U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT EARL YOUNT and U.S. POSTAL SERVICE,
POST OFFICE, Akron, OH

Docket No. 03-377; Submitted on the Record;
Issued May 1, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly denied compensation after September 16, 1994 and denied medical expenses after October 15, 2002.

This case is on appeal to the Board for the fourth time.[1] In the first appeal, the Board found that, contrary to the Office's finding, Drs. Ron Vargo and Dr. R.S. McMillen, both chiropractors, were physicians within the meaning of the Federal Employees' Compensation Act and therefore the Office erred in failing to consider their reports. Further, the Board noted that, in his September 29 and 30, 1994 reports, Dr. Ronald Copeland, a Board-certified surgeon, stated that appellant's repeated heavy lifting and twisting on the job caused the February 8, 1993 strain which led to the diagnosis of fibromyalgia/myofascitis. The Board found that, while the medical evidence was insufficient in itself to establish that appellant continued to be disabled from the February 8, 1993 employment injury, further development of the evidence was required. The Board therefore set aside the Office's June 28, 1994 and April 6, 1995 decisions and remanded the case, with instructions for the Office to refer appellant to an appropriate Board-certified specialist for another medical evaluation, and after further development as was necessary, issue a *de novo* decision.

On remand, the Office referred appellant to Dr. Charles J. Paquelet, a Board-certified orthopedic surgeon, who in a report dated September 27, 1997 stated that appellant had residuals from the February 8, 1993 employment injury through July 27, 1994 and received treatment for his work-related condition though May 1995. In a work capacity evaluation dated September 26, 1997, Dr. Paquelet stated that appellant could work 4 hours a day with no lifting more than 25 pounds a day and no lifting more than 10 pounds frequently. In his November 6, 1997 report, Dr. Paquelet opined that appellant's work tolerance limitations were directly and proximately

[1] Docket No. 95-2079 (issued August 1, 1997). Docket No. 98-1367 (issued December 20, 1999). Docket No. 01-357 (issued October 5, 2001). The facts and history surrounding the prior appeals are set forth in the initial three decisions and are hereby incorporated by reference.

related to the February 8, 1993 employment injury. In his report dated December 2, 1997, Dr. Paquelet diagnosed ruptured disc at C5-6 and chronic upper back and right shoulder strain. He stated that the ruptured disc at C5-6 could have been a result of the 1993 injury but that was strictly conjecture. Dr. Paquelet opined that appellant was disabled due to the unaccepted condition of a ruptured disc and the chronic right shoulder and upper back strain.

In the second appeal, the Board found that the Office, in its March 12, 1998 and December 10, 1997 decisions, without making any findings of fact or providing a statement of reasons, found that Dr. Paquelet's opinion established that appellant was entitled to disability compensation and medical expenses only through July 27, 1994. The Board found that the case must be remanded for the Office to make the appropriate findings of fact on the nature of appellant's work-related injury and the period of disability and provide reasons for its findings, with reference to the evidence in the record. The Board therefore set aside the Office's December 10, 1997 and March 12, 1998 decisions, and remanded the case for further action consistent with its decision, to be followed by a *de novo* decision.

In the third appeal, the Board found that the Office's analysis of Dr. Paquelet's opinion was inadequate given that the Office did not consider Dr. Paquelet's November 6 and December 2, 1997 reports and his September 26, 1997 work capacity evaluation which could establish that appellant continued to be disabled after July 28, 1994 due to the accepted conditions. The Board therefore remanded the case, with instructions for the Office to request clarification from Dr. Paquelet and after such development as it deemed necessary, issue a *de novo* decision.

On remand, because Dr. Paquelet had retired, the Office referred appellant to Dr. Sheldon Kaffen, a Board-certified orthopedist. In a report dated December 6, 2001, Dr. Kaffen considered appellant's history of injury, performed a physical examination and reviewed x-rays, a bone scan, a magnetic resonance imaging (MRI) scan and an electromyogram (EMG). He opined that there were no objective findings to indicate persistent residuals of the accepted conditions of upper back strain and right shoulder strain. Dr. Kaffen stated that there was no evidence of a cervical subluxation based on the x-rays of the cervical spine. He concluded that there was no relationship between appellant's cervical pathology and the February 8, 1993 work incident. Dr. Kaffen stated that, throughout the medical records there was inconsistent and only occasional complaints of posterior neck pain, the neurological examination on multiple examinations was normal and the MRI scan showed minute herniated disc at two levels which did not compress neural structures. He opined that appellant could perform his usual work. Dr. Kaffen stated that appellant "was more likely than not no longer disabled from performing his date-of-injury duties after July 27, 1994 and that one would "expect muscle strain/sprain to have subsided by that time."

