U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WADE SPEARMAN, JR. and DEPARTMENT OF THE ARMY, CORPS OF ENGINEERS, Grenada, MS

Docket No. 97-2518; Submitted on the Record;
Issued December 22, 1999

DECISION and ORDER

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

The issue is whether appellant met his burden of proof to establish that his disability for work beginning June 30, 1995 is causally related to his May 4, 1988 employment injury.

On May 4, 1988 appellant, then a 44-year-old maintenance worker, sustained an employment-related fracture of the right ankle. He returned to work on January 30, 1989, sustained a recurrence of disability on March 12, 1990 and was returned to the periodic rolls. After undergoing rehabilitation efforts, appellant returned to work on August 8, 1994 in a light-duty modified maintenance worker position.[1] On March 8, 1995 he filed a recurrence claim, stating that he was in constant pain in his right foot, ankle and lower back. Appellant missed intermittent periods thereafter and stopped work completely on September 11, 1995. On October 30, 1995 he filed a second recurrence claim, stating that pain and cramps in his right ankle, leg and lower back prevented him from working.

By decision dated January 9, 1996, the Office of Workers' Compensation Programs found that appellant's back condition was not a consequence of the May 4, 1988 employment injury. Appellant, through counsel, requested a hearing that was held on August 6, 1996. In a decision dated October 31, 1996 and finalized on November 4, 1996, an Office hearing representative found that the evidence of record did not establish that appellant's disability beginning June 30, 1995 was causally related to the May 4, 1988 employment injury. The facts of this case as set forth in the hearing representative's decision are hereby incorporated by reference. On June 27, 1997 appellant, through counsel, requested reconsideration and

[1] The record indicates that on May 23, 1994 Dr. Stephen Gipson, an anesthesiologist, provided an evaluation indicating that appellant could work four to six hours daily with the restriction that he could sit and stand for four to six hours at a time with lifting of 30 pounds, 50 pounds occasionally and occasional bending, squatting, kneeling, climbing and reaching. A job offer signed by appellant on May 25, 1994 indicates that the modified position was within these restrictions.

submitted additional evidence. By decision dated July 14, 1997, the Office denied modification of its prior decision. The instant appeal follows.[2]

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

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee 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 to show that he or she 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.[3]

As an employee who has returned to light duty is not considered to have fully recovered from his work-related injury, in claiming a recurrence of total disability, the employee's burden of proof is to show that the change in the injury-related condition was still due to the accepted injury, rather than another cause.[4]

It is an accepted principle of workers' compensation law and the Board has so recognized, 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 is deemed to arise out of the employment, unless it is the result of an independent intervening cause.[5] As is noted by Professor Larson in his treatise: "[O]nce the work-connected character of any injury, has been established the subsequent progression of the condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause."[6]

As described by the Office hearing representative in her decision that was finalized on November 4, 1996, the record in this case includes numerous medical reports dating from the May 4, 1988 work injury. Of special relevance is a November 16, 1995 report in which Dr. Rodney G. Olinger, a Board-certified neurosurgeon, advised that appellant had "always been treated" for a reflex type dystrophy of right foot pain which had, over a period of time traveled up his leg and into the hip. He noted that appellant could not bear weight normally on his right foot. Dr. Olinger testified at deposition on February 6, 1996 that he began treating appellant in 1993 for the employment injury when he was referred for implantation of an electrode in the

[2] On November 8, 1989 appellant received a schedule award for 14 percent loss of use of the right lower extremity and, by decision dated October 31, 1994, the Office determined that appellant's employment in a modified maintenance position fairly and reasonably represented his wage-earning capacity. These decisions are not before the Board.

[3] *See Mary A. Howard*, 45 ECAB 646 (1994).

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, Recurrences, Chapter 2.1500 (January 1995).

[5] Larson, *The Law of Workers' Compensation* § 13.00. *See also Stuart K. Stanton*, 40 ECAB 859 (1989); *Charles J. Jenkins*, 40 ECAB 362 (1988).

[6] *Id*. at § 13.11(a).

thoracic region to control pain emanating from the right foot. He noted findings of swelling and decreased sensation in the foot and diagnosed reflex sympathetic dystrophy with pain in the leg, back and hip causally related to the May 4, 1988 employment injury. Dr. Olinger noted that if appellant developed a lumbar strain, it would have been due to his weakened condition because of the employment injury and concluded that appellant could not work due to the pain in his ankle and leg which had been occurring since the May 4, 1988 employment injury. He noted that appellant had undergone two surgeries in the upper thoracic region to alleviate the leg pain that he had developed secondary to the 1988 employment injury and acknowledged that the surgery could cause muscle spasms, particularly during periods of activity. Dr. Olinger advised that appellant could not be employed in a position that required physical exertion but might be able to do sedentary work.

Subsequent to the hearing representative's decision, appellant submitted, *inter alia*,[7] deposition testimony dated January 21, 1997 in which Dr. Claudio A. Feler, a Board-certified neurosurgeon, described the history of injury and his past treatment of appellant. He diagnosed complex regional pain syndrome caused by the 1988 employment injury and stated that because of the pain syndrome, appellant did not walk normally which caused mechanical back pain and spasms. Dr. Feler opined that appellant was totally disabled from any substantial gainful employment from June 30, 1995 due to the 1988 employment injury, advised that appellant could not work on his feet and recommended that he undergo a functional capacity evaluation to assess his limitations.

Applying the principles noted above, the Board finds that the reports of Drs. Olinger and Feler constitute sufficient evidence in support of appellant's claim to require further development by the Office as they both opine that appellant's pain condition is causally related to the May 4, 1988 employment injury. Although these reports are insufficient to discharge appellant's burden of establishing that his condition and disability on or after June 30, 1995 was causally related to the May 4, 1988 employment injury, the reports constitute sufficient evidence in support of appellant's claim to require further development of the record by the Office.[8] On remand, the Office should compile a statement of accepted facts and refer appellant, together with the complete case record and questions to be answered, to a Board-certified specialist for a detailed opinion on the relationship of appellant's condition and the May 4, 1988 employment injury and any period of disability therefrom. After such development as the Office deems necessary, a *de novo* decision shall be issued.

[7] Appellant also submitted additional reports from Drs. Olinger and Feler, reports indicating that he was hospitalized in February 1997 for back pain, and correspondence with the Office of Personnel Management regarding his retirement. The record also indicates that appellant has degenerative arthritis of the right great toe that is not employment related.

[8] *See John J. Carlone*, 41 ECAB 354 (1989).

The decisions of the Office of Workers' Compensation Programs dated July 14, 1997 and dated October 31, 1996 and finalized on November 4, 1996 are hereby set aside and the case is remanded to the Office for further proceedings.

Dated, Washington, D.C.
December 22, 1999

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member