U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LAWRENCE W. WILLIS and U.S. POSTAL SERVICE, POST OFFICE, Cincinnati, OH

Docket No. 96-1471; Submitted on the Record;
Issued December 6, 1999

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT, A. PETER KANJORSKI

The issue is whether appellant met his burden of proof in establishing that he sustained a recurrence of disability from December 18, 1989 through August 22, 1995.[1]

On January 3, 1987 appellant, then a 34-year-old mail sorting machine operator, filed a notice of occupational disease alleging that he sustained rotational breakdown or instability of the right knee and possible ligament damage due to repetitive bending, squatting and standing in the course of his federal employment.

On March 31, 1988 Dr. David Bryant, appellant's treating physician and a Board-certified orthopedic surgeon, opined that he had a preexisting degenerative condition in his right knee and that the present damage was directly related to his employment duties from January 1984 through November 1986.

The Office of Workers' Compensation Programs subsequently accepted the claim for aggravation of internal derangement, right knee. Appellant stopped working on November 24, 1986 and he received compensation for total temporary disability.

On September 26, 1988 appellant accepted a limited-duty job offer as a modified distribution clerk. The restrictions for this position included no lifting of over 20 pounds, pulling/pushing up to 20 pounds, walking and standing up to 3 hours per day, intermittently; no stooping, no kneeling, partial bending, standing no more than 1 hour at a time and sitting no more than 2 hours at a time. Appellant returned to work on October 3, 1988.

The Office subsequently referred appellant to Dr. Brady F. Randolph, a Board-certified orthopedic surgeon, for a second opinion examination. On January 27, 1989 Dr. Randolph

[1] Appellant filed his appeal on April 15, 1996. The Board lacks jurisdiction to consider the Office's May 15, 1996 decision issued after appellant's appeal; *see* 20 C.F.R. § 5013(d)(2).

indicated that appellant had progressive degenerative arthritis related to a previous surgery. On April 19, 1989 Dr. Randolph reviewed the requirements of appellant's limited-duty position and found that he was capable of performing those duties.

On April 24, 1989 Dr. Bryant indicated that appellant needed a parking space close to work as he was unable to walk long distances due to his right knee derangement.

On March 30, 1990 appellant filed a notice of recurrence of disability alleging that he suffered a recurrence of disability on December 17, 1988. Appellant stopped working on December 17, 1988. He stated that he suffered the recurrence of disability while walking a mile and a half and back from the employing establishment's parking lot to his work station. Appellant indicated that he returned to work on January 13, 1989 and continued through February 25, 1989. He further stated that he returned to work on March 10, 1989 and worked until April 22, 1989.

On April 16, 1990 Dr. Janalee K. Rissover, a physician Board-certified in emergency and physical medicine, provided an impartial medical evaluation at the request of the Office. Dr. Rissover diagnosed severe degenerative joint disease of the right knee with anterior cruciate instability. She stated that this was a progressive condition related to a previous injury, but that appellant's employment activities, as described, substantially and permanently aggravated his degenerative disease. Dr. Rissover opined that appellant should not do any activity requiring squatting and bending, and should not ambulate for any excessive length or ambulate repeatedly for more than 100 feet.

By decision dated June 4, 1991, the Office denied appellant's claim for a recurrence of disability because the evidence failed to establish that his disability commencing December 17, 1986 was related to the accepted employment injury.

Pursuant to appellant's request, a hearing was held on December 3, 1991. Appellant testified that the employing establishment's parking lot was subsequently shut down for a year and that he was required to walk about a mile to and from his work site each day. Appellant said, that after three weeks of enduring this walk, his knee worsened requiring him to stop working.

On December 26, 1991 the employing establishment indicated that its parking lot was not shut down from March 1 through December 1, 1989. It further indicated that appellant only worked three days between April 1 and April 22, 1989. Appellant responded by submitting an employing establishment letter indicating that the parking lot access was restricted beginning April 1, 1989 and that it would last three months. Appellant also submitted a letter from the employing establishment indicating that maintenance/mvo employees were restricted to parking in the west and north lots.

In a decision dated March 10, 1992, the Office hearing representative affirmed the June 4, 1991 decision rejecting the recurrence of disability claim because appellant submitted no medical evidence indicating that he was disabled from doing the job he was performing at the time of the injury. With regard to medical benefits, the hearing representative found that Dr. Rissover's opinion was insufficient to resolve the conflict in the medical evidence because it

failed to contain a rationale to support that appellant's right knee was permanently aggravated. The hearing representative, therefore, remanded the case to the Office to obtain a clarifying supplemental opinion to resolve the issue of whether appellant's right knee condition was temporarily or permanently aggravated by his employment.

