U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GARY LOVERN and U.S. POSTAL SERVICE,
POST OFFICE, Fayetteville, NC

Docket No. 98-1378; Submitted on the Record;
Issued December 16, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issues are: (1) whether appellant established that he sustained a recurrence of disability causally related to his March 24, 1992 employment injury; and (2) whether the Office of Workers' Compensation Programs properly suspended appellant's entitlement to a schedule award on the grounds that he refused to attend a directed medical evaluation.

On March 24, 1992 appellant, then a 36-year-old letter carrier, injured his back in the performance of duty while lifting a tray of flats out of a hamper at work. The Office accepted appellant's traumatic injury claim for lumbar strain and a herniated disc at L4-5. Appellant was off work from March 25 to April 16, 1992 for which he received continuation of pay. He subsequently received compensation for intermittent periods of wage loss.

In a series of treatment notes dating from March 25 to August 19, 1992, appellant's treating physician, Dr. James R. Jackson, noted appellant's work injury and his complaints of back pain and pain in the left leg. He diagnosed a probable bulging disc and stenosis at L4-5, for which he recommended bed rest and then light-duty work detail. He later approved appellant for a return to regular duty on August 26, 1992.

A myelogram performed on October 9, 1992 confirmed a herniated disc at L4-5 on the left.

In a series of intermittent treatment notes dating from August 26, 1992 to January 5, 1995, Dr. Jackson noted that appellant continued to complain that left leg raising caused extreme pain and that he was also having pain in the right hip, probably from having to shift his posture. Dr. Jackson also noted that appellant had some numbness in the medial portion of the left foot. He recommended surgery.

Appellant underwent surgery for removal of a ruptured disc and foraminal stenosis at L4-5 on April 11, 1995. He was subsequently approved for light duty with restrictions on June 12, 1995.

In a (Form CA-20) attending physician's report dated December 22, 1995, Dr. Jackson listed a diagnosis of L4-5 ruptured disc and indicated that appellant had "partial foot-drop on the left side, intermittent pain and burning, dyesthesia." He opined that appellant had reached maximum medical improvement. Dr. Jackson stated that appellant had a permanent disability rating of 20 percent whole body and 50 percent of the left leg.

On January 9, 1996 appellant filed a Form CA-7 requesting a schedule award for permanent disability in his left leg caused by the work-related back injury.

In a report dated February 6, 1996, an Office medical adviser reviewed Dr. Jackson's physical examination findings in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, fourth edition (A.M.A., *Guides*). He rated appellant's permanent impairment as seven percent in the lower left extremity.

In a March 19, 1996 report, Dr. Jackson stated that appellant's impairment was at least twice of the rating determined by the Office medical adviser, or 14 percent impairment.

The Office referred appellant for an impartial evaluation with Dr. Clarence E. Ballenger, a Board-certified neurologist. In a May 30, 1996 report, Dr. Ballenger noted that appellant was lifting mail bags at work in 1992 when he felt a pop in his back. He also noted physical findings including left foot drop with weakness, pain and dorsiflexion of the left leg. He stated that he was in agreement with Dr. Jackson that, under the A.M.A., *Guides*, appellant had a 25 percent impairment of the left lower extremity. Dr. Ballenger, however, did not make specific reference to the pages and charts in the A.M.A., *Guides* to support his opinion.

In a report dated June 25, 1995, the Office medical adviser found that appellant had a 13 percent permanent impairment rating.

In a report dated August 19, 1996, Dr. Philip A. Horn, a different medical adviser, noted that Dr. Ballenger's impairment rating findings did not follow the instructions at page 51, Tables 20 and 21 of the A.M.A., *Guides*. Thus, he concluded that there was insufficient information in Dr. Ballenger's report to estimate an impairment rating different from that approved on June 25, 1996.

In an Office memorandum dated August 19, 1996, a claims examiner noted a conflict in the medical record between the attending physician, the Office medical adviser and Dr. Ballenger. She recommended that the Office issue a 14 percent schedule award as that rating was closest to the Office medical adviser's opinion and was "less expensive than a referee exam[ination]."

In a decision dated August 28, 1996, the Office issued a schedule award for 14 percent permanent impairment of the left lower extremity.

In a letter dated September 24, 1996, appellant requested a hearing.

On December 28, 1996 appellant filed a claim alleging a recurrence of disability.

In a decision dated April 23, 1997, an Office hearing representative noted that appellant's case had been reviewed and it was not in posture for a decision. The Office hearing

representative vacated the Office's August 28, 1996 decision on the grounds that the Office failed to properly obtain a reasoned medical opinion from Dr. Ballenger, the impartial medical examiner. He therefore instructed the Office on remand to refer appellant for a second impartial medical evaluation for an impairment rating.

By letter dated May 23, 1997, the Office scheduled appellant for a second impartial opinion medical evaluation on June 26, 1997 with Dr. Noel Rogers.

In a letter dated May 28, 1997, the Office advised appellant of the evidence required to establish his claim for recurrence of disability.

By letter dated June 26, 1997, the Office indicated that it had been informed that appellant had not kept his appointment with Dr. Rogers. The Office notified appellant that he had 14 days to show good cause for his failure to keep the scheduled appointment or his entitlement to compensation would be suspended in accordance with 5 U.S.C. § 8123(d).

