U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL R. TURNEY and DEPARTMENT OF THE ARMY, ARMY ENGINEER DISTRICT, Omaha, NE

Docket No. 99-2079; Submitted on the Record;
Issued December 13, 2001

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM, PRISCILLA ANNE SCHWAB

The issue is whether appellant sustained a recurrence of disability commencing on September 15, 1995.

The Office of Workers' Compensation Programs accepted that on September 15, 1995 appellant, then a 47-year-old electrician, sustained a contusion of his left lower leg, pes anserine bursitis, a left meniscal tear, thrombophlebitis and saphenous nerve injury when a ladder fell and struck his left knee.

The facts and circumstances of the case are set forth in Board decision Docket No. 1999-1494 and are hereby incorporated by reference.[1] On September 16, 1996 the Office terminated appellant's compensation entitlement finding that his disability as a result of his left knee arthroscopy ceased no later than September 16, 1996. That decision was affirmed by the Office on December 3, 1998 and by the Board on December 11, 2000.

On January 26, 1999 appellant filed a January 22, 1998 claim for a recurrence of disability, characterized by chronic pes anserine bursitis, which he alleged had been continuous from September 15, 1995.

Appellant submitted a May 14, 1998 report from Dr. Dana G. Seltzer, a Board-certified orthopedic surgeon specializing in shoulder and elbow surgery, who noted that appellant had complaints of pain and mild chronic instability of the ankle. He indicated that a bone scan revealed an inflammatory process not consistent with a stress fracture, that there was no x-ray evidence of a stress fracture, and that he could not explain why appellant had recurrent bouts of pes anserine bursitis. Dr. Seltzer opined that appellant had chronic pes anserine bursitis characterized by inflammation and visible swelling as well as tenderness to palpation, some

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[1] Docket No. 1999-1494, issued December 11, 2000. Appellant also filed a stress claim No. 13-1016216 and was on social security disability due to work-related illness.

tenderness over the saphenous nerve and some evidence of sensory nerve entrapment of the saphenous nerve at Hunter's canal, but he noted that this had essentially resolved. He opined that appellant could not work doing the strenuous activities as a utility electrician, but could work at a less strenuous job as an electrician with limitations on stooping, squatting, kneeling and doing repetitive standing and sitting. Dr. Seltzer opined: "I have no doubt that this is related to his original injury and a severe blow to the medial aspect of the knee can certainly cause an irritation to the saphenous nerve as it exits Hunter's canal in the distal thigh. This is also the region where the pes anserine bursa is, and a traumatic or hemorrhagic bursitis could certainly have started this whole condition.... His symptoms really have not changed much since 1995."

In an August 3, 1998 report, Dr. Seltzer noted that appellant persisted with left knee pain around the medial aspect of his proximal tibia, noted that he had significant tenderness with some mild swelling located over the proximal medial tibia in the region of the pes anserine bursa, but noted that he had full range of motion of his knee without pain. Dr. Seltzer noted that appellant had pain with resisted knee flexion, primarily in the medial aspect of his proximal tibia with some soreness along his medial hamstrings, which were weaker on the left than on the right. No significant pain with percussion of the proximal tibia was noted. Dr. Seltzer opined that appellant had chronic left pes anserine bursitis, rule out stress fracture.

In an August 26, 1998 work capacity evaluation, Dr. Seltzer indicated that appellant could work and he presented appellant's work activity restrictions.

Appellant also submitted a September 4, 1998 report from Dr. Seltzer which noted appellant's history of injury and treatment, noted that appellant underwent arthroscopic surgery on May 20, 1996 where a chondral fracture with degenerative changes in the medial femoral condyle was noted. A chondroplasty was performed to treat the fracture and degenerative changes and appellant was noted to have improved after surgery. Dr. Seltzer noted that he first saw appellant on October 1, 1996 at which time he had numbness in the back of the left leg with some systemic complaints that were difficult to relate to his left knee pain. At that time appellant was noted to have tenderness over Hunter's canal in the region of the saphenous nerve as well as tenderness along the pes anserine bursa. He also had patellofemoral crepitation and a retropatellar click with some weakness distally, but otherwise his examination was relatively benign. Dr. Seltzer injected appellant's pes anserine bursa with good results; he obtained enough relief to resume normal activities such as jogging. Appellant's pain eventually returned and on May 6, 1997 he saw Dr. Seltzer again complaining of some ankle pain. At that time, Dr. Seltzer noted significant quadriceps atrophy, but that he was otherwise unchanged. He injected appellant's pes anserine bursa and area around the saphenous nerve as it exits Hunter's canal. It was recommended that appellant resume bicycling and swimming rather than jogging.

