U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THOMAS V. MILLEA and DEPARTMENT OF VETERANS AFFAIRS, EDWARD HINES, JR. HOSPITAL, Hines, IL

Docket No. 99-2006; Submitted on the Record;
Issued November 29, 2001

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof in rescinding acceptance of the condition of degenerative osteoarthritis with medial compartment disease of both knees; (2) whether appellant has established that he sustained greater than a 20 percent permanent impairment of the left lower extremity and a 15 percent permanent impairment of the right lower extremity for which he received a schedule award; (3) whether appellant was totally disabled for work on and after January 17, 1992, the last date of the schedule award period, due to the residuals of his accepted conditions; and (4) whether the Office properly denied appellant's subpoena request.

This is the fourth appeal in this case. By decision issued May 28, 1997,[1] the Board set aside a December 20, 1994 decision of the Office and remanded the case for further development on the issue of whether appellant sustained greater than a 20 percent impairment of the left lower extremity and a 15 percent impairment of the right lower extremity. The Board found that the November 22, 1994 report of Dr. Irwin Feinberg, a second opinion physician Board-certified in orthopedic surgery, did not provide sufficient rationale regarding causal relationship or reference the American Medical Association, *Guides to the Evaluation of Permanent Impairment.* The law and facts of the case as set forth in the May 28, 1997 decision are hereby incorporated by reference.

[1] Docket No. 95-1068 (issued May 28, 1987). The Board notes that page one of the previous decision states that it adjudicated the second appeal in appellant's case, whereas it actually was the third appeal. This discrepancy became clear after the Office reconstructed appellant's case file. Appellant's first appeal resulted in issuance of an order remanding case on October 10, 1984, remanding the case for a *de novo* decision regarding the causal relationship of appellant's left knee condition to the February 7, 1997 work injury. The second appeal resulted in a decision issued March 26, 1991 (Docket No. 90-1104), remanding the case to the Office for further development regarding the extent of any work-related permanent impairment to appellant's left lower extremity.

Following remand, the Office referred appellant, a copy of the October 26, 1994 statement of accepted facts and the medical record to Dr. Julie Wehner, a Board-certified orthopedic surgeon, for a second opinion examination and evaluation of any permanent impairment of the lower extremities due to the accepted injuries.[2]

In a November 12, 1997 report, Dr. Wehner provided a history of injury and treatment, and reviewed the statement of accepted facts and the medical record. On examination, Dr. Wehner found limited lumbar motion, a moderately antalgic gait bilaterally, an inability to heel or toe walk, significant valgus deformity of both ankles, and marked evidence of osteoarthritis of both knees with limited motion. Bilateral knee x-rays obtained that day showed significant medial joint space narrowing with loose bodies present and moderate patellofemoral arthritis. The medial joint space was at two millimeters in the right knee and zero millimeters in the left knee. Dr. Wehner diagnosed bilateral osteoarthritis of the knees and ankles. She opined that, as appellant did not have a documented injury to the intra-articular cartilaginous surfaces of either knee, the accepted injuries were most likely soft tissue injuries that did not have any permanent effect on the development of osteoarthritis. Dr. Wehner recommended bilateral knee replacement, noting that appellant reached maximum medical improvement approximately six months after the February 7, 1977 left knee sprain. Regarding the percentage of permanent impairment, Dr. Wehner referred to the fourth edition of the A.M.A., *Guides* at page 83, Table 62, entitled "Arthritis Impairments Based on Roentgenographically Determined Cartilage Intervals," which provided that a 0 degree cartilage interval of the left lower extremity equaled a 50 percent impairment and a 2 millimeter interval in the right knee equaled a 20 percent impairment. Dr. Wehner cautioned that these impairment ratings were applicable only if the Office deemed appellant's osteoarthritis to be work related.[3]

[2] Dr. Wehner was advised that the Office accepted that on February 7, 1977 appellant was struck in the back by a linen cart and his left foot was caught underneath, causing a left knee sprain and lumbosacral contusion. The Office also accepted that on April 17, 1985 appellant sustained a right knee injury when he tripped over a curb in the employing establishment parking lot. On May 2, 1988 appellant filed an occupational disease claim for osteoarthritis of both knees and degenerative disease of the lumbosacral spine. The Office also accepted that on December 7, 1988 appellant sustained bilateral knee contusions and a permanent aggravation of right knee osteoarthritis when an elevator door closed on him repeatedly. The Office directed Dr. Wehner to utilize the fourth edition of the A.M.A., *Guides* in preparing her opinion.

