U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CALVIN E. KING and DEPARTMENT OF THE AIR FORCE, EIELSON AIR FORCE BASE, AK

Docket No. 98-922; Submitted on the Record;
Issued March 24, 2000

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether appellant is entitled to continuation of pay in excess of 40 hours per week; (2) whether appellant has established that he sustained a recurrence of disability causally related to an accepted employment injury; and (3) whether appellant has established that he sustained acquired spinal stenosis causally related to his employment injuries.

On March 6, 1995 appellant, then a 52-year-old boiler plant worker, filed a claim alleging that he sustained an injury on that date to his lower back. At the time of his injury, appellant worked a 12-hour shift Saturday through Tuesday each week. The Office of Workers' Compensation Programs assigned the case File Number A14-303690 and accepted the claim for lumbar strain.[1] Appellant had previously filed a claim for an injury on February 12, 1991, which the Office assigned File Number A14-261773 and accepted for low back strain and a claim for an injury on February 15, 1993 which the Office assigned File Number A14-282760 and accepted for low back strain and lumbar radiculitis. The Office doubled File Number A14-303690 into File Number A14-282760.[2] Appellant returned to light-duty clerical employment on April 29, 1995 and to his regular employment on September 15, 1995.

By letter dated September 18, 1995, the Office referred appellant, together with the case record and a statement of accepted facts, to Dr. Bryan H. Laycoe, a Board-certified orthopedic surgeon, for a second opinion evaluation.

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[1] In a decision dated August 26, 1995, the Office denied appellant's claim on the grounds that he did not establish fact of injury. By decision dated December 11, 1995, a hearing representative reversed the Office's August 26, 1995 decision after finding that appellant had established that he sustained lumbar strain due to an injury on March 6, 1995.

[2] On October 14, 1994 appellant filed a claim for a recurrence of disability on July 15, 1994 causally related to his February 15, 1993 employment injury. Appellant did not stop work at the time of the alleged recurrence of disability.

In a report dated October 7, 1995, Dr. Laycoe discussed appellant's medical history and the results of objective testing. He diagnosed degenerative disc disease at L3-4, degenerative facet arthrosis at L3-4 and L4-5, resolved lumbar strain from the 1991 and 1993 employment injuries, lumbar strain from the March 6, 1995 employment injury, radicular pain in appellant's left leg due to his February 15, 1993 injury, degenerative lumbar spine disease and chronic low back pain due to degenerative disease of the lumbar spine. Dr. Laycoe stated:

> "[I]t is my belie[f] that [appellant] is experiencing chronic low back pain due to the degenerative disease in the lumbar spine with facet hypertrophy and arthrosis and degenerative disc disease. The reason for this condition is a degenerative disease secondary to age with some genetic predisposition.
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> "It is my belief that the strain events of 1991[,] 1993 and 1995 were merely waxing and waning episodes of temporary increase in symptoms from this preexisting condition.
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> "It is my belief that he developed radiculitis or radicular pain following the 1993 incident with documented EMG [electromyography] changes. There is objective evidence of worsening of the preexisting degenerative disease caused by the February 15, 1993 lifting injury at work. Thus the February 15, 1993 lifting injury at work resulted in an objective worsening of the preexisting degenerative disease with continuing radicular pain and perhaps some radiculopathy with sensory loss, [and] perhaps muscle weakness."

Dr. Laycoe found that appellant's radiculopathy did not disable him from his regular employment and noted that he was currently working in his usual position.

By decision dated January 2, 1996, the Office denied appellant's claim for continuation of pay in excess of 40 hours per week. In an accompanying letter of the same date, the Office noted that at the time of his injury appellant worked four 12-hour days per week. The Office further noted that appellant claimed a loss in overtime pay from March 11 to April 25, 1995 when he received continuation of pay and a loss of overtime compensation upon his return to work on April 29, 1995. The Office informed appellant that overtime was not included in the computation of continuation of pay or compensation but that he would be reimbursed for lost Sunday premium pay and night differential pay.