By decision dated July 21, 1997, the Office denied appellant's claim for recurrence of disability on the grounds that there was insufficient evidence of record to establish that appellant's disability on or after December 28, 1996 was causally related to his March 24, 1992 employment injury.

In a July 21, 1997 decision, the Office suspended appellant's compensation until such time as appellant reported for examination.

In a letter dated December 17, 1997, appellant, by counsel, requested reconsideration of the Office's suspension determination alleging that he notified the Office by letter dated May 30, 1997 that he would not be attending his scheduled appointment with Dr. Rogers because he no longer wished to contest the 14 percent schedule award. A copy of a letter was thereto attached to the reconsideration request, but it was undated.

In a decision dated January 7, 1998, the Office denied appellant's request for modification following a merit review.

The Board finds that appellant failed to establish that he sustained a recurrence of disability.

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.[1]

In the instant case, the Office accepted that appellant sustained a low back strain and a herniated disc as a result of his March 24, 1992 work injury. Appellant's treating physician,

[1] *Gus N. Rhodes*, 46 ECAB 518 (1995); *Terry R. Hedman*, 38 ECAB 222 (1986).

Dr. Jackson approved appellant for light duty on June 12, 1995. Appellant next filed claim for recurrence of disability on December 28, 1996, but he did not submit any medical evidence. Although appellant was directed by the Office to submit evidence in support of his claim, he failed to provide any medical evidence to establish that his disability on or after December 28, 1996 was causally related to his accepted work injury. Because appellant bears the burden of establishing his claim for recurrence and there is no evidence to show that there was a change in the nature and extent of his disability related to the accepted March 24, 1992 back injury or to establish a change in the nature and extent of his light-duty job requirements, the Office properly denied his claim.

The Board also finds that the Office properly suspended appellant's entitlement to a schedule award on the grounds that he refused to attend a directed medical evaluation.

Section 8123(a) of the Federal Employees' Compensation Act authorizes the Office to require an employee who claims disability as a result of federal employment to undergo a physical examination as it deems necessary.[2] The determination of the need for an examination, the type of examination, the choice of locale and the choice of medical examiners are matters within the province and discretion of the Office.[3] The Office's regulations, 20 C.F.R. § 10.407(a), provides that an injured employee "shall be required to submit to examination by a U.S. Medical Officer or by a qualified private physician approved the Office as frequently and at such times and places as in the opinion of the Office may be reasonably necessary." The only limitation on this authority is that of reasonableness.[4] Section 8123(d) of the Act provides that if an employee refuses to submit to or obstructs a directed medical examination, his or her right to compensation is suspended until the refusal or obstruction ceases.[5] However, before the Office may invoke this provision, the employee is provided a period of 14 days within which to present, in writing, his or her reasons for the refusal or obstruction.[6]

In the instant case, the Office properly scheduled appellant for a second impartial medical examination with Dr. Rogers on June 26, 1997 in order to resolve the conflict in the medical record between appellant's treating physician and the Office medical examiner concerning the extent of appellant's permanent left leg impairment. Appellant, however, did not attend the scheduled examination. Although appellant alleged that he notified the Office that he would not attend the examination by letter dated May 30, 1997, such letter was not received by the Office and, therefore, was not part of the record when the Office issued its July 21, 1997 decision suspending appellant's compensation. Because the Board finds that appellant failed to timely show good cause within the 14 days provided by statute for his failure to attend the scheduled medical appointment, the Board affirms the Office's decision to suspend appellant's entitlement to a schedule award.

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[2] 5 U.S.C. § 8123(a).

[3] *James C. Talbert*, 42 ECAB 974 (1991); *Dorine Jinkins*, 32 ECAB 1502 (1981).

[4] *Id.; see also William G. Saviolidis*, 35 ECAB 283 (1983); *Joseph W. Bianco*, 19 ECAB 426 (1968).

[5] 5 U.S.C. § 8123(d).

[6] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14(d) (April 1993).

The Board further notes that while appellant has expressed his desire to accept the Office's initial schedule award for 14 percent permanent impairment of the left lower extremity, such award is no longer available to appellant. The Office hearing representative specifically vacated the Office's August 28, 1996 decision granting the 14 percent schedule award. That decision was appropriate as the Office hearing representative correctly found that the Office did not rely on a rationalized impartial medical opinion to resolve the conflict in the record between appellant's treating physician and the Office medical adviser concerning the extent of appellant's permanent impairment. Because the Office hearing representative determined that the Office erred in rendering a 14 percent schedule award, there is no appropriate schedule award for appellant to accept. Furthermore, until such time as appellant makes himself available for a second impartial medical evaluation, there is no acceptable method for determining appellant's rate of impairment for the purposes of a schedule award.

Accordingly, the Board finds that appellant's failure to keep the June 26, 1997 appointment with Dr. Rogers constituted a refusal to submit to a medical examination without good cause and the Office properly invoked the penalty provision of section 8123(d) of the Act. Appellant's right to compensation is suspended until his refusal stops.

The decisions of the Office of Workers' Compensation Programs dated January 7, 1998, and July 21 and April 23, 1997 are hereby affirmed.

Dated, Washington, D.C.
December 16, 1999

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member