[3] In an accompanying November 12, 1997 work capacity evaluation, Dr. Wehner found appellant could work 8 hours per day, with walking and standing limited to 2 hours and no squatting or kneeling, and climbing limited to 15 minutes.

In a February 4, 1998 supplemental report,[4] Dr. Wehner stated that a significant meniscal tear or fracture would predispose a person to develop osteoarthritis at the injury site due to disruption of the articular surface, but that the record did not establish that appellant had sustained such injuries. Dr. Wehner explained that appellant's February 7, 1977 left knee injury was most likely a sprain as a March 2, 1977 arthrogram did not show any significant meniscal tear or fracture, with no impact on the articular surfaces, and thus would not cause degeneration of the articular cartilage. She noted that, as there was "no specific injury pattern to the articular surface in walking that would cause somebody to have osteoarthritis," walking the hospital halls did not cause or aggravate his osteoarthritis. Dr. Wehner characterized the April 17, 1985 right knee sprain and December 7, 1988 bilateral knee contusions as soft tissue injuries causing a temporary aggravation of preexisting osteoarthritis, but without influence on the development or progression of the disease. She concluded that walking, kneeling and the accepted injuries did not damage the intra-articular surfaces of appellant's knees and, therefore, his osteoarthritis could not be work related. Dr. Wehner noted that appellant's "present status of … osteoarthritis [was] well in keeping with his age and the known results of osteoarthritis in the general population without any antecedent trauma." Therefore, appellant's condition was attributable to a genetic predisposition.

By decision dated February 26, 1998, the Office rescinded its acceptance of osteoarthritis of both knees, found that appellant had not established that he sustained greater than a 20 percent permanent impairment of the left lower extremity or a 15 percent permanent impairment of the right lower extremity, and denied appellant's claim for compensation for total disability on and after January 17, 1992, based on Dr. Wehner's reports as the weight of the medical evidence. Regarding the schedule award, the Office noted that, although Dr. Wehner found increased percentages of impairment of both legs, no additional award was payable as she attributed these impairments to nonwork-related conditions. Regarding appellant's claimed disability for work on and after January 17, 1992, the Office found that appellant had submitted insufficient medical evidence to establish that he had disabling residuals of the accepted injuries and conditions on and after that date.

On March 4, 1998 letter appellant requested an oral hearing before a representative of the Office's Branch of Hearings and Review.

In an August 24, 1998 letter, appellant requested the issuance of subpoenas. He requested that Dr. Wehner be subpoenaed to explain her conclusion that he was genetically predisposed to osteoarthritis, as she did not perform genetic testing or interview appellant regarding any family history of osteoarthritis. Appellant also requested that the Office subpoena a senior claims examiner to explain why appellant's case had taken so long to process and why certain errors were made.

By decision dated September 2, 1998, the Office hearing representative denied appellant's request to subpoena Dr. Wehner and the Office claims examiner. The hearing representative found that Dr. Wehner had given detailed rationale explaining her reasons for

[4] In a January 23, 1998 letter, the Office requested that Dr. Wehner clarify her previous opinion regarding causal relationship, including specifying when any temporary aggravation of underlying osteoarthritis ceased.

negating causal relationship, and that appellant had not established that her attendance at the hearing would establish any pertinent fact. The hearing representative further found that there was no showing of bad faith or improper conduct by the claims examiner sufficient to justify compelling her attendance at the hearing by subpoena. This decision was addressed to appellant at "4324 North Lieb Av[enue]." in Chicago. The record demonstrates that appellant's correct address is "5342 North Lieb Av[enue]."

At the hearing, held September 23, 1998, appellant alleged that Dr. Wehner's reports were insufficient to establish that his bilateral medial compartment disease was due to a genetic predisposition and not to the accepted injuries. Appellant asserted that the statement of accepted facts contained errors, as he was 67 when he saw Dr. Wehner in November 1997 but the statement of accepted facts, dated October 1994, listed him as being 63, and that his duties as a chaplain did not entail lifting.[5] Appellant contended that Dr. Wehner was prejudiced against him because he was a clergyman, as she mentioned that he wore his clerical collar to the examination and that she trained at Loyola University. Appellant also raised the issue of the September 2, 1998 denial of his subpoena requests being mailed to an incorrect address.