In a form report dated January 3, 1996, Dr. John J. Joosse, a Board-certified orthopedic surgeon and appellant's attending physician, diagnosed acquired spinal stenosis and found that he could work for 12 hours per day 4 days per week with restrictions. Dr. Joosse submitted periodic form reports with the same diagnosis and limitations. Based on the restrictions found by Dr. Joosse, the employing establishment moved appellant to a limited-duty position working eight hours per day five days per week. Appellant filed claims for continuing compensation on account of disability, (Form CA-8), requesting compensation for lost night differential and Sunday premium pay due to his change in schedule. Appellant also claimed compensation for intermittent periods of temporary total disability and for physician's appointments.

By letter dated January 4, 1996, the Office requested that Dr. Laycoe clarify the cause of appellant's radiculopathy and further explain why he attributed it to the February 15, 1993 employment injury.

In a supplemental report dated January 23, 1996, Dr. Laycoe noted that an October 26, 1994 EMG study confirmed that appellant had radiculopathy in his left leg. Regarding the cause of the condition, Dr. Laycoe related:

> "He has objective evidence as demonstrated by his MRI [magnetic resonance imaging] [study] of compromise for the space available to the nerve roots in the lower lumbar spine. There is moderate facet hypertrophy at L3-4 and L4-5. The dictated note indicates L3-4, L4-5 [and] L5-6 spondylosis, spinal stenosis L3-4 greater than L4-5, acquired facet hypertrophy, disc bulging [and a] congenital small canal.
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> "This is a preexisting degenerative condition but does compromise [appellant] in creating less space for the nerve roots."
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> * * *
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> "The causation for the persistence of the buttocks pain or radiculitis is a chronic inflammatory change in the nerve root accompanied by perhaps some thickening or scarring about the nerve root and compromise by degenerative change narrowing the space for the nerve root as it leaves the spine. Clearly the major causative factor for the radiculitis is the degenerative change in the lumbar spine. Nonetheless, I cannot completely discount the role that the February [15], 1993 incident had in creating the radiculitis. In other words, I cannot at this point in time state on a more probable than not basis that [appellant] would be in the same situation today irrespective of the February [15], 1993 injury."

In a report dated April 10, 1996, Dr. Joosse related that he was treating appellant for "back injuries sustained at his employment. He strained his back (lumbar strain) with resultant narrowing of his spinal canal (acquired spinal stenosis)." He indicated that all form reports should include both diagnoses.

In a letter dated April 11, 1996, the Office informed appellant that his claim had not been accepted for spinal stenosis and informed him that in order to establish entitlement to compensation from January 1996 onwards he must submit rationalized medical evidence from his physician describing the change in his employment-related medical condition which necessitated the limited duty. The Office further informed appellant that it was referring him for a second opinion evaluation and requested copies of his medical records from March 1993 through July 1994.

By letter dated June 10, 1996, the Office requested that Dr. Laycoe further comment on whether appellant's radiculopathy was due to his February 15, 1993 employment injury. The Office indicated that appellant had not submitted medical reports from March 1993 through July 1994 documenting treatment for symptoms of radiculopathy.

The employing establishment indicated that appellant had returned to his regular employment on June 10, 1996 working 12 hours per day 4 days working Monday through Thursday. Appellant continued to submit CA-8's claiming lost Sunday premium pay.

In a supplemental report dated July 2, 1996, Dr. Laycoe related:

> "It is not surprising to me to see an absence of records for a period of time as the individual's radicular symptoms were not sufficient that he desired any further medical evaluation. The fact that he did not desire or seek medical evaluation does not mean that his symptoms were [not] ongoing as he reported to me.
>
> "Thus, at this point in time I can only state that the major contributing cause for [appellant's] S1 radiculopathy was his preexisting degenerative disease and that a lesser secondary cause was the injury of 1993."

In a decision dated August 14, 1996, the Office found that appellant had sustained S1 radiculopathy causally related to his February 15, 1993 employment injury based on the opinion of Dr. Laycoe, the Office referral physician. The Office further determined that the radiculopathy did not disable appellant from his regular employment. The Office informed appellant that he would be paid compensation for lost night differential and Sunday premium pay prior to his return to regular employment on September 15, 1995 and for intermittent time lost from work for medical treatment. The Office further indicated that it did not accept appellant's claim for lost night differential and Sunday premium pay after September 15, 1995 or appellant's claim that he sustained spinal stenosis due to his employment-related back strains.