An October 13, 1998 report from Dr. Setlzer noted that appellant's chronic left pes anserine bursitis was injected with good results and that he recommended appellant avoid pounding activities such as aerobics or jogging.

Dr. Seltzer noted that appellant returned on December 18, 1998 after resuming jogging and experiencing pain. He noted that appellant's examination was benign except for symptoms around his pes anserine bursa and some mild ankle discomfort.

By report dated January 12, 1999, Dr. Setlzer noted that on examination appellant had a tender and swollen pes anserine bursa and tenderness over Hunter's canal. He opined that appellant had left pes anserine bursitis with a possible saphenous nerve injury, and he recommended that appellant have some nerve conduction studies. Dr. Setlzer also opined that appellant would benefit from a gym membership to work on his hamstring flexibility.

By letter dated March 3, 1999, the Office advised appellant that Dr. Seltzer's report was insufficient to establish his recurrence claim. It requested further information including a medical narrative with objective findings and a discussion of causal relation.

By report dated March 9, 1999, Dr. Seltzer opined that appellant had left chronic pes anserine bursitis and evidence of ongoing left saphenous nerve entrapment. He opined:

> "I believe this is related to the original injury and though it is difficult to prove that there is saphenous nerve entrapment, we will try and do that with an EMG [electromyogram].... However, even if it is negative, it does n[o]t mean that an entrapment is not present. It only means that the entrapment has not caused enough compression to cause a permanent problem in the nerve. I am not certain of the etiology of the persistent pes anserine bursitis, as this usually does resolve with conservation treatment. In any case, I think this will prevent you from doing all the activities of your job as a utility electrician, though I believe there should be some duties of an electrician that [he] could perform."

Dr. Seltzer referred appellant to Dr. J. Michael Powers, a Board-certified neurologist, who on March 25, 1999 provided a comprehensive report. Dr. Powers noted appellant's factual and medical history and his present complaints, indicated that electrodiagnostic testing was performed and reported that "the current electrodiagnostic testing is normal. There is a general integrity of the nerves in the lower extremity including the saphenous conduction distal to the point of the injury. No denervation is encountered." Dr. Powers noted that, because of the nature of the testing, he had to rely on the integrity of the saphenous nerve distal to the point of impact to presume that the nerve is fundamentally structurally intact, but noted that he could not rule out some very restricted flowing at the site of injury, but that if such was present it did not materially disrupt the nerve as it passed distally.

By decision dated May 11, 1999, the Office denied appellant's claim finding that the medical evidence submitted was insufficient to establish a recurrence of his original work injury. The Office noted that, despite appellant's claim that he had a "recurrence" of disability continuous from 1995, the Board affirmed that appellant's disability due to injury on September 15, 1995 had ceased no later than September 16, 1996. It found that, although Dr. Seltzer, in his September 4, 1998 report, found that appellant had residuals of his September 15, 1995 employment injury, he also found that appellant could work as an electrician with certain activity restrictions and therefore had not experienced a spontaneous return to total disability causally related to the original work injury. The Office found that Dr. Power's testing indicated that appellant's neurologic system was normal and that he had not experienced a return to total disability on an increase in disability. The Office concluded that the medical evidence of record did not support that appellant was totally disabled or had sustained a recurrence of disability, causally related to his September 15, 1995 injury.

The Board finds that appellant has not established that he sustained a recurrence of disability commencing on September 15, 1995, the date of his original injury and ongoing.

As used in the Federal Employees' Compensation Act,[2] the term "disability" means incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.[3] An individual who claims a recurrence of disability due to an accepted employment injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which compensation is claimed is causally related to the accepted injury. This burden includes the necessity of 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 supports that conclusion with sound medical reasoning.[4] Causal relationship is a medical issue and can be established only by rationalized medical evidence.[5] Where no such rationale is present, medical evidence is of diminished probative value.[6]

In this case, the medical evidence does not establish that appellant had a recurrence of total disability for work. Dr. Seltzer opined that, although appellant could not return to his original job of utility electrician, he could work at a less strenuous activities as an electrician. He further opined that the original injury could have caused this saphenous nerve irritation, but that appellant's symptoms had not changed much since 1995. As this report does not identify a specific recurrence of appellant's employment injury, but speculates that the original injury could have caused this saphenous nerve irritation, it is of diminished probative value, and as it states that appellant could return to electrician work in a different capacity, it does not support ongoing total disability.[7]

On May 14, 1998 Dr. Seltzer indicated that neither a bone scan nor x-rays revealed an inflammatory process not consistent with a stress fracture and that he could not explain appellant's recurrent bouts of pes anserine bursitis. He opined that appellant had chronic pes anserine bursitis. As causal relation was not discussed this report is of diminished probative value and therefore does not establish appellant's claim.