At the hearing, appellant submitted medical literature on osteoarthritis and copies of medical records and correspondence previously of record.[6] Following the hearing, appellant submitted additional evidence: a June 13, 1997 chart note providing a history of workplace injuries; and a June 17, 1997 x-ray report noting severe degenerative narrowing of the medial compartment of the knees with varus deformity, mild degenerative joint disease of both ankles, a loose body in the right knee with significant narrowing of the patella-femoral compartment, significant degenerative disease of the left knee with narrowing of the medial and patellofemoral compartments and significant hypertrophic spurring of medial tibial plateau. A July 18, 1997 chart note suggested that appellant try aspirin to control the symptoms of his degenerative joint disease.

By decision dated and finalized December 7, 1998, the Office hearing representative affirmed the Office's February 6, 1998 decision.

Regarding the first issue, the Board finds that the Office's rescission of its acceptance of degenerative osteoarthritis of both knees was proper.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. This holds true where the Office later decides that it erroneously accepted the claim. To justify rescission of acceptance, the Office must show that it based its

[5] The Board notes that appellant's job description as a hospital chaplain states that the position required heavy lifting over 45 pounds.

[6] Appellant submitted February 7, 1977 chart notes by a Dr. Smith noting left knee effusion, negative McMurray and Drawer signs and "possible internal derangement"; a March 8, 1977 chart note from Dr. Smith stating that a left knee arthrogram showed "no obvious pathology"; an Office letter dated September 21, 1979 stating that further development was necessary regarding a second opinion for surgery and a claim for two hours of wage-loss compensation on November 20 1978; and appellant's June 22, 1988 claim (Form CA-1) asserting that he was struck on the left ankle by a falling fan on June 21, 1988 with no time lost from work.

decision on new evidence, legal argument and/or rationale.[7] After it has been determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability has ceased or is no longer related to the employment injury.[8]

In the instant case, the Office accepted that appellant sustained a left knee sprain and lumbosacral contusion on February 7, 1977, a right knee sprain on April 17, 1985, and bilateral knee contusions on December 7, 1988. The Office also accepted that he sustained a permanent aggravation of degenerative osteoarthritis with medial compartment disease of both knees.

The Office rescinded acceptance of the claim for degenerative osteoarthritis of both knees, based on the medical opinion of Dr. Wehner, a Board-certified orthopedic surgeon and second opinion physician. In November 12, 1997 and February 4, 1998 reports, Dr. Wehner provided a history of injury and treatment, conducted a thorough orthopedic examination of appellant's lower extremities, and opined that the degenerative osteoarthritis disease of appellant's knees was not causally related to work factors. In reaching this conclusion, Dr. Wehner explained why each of the accepted causative factors could not have influenced the development or course of appellant's degenerative osteoarthritis. Dr. Wehner noted that the February 7, 1977 left knee sprain was a soft tissue injury only, as evidenced by a March 2, 1977 arthrogram which was reported negative for meniscal tear or fracture. She noted that the April 7, 1985 right knee sprain and December 7, 1988 bilateral knee contusions were also soft tissue injuries. Dr. Wehner stated that none of these soft tissue injuries caused a documented injury to the intra-articular cartilaginous surfaces in the medial or patellofemoral compartments that would predispose appellant to developing osteoarthritis, or accelerate a preexisting degenerative process. With regard to appellant's claim that osteoarthritis of both knees due to walking hospital hallways, Dr. Wehner again noted that there was "no specific injury pattern to the articular surface in walking that would cause somebody to have osteoarthritis." Dr. Wehner presented detailed medical rationale, based on a complete and accurate factual and medical history, explaining why the accepted work factors would not cause or aggravate appellant's bilateral osteoarthritic knee condition.

The Board finds Dr. Wehner's opinion constitutes new evidence and is adequately reasoned to justify the Office's decision to rescind acceptance of appellant's claim as it pertains to the bilateral degenerative osteoarthritis of the knees. The fact that the statement of accepted facts erroneously listed appellant's age as 63 has not been shown to be in any way material to the findings made by Dr. Wehner on examination of appellant.

Regarding the second issue, the Board finds that the case is not in posture for decision.

By decision dated February 4, 1992, appellant was awarded compensation for a 20 percent impairment of the left leg and a 15 percent impairment of the right leg, with the period of award running from September 1, 1990 to January 17, 1992.