By letter dated September 10, 1996, appellant requested a hearing before an Office hearing representative.

In a report dated October 9, 1996, Dr. Joosse noted appellant's history of employment-related lumbar spine injuries and opined that appellant had "gradually developed an acquired spinal stenosis syndrome at the L3-4 and L4-5 levels." He noted that an MRI obtained on September 11, 1996 showed "spondyloslysis at L3-4 and a far left lateral disc herniation and mild-to-moderate findings of spinal stenosis at the L3-4 and 4-5 levels." Dr. Joosse diagnosed "acquired spinal stenosis secondary to repeated lumbar strain injuries with disc protrusion" and related:

> "Spinal stenosis causes symptoms by exerting steady pressure on the nerve roots and neural elements. This causes aching and muscular cramps in the area affected and innervated by the nerves."

Dr. Joosse noted that appellant currently performed his regular employment but indicated that in view of his increasing symptoms he "should at this time either proceed with surgery and/or consider medical retirement if he wishes to avoid surgery."

In a form report dated November 6, 1996, Dr. Joosse indicated that appellant could work 8 hours per day 5 days per week rather than his 12-hour compressed work schedule. Appellant submitted CA-8's requesting compensation for lost night differential and Sunday premium pay.

Appellant submitted periodic form reports from Dr. Joosse, who diagnosed, *inter alia*, acquired spinal stenosis, facet arthritis, S1 radiculopathy, a herniated nucleus pulposus at L3-4 and spondylosis and checked "yes" that the condition was caused by the injury for which compensation was claimed. Dr. Joosse further listed work restrictions.

In a report dated June 5, 1997, Dr. Joosse indicated that he had treated appellant for "a number of years." He stated:

> "[Appellant] has complained of low back pain associated initially with breaking frozen coal from a coal car and he described a typical lumbar strain-type injury exerting himself while flexed and twisted. Following this initial episode, there were repeated lumbar strain episodes involving twisting heavy valves and bending and lifting.
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> "Gradually [appellant] has developed a syndrome of low back pain with left more than right leg pain radiation into the calves and especially into the left foot where he has pain and numbness. Additionally he describes weakness of the left calf and cannot do multiple repetitive toe walking on the left."

Dr. Joosse listed physical findings and noted that appellant "has been allowed to continue work but his activity has been limited to an 8-hour day rather than a 12-hour day in order to avoid the increased symptoms that occur with an extended day."

In a decision dated October 30, 1997 and finalized November 4, 1997, the hearing representative affirmed the Office's January 2 and August 14, 1996 decisions.

The Board finds that appellant is not entitled to continuation of pay in excess of 40 hours per week.

Section 8114(e) of the Federal Employees' Compensation Act[3] provides that, in computing an employee's monthly pay for compensation purposes, overtime pay is not included. The Office, in incorporating this statutory exclusion into its administrative procedures, stated:

> "It has been determined that the extra pay required by the provision of the Fair Labor Standards Act for hours worked in excess of the standard prescribed under the Act is not to be included in the computation of pay for the purposes of continuation of pay or compensation. Such extra pay is earned only if the actual hours are worked and is considered to be overtime pay for the purposes of 5 U.S.C. § 8114(e)."[4]

[3] 5 U.S.C. § 8114(e).

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.6(a)(1) (December 1995). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Continuation of Pay and Initial Payments*, Chapter 2.807.11(a) (July 1993) (overtime pay may not be included in computing the pay rate for continuation of pay purposes).

Therefore, the Office properly found that appellant's regularly scheduled overtime should not be included in the computation of his continuation of pay.

The Board further finds that appellant has not established that he had any disability after January 3, 1996, which would entitle him to compensation for lost wages.