On appeal, the Board issued a June 8, 1993 decision in which it set aside the Office representative's March 10, 1992 decision.[2] The Board found that Dr. Rissover's opinion failed to resolve the conflict concerning whether appellant's right knee was permanently aggravated. The Board also found that Dr. Rissover's opinion was not sufficiently rationalized on whether appellant had employment-related disability and how employment-related factors caused appellant to have residuals of his accepted injury. The Board further noted that Dr. Rissover was unaware of the walk required of appellant in getting from the parking lot to his work site because such evidence was not developed. Accordingly, the Board remanded the case to the Office for further development.

The Office subsequently referred the case back to Dr. Rissover with a statement of accepted facts. The statement of accepted facts indicated that beginning April 1, 1989 appellant occasionally had to walk 2,112 feet from an alternate parking lot to the employing establishment facility and back.

On October 1, 1993 Dr. Rissover indicated that, at the time of her last examination, she found significant medical residuals resulting from appellant's work injury. As a result of appellant's employment duties, Dr. Rissover found a substantial and permanent aggravation of appellant's degenerative joint disease. She stated that appellant's injury-related residuals caused his total disability.

By decision dated November 5, 1993, the Office accepted appellant's recurrence of disability from December 12, 1988 through January 13, 1989 was related to the employment injury of November 23, 1986. It also accepted the claim for continuing medical treatment due to the employment injury. The Office, however, denied the claim for compensation for disability from February 25 through March 10, 1989 and from April 22, 1989 through the present because there was no medical evidence demonstrating, by objective evidence, a worsening of appellant's condition due to his accepted knee condition.

Appellant subsequently requested a hearing.

By decision dated May 6, 1994, an Office hearing representative found that Dr. Rissover failed to provide an opinion, as directed by the Board, addressing whether appellant sustained any compensable disability for the period February 25 to March 11, 1989 and from April 22, 1989 and continuing. The hearing representative, directed the Office to refer the case to another impartial specialist for a referee examination for further opinion on this aspect of the claim.

The Office referred appellant, together with a statement of accepted facts, to Dr. Bernard Bacevich, a Board-certified orthopedic surgeon, for a referee examination. On June 15, 1994

[2] *Lawrence W. Willis*, Docket No. 92-1238 (issued June 8, 1993).

Dr. Bacevich examined appellant. Dr. Bacevich noted appellant's history of right knee problems beginning with his initial injury in 1971 and continuing through subsequent surgeries in 1971 and 1979. Dr. Bacevich indicated that bending and squatting in his federal employment corresponded with recurring knee problems. He noted that appellant began light duty in 1988 and worked for about four months. Dr. Bacevich indicated that during that last three and one-half weeks of this period the employing establishment's regular parking lot closed and appellant was required to do extensive walking to travel to and from his work site. He noted that this caused appellant's knee to swell. Dr. Bacevich stated appellant was unable to perform regular duty requiring bending, squatting, kneeling or repetitive climbing. He stated that appellant was also unable to do extensive, prolonged walking

In a supplementary report dated July 21, 1994, Dr. Bacevich stated that he believed appellant was capable of performing light duty from February 25, 1989 through March 11, 1989 and from April 22, 1989 through present. He stated that appellant could perform work within the restrictions of no lifting over 20 pounds, no pulling or pushing up to 20 pounds, limited walking and standing up to 3 hours per day intermittently, no stooping, kneeling or partial bending at the knees, no standing more than 1 hour at a time and no sitting more than 2 hours at a time.

In a decision dated September 9, 1995, the Office found that the opinion of Dr. Bacevich, the referee examiner, constituted the weight of the evidence and it denied appellant's claim for compensation for the periods February 25 through March 11, 1989 and from April 22, 1989 through the present.

Appellant requested a hearing. Appellant submitted a January 11, 1990 report from Dr. Carl R. Palecheck, a Board-certified orthopedic surgeon. He diagnosed moderate to severe degenerative changes at the patellofemoral joint, most marked in the medial compartment, and stated that appellant should be on disability status. Appellant also resubmitted Dr. Bryant's April 24, 1989 note, indicating that appellant must have parking close to work due to his right knee derangement, and Dr. Bacevich's June 16, 1994 opinion.

At a hearing held on February 23, 1995, appellant stated that he quit working for the employing establishment in March 1989 when the parking lot was closed and he had to make a round trip of a mile and one-quarter to reach his job. He stated that this inflamed his leg and that the employing establishment refused to provide him with a closer parking space so he was forced to quit working.