[7] *Billie C. Rae*, 43 ECAB 192 (1991).

[8] *Frank J. Mela, Jr.*, 41 ECAB 115 (1989); *Mary E. Jones*, 40 ECAB 1125 (1989).

The only medical evidence submitted pursuant to this appeal regarding a schedule award evaluation was Dr. Wehner's November 12, 1997 report finding a 50 percent permanent impairment of the left leg and a 20 percent impairment of the right leg due to degenerative arthritis. Although the Office rescinded its acceptance of osteoarthritis of the lower extremities, it did not rescind its acceptance of permanent aggravation of degenerative arthritis of both knees. It is well established that in calculating a schedule award for a member of the body that sustained an employment-related impairment, preexisting permanent impairments of that member must be included. As applied to this case, the Office must take into account any of appellant's nonoccupational osteoarthritis impairments to both knees in calculating the schedule awards.[9]

To support a claim for total disability, a claimant must submit rationalized medical evidence, of reasonable certainty, establishing a causal relationship between the alleged work factors and the diagnosed condition, and explaining how and why such condition would totally disable appellant for work.[10]

Appellant submitted several reports addressing his condition after January 17, 1992, including June 13, 1997 chart notes recounting appellant's workplace injuries, and a June 17, 1997 x-ray report documenting significant osteoarthritic degenerative disease of the knees and ankles bilaterally. While these reports document the presence of degenerative osteoarthritis of both knees, they do not establish that appellant was disabled for work on or after January 17, 1992 due to the accepted injuries. There is no opinion provided on the issue of disability for work. Therefore, the Office properly found that appellant has not established any period of total disability for work on and after January 17, 1992.

Regarding the fourth issue, the Board finds that the Office properly denied appellant's subpoena request.

Section 8126 of the Federal Employees' Compensation Act[11] states: "The Secretary of Labor, on any matter within his jurisdiction under this subchapter, may -- (1) issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles." This section of the Act gives the Office discretion to grant or reject requests for subpoenas. The Office's regulation on subpoenas states, in part, "When reasonably necessary for full presentation of a case, an Office hearing representative may upon his or her own motion, or upon request of the claimant, issue subpoenas for the attendance and testimony of witnesses."[12]

In his September 2, 1998 decision, the Office hearing representative noted that appellant failed to demonstrate that the testimony of Dr. Wehner could not be obtained by means other than the issuance of a subpoena. He noted that Dr. Wehner's reports fully explained her opinion of appellant's bilateral knee osteoarthritis as a genetic predisposition rather than to work factors,

[9] *See Dale Larson*, 41 ECAB 481 (1990); *Pedro DeLeon*, 35 ECAB 487 (1983).

[10] *Charles E. Burke*, 47 ECAB 185 (1995).

[11] 5 U.S.C. § 8126.

[12] 20 C.F.R. § 10.134(a).

such that her attendance would not establish any pertinent information. The hearing representative further found that there was no evidence demonstrating bad faith or improper conduct by the senior claims examiner which would justify issuing a subpoena.

To establish that the Office abused its discretion, appellant must show manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely who that the evidence could be construed so as to produce a contrary factual conclusion.[13] The Board finds no abuse of discretion in the finding of the Office hearing representative that appellant had failed to show that issuance of the requested subpoenas was necessary for a full presentation of the case.

The Board notes that the September 2, 1998 decision denying appellant's subpoena request was sent to an incorrect address, and that appellant did not receive this decision prior to the September 23, 1998 hearing.[14] However, the Board finds that, under the facts of this case, it was harmless error. As noted, the testimony appellant sought from Dr. Wehner had already been provided in her reports, and he did not show that her testimony at the hearing would address anything new. Also, appellant has not established any relevance to the testimony of the Office claims examiner that would justify her subpoena. Appellant's frustration to matters relating to the handling of his workers' compensation claim is not relevant to the issue in this case, which is medical in nature.[15]

[13] *See Daniel J. Perea*, 42 ECAB 214 (1990).

[14] The September 2, 1998 decision was addressed to appellant at "4324 North Lieb Av[enue]," whereas his correct address is "5342 North Lieb Av[enue]."

[15] *See Bettina M. Graf*, 47 ECAB 687 (1996).

The decision of the Office of Workers' Compensation Programs dated and finalized December 7, 1998 is hereby affirmed in part and set aside in part in accordance with this decision and order.

Dated, Washington, DC
November 29, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member