In the instant case, appellant sustained employment-related injuries on February 12, 1991, February 15, 1993 and March 6, 1995, which the Office accepted for low back strain and lumbar radiculitis. Appellant resumed his regular employment following his March 6, 1995 employment injury on September 15, 1995. On January 3, 1996 appellant began working limited-duty employment with the employing establishment for eight hours per day five days per week. Appellant submitted CA-8 forms requesting compensation for lost night differential and Sunday premium pay for intermittent periods beginning January 3, 1996. In support of his claim, appellant submitted numerous form reports from his attending physician, Dr. Joosse, who diagnosed, *inter alia*, acquired spinal stenosis, checked "yes" that the condition was caused or aggravated by employment and listed work restrictions. However, the Board has held that a physician's opinion on causal relationship which consists only of checking "yes" to a form question without supporting rationale has little probative value and is insufficient to support causation.[5]

In a narrative report dated June 5, 1997, Dr. Joosse noted appellant's history of lumbar strain injuries and related that he had developed low back pain with radiculopathy. He limited appellant's workday to eight hours "to avoid the increased symptoms that occur with an extended day." Dr. Joosse did not specifically relate appellant's condition to his employment injuries. Further, he provided restrictions to prevent an increase in appellant's low back pain and radiculopathy; however, the Board has held that fear of future injury is not compensable.[6]

The Board further finds that appellant has not established that he sustained acquired spinal stenosis causally related to his accepted employment injuries.

An employee seeking benefits under the Act[7] has the burden of establishing the essential elements of his or her claim, including the fact that an injury was sustained in the performance of duty as alleged, and that any disability and/or specific condition for which compensation is claimed is causally related to the employment injury.[8] As part of this burden, the claimant must present rationalized medical evidence, based on a complete factual and medical background, showing causal relationship.[9]

[5] *Ruth S. Johnson*, 46 ECAB 237 (1994).

[6] *See William A. Kandel*, 43 ECAB 1011 (1992).

[7] 5 U.S.C. §§ 8101-8193.

[8] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[9] *Joseph T. Gulla*, 36 ECAB 516 (1985).

In a report dated April 10, 1996, Dr. Joosse noted his treatment of appellant for employment injuries and found that appellant had "strained his back (lumbar strain) with resultant narrowing of his spinal canal (acquired spinal stenosis)." He, however, did not describe the specific employment injuries to which he attributed appellant's condition or provide a medical explanation regarding how these employment injuries caused the development of spinal stenosis. Thus, his opinion is insufficient to meet appellant's burden of proof.

In a report dated October 9, 1996, Dr. Joosse discussed appellant's employment-related back injuries and diagnosed "acquired spinal stenosis secondary to repeated lumbar strain injuries with disc protrusion." However, he did not provide any rationale for his causation finding or discuss how, with reference to the specific facts of the instant case, appellant's accepted lumbar strain injuries caused his acquired spinal stenosis. Thus, his opinion is insufficient to meet appellant's burden of proof.[10]

Dr. Joosse further diagnosed acquired spinal stenosis in numerous form reports dated January 3, 1996, onwards and checked "yes" that the condition was caused or aggravated by employment. However, as discussed above, the Board has held that a medical report, which checks a box on a form report "yes" with regard to whether a condition is employment related, is of diminished probative value without further detail and explanation.[11]

An award of compensation may not be based upon surmise, conjecture or speculation or upon appellant's belief that there is a causal relationship between his condition and his employment.[12] To establish causal relationship, appellant must submit a physician's report, in which the physician reviews the factors of employment identified by appellant as causing his condition and, taking these factors into consideration as well as findings upon examination of appellant and appellant's medical history, state whether these employment factors caused or aggravated appellant's diagnosed condition.[13] Appellant failed to submit such evidence and, therefore, failed to discharge his burden of proof.

The decision of the Office of Workers' Compensation Programs dated October 30, 1997 and finalized November 4, 1997 is hereby affirmed.

Dated, Washington, D.C.
March 24, 2000

David S. Gerson

[10] *Carolyn F. Allen*, 47 ECAB 240 (1995) (medical reports not containing rationale on causal relation are entitled to little probative value).

[11] *Lester Covington*, 47 ECAB 539 (1996).

[12] *William S. Wright*, 45 ECAB 498 (1993).

[13] *Id.*

Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member