In response to the Office's request for clarification in a report dated December 21, 2001, Dr. Kaffen stated that appellant was not disabled from performing his date-of-injury duties after July 27, 1994 based on the allowed conditions of upper back strain and right shoulder strain. By decision dated January 8, 2002, the Office denied appellant's claim, stating that Dr. Kaffen's report constituted the weight of the evidence and established that appellant's February 8, 1993 employment injury had resolved as of July 27, 1997. The Office therefore denied compensation

benefits effective July 28, 1994 and terminated appellant's medical expenses effective January 8, 2002.

By letter dated January 10, 2002, appellant requested an oral hearing before an Office hearing representative which was held on June 26, 2002. He testified that he was currently employed in the private sector at Dick's Sporting Goods. Appellant stated that he stopped working for the government on July 18, 1995 due to pain in his shoulder and back and for which he was still being treated. He stated that his physical examination with Dr. Paquelet was very cursory. Appellant stated that in August 1995 he had an automobile accident which "threw [his] back out again" and he settled that case. He stated that, when he left the government he had been on limited duty answering the telephone and repairing torn mail, and they had him sit a lot which bothered his shoulder. Appellant stated that he had sold cars, was currently a retail sales clerk and the retail work did not involve heavy lifting. His attorney contended that Dr. Paquelet's report did not establish appellant had recovered from his February 8, 1993 employment injury because Dr. Paquelet stated "one would expect" muscle sprains and strains to have subsided but did not actually state that appellant's condition had subsided and that appellant had recovered. Appellant explained that he actually stopped working on July 19, 1994 and resigned in 1995.

By decision dated October 15, 2002, the Office hearing representative affirmed the Office's denial of benefits, but found that the date of entitlement should be extended to September 18, 1994 because that was the date appellant was released to full-time limited-duty work by his treating physician, Dr. Ron Vargo, a chiropractor. The Office hearing representative affirmed the Office's findings that appellant's medical expenses should be terminated but extended the date of entitlement to October 15, 2002, on the basis that the Office did not provide a pretermination notice prior to issuing the January 8, 2002 decision.

The Board finds that Office properly denied appellant compensation after September 18, 1994 and denied appellant medical expenses after October 15, 2002.

Since the Office was paying appellant compensation based upon the ongoing submission of documentation that he was disabled following his February 8, 1993 employment injury, appellant maintained the burden of establishing entitlement to continuing disability which was related to the employment injury.[2]

Pursuant to the Board's instructions in the October 5, 2001 decision, the Office referred appellant to Dr. Kaffen since Dr. Paquelet had retired. In his December 6, 2001 report, based on a physical examination and a review of the diagnostic tests of record, Dr. Kaffen found there were no objective findings to indicate persistent residuals of the accepted conditions of upper back strain and right shoulder strain. He found the x-rays of the cervical spine did not show that there were subluxations, that several neurological examinations were normal and the MRI scan showed a minute herniated disc at two levels which did not compress neural structures. Dr. Kaffen concluded that there was no relationship between appellant's cervical pathology and the February 8, 1993 work incident. He opined that appellant could perform his usual work. In his supplemental report dated December 21, 2001, Dr. Kaffen stated that appellant was not disabled from performing his date-of-injury duties after July 27, 1994. While he did not

[2] *Donald Leroy Ballard*, 43 ECAB 876, 882 (1992).

explicitly state that appellant's back and neck condition had resolved but stated one would have expected appellant's condition to have resolved by the time he examined appellant and the fact that he found no objective evidence of appellant's ongoing complaints of pain, his reports support the Office's finding that appellant recovered from his February 8, 1993 employment injury. His opinion is sufficiently complete and well rationalized to constitute the weight of the evidence.[3]

Further, as the Office noted, the work restriction evaluation of one of appellant's treating physicians, Dr. Vargo, released appellant to return to full-time work with restrictions on September 19, 1994 and appellant did not submit any evidence after that date showing that he was unable to perform the light-duty work. Appellant has failed to establish that he continued to be disabled after September 18, 1994. Since the Office terminated medical expenses on January 8, 2002 without giving appellant prior notice, it was appropriate for the Office to extend the payment of appellant's medical expenses through the time of its October 15, 2002 decision.[4]

The October 15, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
May 1, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

[3] *See Gary R. Sieber*, 46 ECAB 215, 224-25 (1994); *Connie Johns*, 44 ECAB 560, 570 (1993).

[4] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances, When Pretermination and Prereduction Notices Are Required*, Chapter 2.1400(6)(a) (March 1997).