In a July 10, 1995 decision, the Office hearing representative found that the opinion of Dr. Bacevich, the impartial medical examiner, constituted the weight of the evidence and established that appellant was capable of performing limited-duty work as of April 1989, except for the periods of time in which he was required to walk long distances from the parking lot to his work site due to a closed parking lot. The hearing representative further noted that appellant established a change in his light-duty requirements due to the prolonged walk to and from the alternate parking lot. The hearing representative remanded the case to the Office to determine the period of time appellant had to walk the extended distances due to parking unavailability. The hearing representative instructed the Office to compute appellant's entitlement to monetary compensation for wage loss due to this change in light-duty requirements.

The employing establishment subsequently resubmitted a December 26, 1991 letter indicating that it never shut down the employee's parking lot from March 1 through December 1, 1989. The employing establishment reiterated this point in an August 18, 1995 letter. By letter dated August 22, 1995, the Office stated that, although the parking lot was not shut down, it was unavailable to most workers. It, therefore, requested information concerning when the parking lot was made available to all the employing establishment's workers.

On August 22, 1995 appellant accepted another limited-duty job offer as a modified clerk. This job required standing, at appellant's discretion, intermittent walking, sitting in a straight back chair, lifting 0 to 10 pounds, carrying 0 to 10 pounds, reaching the length of an arm, but no pushing, pulling, climbing, stooping, kneeling, crawling or twisting. Appellant returned to work on August 22, 1995.

By letter dated October 4, 1995, the Office indicated that a telephone call to the employing establishment established that the parking lot was closed to nonmanagement employees from April 1 through December 19, 1989. A March 21, 1989 letter from the employing establishment indicated that the lot closed to employees below a certain salary on March 21, 1989, while a letter dated December 19, 1989 indicated that it reopened to all employees on that date.

On October 16, 1995 appellant filed a claim for continuing compensation from April 22 through December 19, 1989.

On February 9, 1996 the employing establishment indicated that appellant stopped work on April 19, 1989. It stated that every possible effort was made to keep appellant in work status, including placing appellant on absent without leave (AWOL) status. The employing establishment submitted leave records indicating that appellant was AWOL for a portion of the pay period of April 8 through April 21, 1989. Finally, the employing establishment indicated that it was its policy to provide restrictive duty to the extreme and that appellant's limited-duty position remained available to him.

By memorandum dated March 21, 1996, the Office paid appellant compensation for the time period April 19 through December 18, 1989, when the parking lot was closed.

By decision dated March 28, 1996, the Office denied appellant's claim for compensation after December 18, 1989 through August 22, 1995, then he returned to work with the employing establishment, because the evidence of record established that appellant was capable of performing limited duty and that such position remained open and available to appellant by the employing establishment.

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 of record 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 either a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.[3]

In the instant case, the Office accepted on March 21, 1996 that for the period of April 19 through December 18, 1989 there existed a change in appellant's light-duty requirements. Letters from the employing establishment indicated that appellant's access to its parking lot was restricted for this period and consequently he was required to walk approximately one mile and a quarter to and from his work site to an alternate parking lot. The Office, however, denied appellant's claim for compensation after December 19, 1989, the date the parking lot was reopened to employees.

The Board finds that appellant did not meet his burden of establishing total disability from December 19, 1989 through August 22, 1995, the date he returned to work.

The record is devoid of any evidence establishing any change in the nature and extent of appellant's permanent light-duty position for the period commencing December 19, 1989. Moreover, there is no evidence establishing that appellant was precluded by the employing establishment from working his light-duty position after December 18, 1989 through August 22, 1995, the date he returned to work with the employing establishment. In fact, the employing establishment stated that its policy was to promote restricted duty and it submitted leave records indicating that it held appellant AWOL for not reporting to his limited-duty position for this period. The weight of medical opinion on this issue is represented by the opinion of Dr. Bacevich, the impartial medical specialist. He reviewed appellant's light-duty requirements and found that appellant was capable of performing the limited-duty job within the restrictions he set forth. Dr. Bacevich noted that appellant's right knee condition would not preclude him from limited duty. As Dr. Bacevich provided a well-rationalized opinion based on a proper factual background, his opinion is accorded special weight.[4] Accordingly, appellant has failed to establish a recurrence of total disability for the period of December 18, 1989 through August 22, 1995.

[3] *See Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Stuart K. Stanton*, 40 ECAB 859, 864 (1989); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

[4] *See Jack R. Smith*, 41 ECAB 691 (1990).

The decision of the Office of Workers' Compensation Program dated March 28, 1996 is affirmed.

Dated, Washington, D.C.
December 6, 1999

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member