellant that he needed to submit well-rationalized medical evidence in support of the claimed condition.

The Board finds that appellant has not established that he sustained a recurrence of disability as of February 17, 1996 causally related to the January 18, 1994 employment injury.

An individual who claims a recurrence of disability resulting from an accepted employment injury has the burden of establishing that the disability is related to the accepted injury. This burden requires furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury, and who supports that conclusion with sound medical reasoning.[1]

The record contains no such medical opinion. Indeed, appellant has failed to submit any medical opinion containing a rationalized, probative report which relates his disability for work as of February 17, 1996 to his January 18, 1994 employment injury. For this reason, he has not discharged his burden of proof to establish his claim that he sustained a recurrence of disability as a result of his accepted employment injury.

The only medical evidence which appellant submitted were medical reports from Drs. Assam and Zirpolo which described appellant's complaints of back pain on examination, noted inconclusive findings from x-ray and MRI tests and generally indicated that he was suffering "a recurrence of symptoms," but did not include a rationalized, probative medical opinion indicating that his current condition was caused or aggravated by the accepted January 18, 1994 employment injury.[2]

As there is no medical evidence addressing and explaining why the claimed condition and disability as of February 17, 1996 was caused or aggravated by his January 18, 1994 employment injury, appellant has not met his burden of proof in establishing that he sustained a recurrence of disability.

[1] *Dennis E. Twardzik*, 34 ECAB 536 (1983); *Max Grossman*, 8 ECAB 508 (1956); 20 C.F.R. § 10.121(a).

[2] *William C. Thomas*, 45 ECAB 591 (1994).

The Board finds that appellant has not established that he sustained a consequential injury causally related to his accepted employment injury.

The basic rule respecting consequential injuries as expressed by Larson is that "when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributed to the claimant's own intentional conduct."[3] The subsequent injury "is compensable if it is the direct and natural result of a compensable primary injury."[4] With regard to consequential injuries, the Board has stated that where an injury is sustained as a consequence of an impairment residual to an employment injury, the new or second injury, even though nonemployment related, is deemed, because of the chain of causation, to arise out of and be in the course of employment and is compensable.[5] However, an employee who asserts that a nonemployment-related injury was a consequence of a previous employment-related injury has the burden of proof to establish that such was the fact.[6]

In the instant case, appellant alleged that his sleep disorder, which he became aware of shortly after his June 1994 laminectomy (according to his Form CA-2), was causally related to his January 18, 1994 employment injury, which the Office accepted for a herniated disc at L4-5 with root compression at L5. The only medical evidence which addresses the issue of the causal relationship between this accepted injury and appellant's January 18, 1994 injury consists of Dr. Spinweber's August 20 and 28, 1996 reports. In these reports, Dr. Spinweber documented appellant's complaints of sleeplessness, noted that Dr. Zirpolo had recommended his transfer from the night shift because of a sleep disorder, and described the course of treatment she prescribed for appellant's condition. However, her opinion is unsupported by any medical rationale explaining the physiological process by which appellant's sleep apnea condition is causally related to his prior employment injury. The Board therefore finds that appellant has not submitted

[3] A. Larson, *The Law of Workers' Compensation* § 13.00.

[4] *Id*. at § 13.11.

[5] *Margarette B. Rogler*, 43 ECAB 1034 (1992).

[6] *Id.*

sufficient medical evidence to establish that the onset of his sleep disorder in June 1994 was the "direct and natural result" of his accepted January 18, 1994 injury.[7]

The October 9 and July 3, 1996 decisions of the Office of Workers' Compensation Programs are therefore affirmed.

Dated, Washington, D.C.
November 4, 1998

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

[7] The Board notes that appellant filed an appeal of the Office's October 9, 1996 decision denying benefits based on his sleep disorder claim, which the Office denied in a decision dated January 27, 1997. The Board finds that this decision is null and void, as the Board and the Office may not have simultaneous jurisdiction over the same cause or issue arising in a case. The Board notes that appellant filed his appeal to the Board on December 6, 1996, at which time the Board acquired jurisdiction of the claim, and the Office does not have jurisdiction to render a decision on a case following appeal to the Board; *see Douglas E. Billings*, 41 ECAB 880 (1990); *Jimmy W. Galetka*, 43 ECAB 432 (1992); 20 C.F.R. § 501.3(d)(3).