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[2] 5 U.S.C. §§ 8101-8193.

[3] *Richard T. DeVito*, 39 ECAB 668 (1988); *Frazier V. Nichol*, 37 ECAB 528 (1986); *Elden H. Tietze*, 2 ECAB 38 (1948); 20 C.F.R. § 10.5(17). Disability is not synonymous with physical impairment. An employee who has a physical impairment, even a severe one, but who has the capacity to earn the wages he was receiving at the time of injury, has no disability as that term is used in the Act and is not entitled to disability compensation. *See Gary L. Loser*, 38 ECAB 673 (1987) (although the evidence indicated that appellant had sustained a permanent impairment of his legs because of thrombophlebitis, it did not demonstrate that his condition prevented him from returning to his work as a chemist or caused any incapacity to earn the wages he was receiving at the time of injury.)

[4] *Stephen T. Perkins*, 40 ECAB 1193 (1989); *Dennis E. Twardzik*, 34 ECAB 536 (1983); *Max Grossman*, 8 ECAB 508 (1956); 20 C.F.R. § 10.121(a).

[5] *Mary J. Briggs*, 37 ECAB 578 (1986); *Ausberto Guzman*, 25 ECAB 362 (1974).

[6] *Michael Stockert*, 39 ECAB 1186 (1988).

[7] The condition is "probably" related, "most likely" related, "could be" related -- all such phrases are speculative and hence of diminished probative value. *See Brian E. Flescher*, 40 ECAB 532 (1989).

On August 25, 1998 Dr. Seltzer diagnosed chronic pes anserine bursitis, but noted that there was no reason that appellant could not work eight hours per day. This report, therefore, does not support any injury-related continuing or recurrent total or partial disability. An August 26, 1998 work capacity evaluation specified appellant's duty activity restrictions.

In fact, on September 4, 1998 Dr. Seltzer noted that he could not explain why appellant had recurrent bouts of pes anserine bursitis. Therefore this report does not support a causal relationship between appellant's pes anserine bursitis at that time and his originally accepted employment injuries. Dr. Seltzer later speculated that the pes anserine bursitis "could be caused" by a direct blow, that a traumatic of hemorrhagic bursitis "could certainly have started this whole condition," and that a severe blow "can certainly cause" an irritation of the saphenous nerve. As these statement are facially speculative, they are of reduced probative value and are therefore insufficient to establish continuing injury-related disability.[8]

After jogging, appellant experienced an increase in discomfort and on December 18, 1998 returned to see Dr. Seltzer, who noted pes anserine bursitis and some mild ankle discomfort and he recommended less high impact excercises. This does not support a spontaneous return of disability causally related to the 1995 injuries.

His report dated January 12, 1999 basically repeated what his earlier reports concluded.

In his March 9, 1999 report, Dr. Seltzer noted that he was not certain of the etiology of the persistent pes anserine bursitis, which usually resolved with conservation treatment and he opined that appellant's condition should allow him to perform some of the duties of an electrician.

Dr. Powers performed electrodiagnostiuc testing on appellant and noted the results as being normal. He indicated that no denervation was encountered, that the nerves distal to the injury site were fundamentally intact.

The Office reviewed all of these reports and determined that none of the medical evidence provided a rationalized medical opinion establishing a recurrence of total disability, causally related to appellant's September 15, 1995 contusion of his left lower leg, pes anserine bursitis, left meniscal tear, thrombophlebitis and saphenous nerve injury. In fact the reports establish that appellant can perform work as an electrician with some limitations, that the etiology of the chronic pes anserine bursitis was not clear and that electrodiagnostic testing did not reveal any saphenous entrapment or injury, or at least not enough saphenous nerve entrapment to cause material disruption of the saphenous nerve, denervation or any other documented permanent problems.

Therefore, appellant has not met his burden of proof to establish his recurrence claim.

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[8] *Id.*; *see also Philip J. Deroo*, 39 ECAB 1294 (1988) (although the medical opinion of a physician supporting causal relationship does not have to reduce the cause or etiology of a disease or condition to an absolute medical certainty, neither can such opinion be speculative or equivocal); *Jennifer Beville*, 33 ECAB 1970 (1982) (statement of a Board-certified internist that the employee's complaints "could have been" related to her work injury was speculative and of limited probative value).

Accordingly, the decision of the Office of Workers' Compensation Programs dated May 11, 1999 is hereby affirmed.

Dated, Washington, DC
December 13, 2001

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member