U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CONARD HIGHTOWER and DEPARTMENT OF THE ARMY, RED RIVER ARMY DEPOT, Texarkana, TX

Docket No. 02-1568; Submitted on the Record;
Issued September 9, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issues are: (1) whether appellant established that he sustained a recurrence of disability commencing April 1997 causally related to the April 2, 1979 work-related injury; and (2) whether the Office of Workers' Compensation Programs properly determined that appellant had not acted in good faith to comply with vocational rehabilitation efforts.[1]

This is the fourth appeal in this case.[2] By decision dated July 18, 1981, the Board affirmed an Office loss of wage-earning capacity determination for the period December 16, 1979 through March 9, 1980.[3] In an order dated November 21, 1986, the Board dismissed appellant's appeal because the case was in an interlocutory posture since, in an April 23, 1986 decision, an Office hearing representative found that the Office properly terminated benefits, but remanded the case for further development.[4] In the most recent decision, dated August 3, 2000, the Board affirmed an Office decision dated February 12, 1998, which reduced appellant's compensation for failure to cooperate with rehabilitation efforts.[5] The law and facts as set forth in the Board's prior decisions and orders are incorporated herein by reference.

On May 25, 2001 appellant filed a Form CA-2a, claim for recurrence of disability, alleging that he sustained a recurrence of total disability in April 1997 causally related to the April 3, 1979 work injury. He indicated that he stopped work in April 1997 and did not return.

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[1] The record contains a letter dated August 20, 2002 in which the Office stated that it was unable to locate appellant's file and was attempting to reconstruct it.

[2] The Office accepted appellant's claim for a musculoskeletal strain of the lumbar area and permanent aggravation of degenerative disc disease.

[3] 32 ECAB 1738 (1981).

[4] Docket No. 86-1919 (issued November 21, 1986).

[5] Docket No. 98-1655 (issued August 3, 2000).

The employing establishment noted, on the claim form, that appellant had returned to a light-duty position until his separation, effective March 27, 1981 and did not return to work thereafter.

The medical evidence submitted by appellant in support of his recurrence claim included reports from his treating physician, Dr. Richard V. Wilson, a Board-certified orthopedist, dated May 1, 1997 to March 2, 2001. In a report dated May 1, 1997, he indicated that appellant had been treated for an increase of symptoms which affected his ability to bend, stoop and lift. Dr. Wilson noted that the effects of appellant's work injury continued and were not expected to improve. He advised that no treatment was indicated, stating that appellant's condition had been stable since 1987. In a report dated August 7, 1997, Dr. Wilson noted that appellant had good and bad days and that if he were placed in a position he would miss work intermittently. He noted that appellant worked in his wife's antique shop in a mostly sedentary position. In his report of February 18, 2000, Dr. Wilson noted that appellant had sustained a severe recurrence in December 1999 when he attempted to lift and twist in an awkward manner. He advised that appellant had partially recovered but the effects of the work injury continued and had not ceased and prevented him from returning to the job that he held at the date of injury. Dr. Wilson opined that appellant could not return to gainful employment due to his recurrence and his inability to sit or stand for very long. In a report dated March 2, 2001, he advised that appellant had a restricted range of motion and still experienced the effects of the work injury. Dr. Wilson noted that appellant could not return to the date-of-injury position but could perform a position involving intermittent sitting and standing but further stated that he did not believe appellant would recover enough to become employable.

By decision dated October 9, 2001, the Office denied appellant's claim for a recurrence of disability on the grounds that the evidence submitted was insufficient to support that appellant sustained a recurrence commencing in April 1997. In a letter dated October 16, 2001, appellant requested an oral hearing before an Office hearing representative that was held on March 14, 2002. Appellant testified that he had last worked at the employing establishment in 1981 and had not worked since that time.[6] He indicated that, in December 1999, he experienced low back pain and had to be treated at a hospital. Appellant also submitted additional medical evidence.

In a report dated December 2, 1999, Dr. Greta Parks, a Board-certified orthopedist, noted that appellant had experienced chronic low back pain for months and had marked difficulty sitting and standing. He noted x-ray findings of degenerative changes and diagnosed acute musculoskeletal back pain. A magnetic resonance imaging (MRI) scan of the lumbar spine, dated December 3, 1999, demonstrated a moderate bulge on the right at the L4-5 level extending along the inferior margin of the neural foramen and moderate degenerative disease, primarily inferiorly. By report dated December 14, 1999, Dr. R.M. Hilborn, a Board-certified orthopedic surgeon, noted a history that appellant had been injured 20 years previously and had suffered back pain since. A physical examination revealed negative straight leg raising test and intact motor and sensory examination. He reviewed the MRI scan and diagnosed chronic low back pain and degenerative disc disease.

[6] Appellant stated that he would sit in his wife's antique store to keep customers from harassing her but did not work there.

In a letter dated February 11, 2002, appellant indicated that his compensation was originally reduced because of his refusal to cooperate with vocational rehabilitation. He noted that the counselor requested that he undergo training as a telemarketer, which he refused. Appellant indicated that, on January 1, 2002, Texas and Louisiana had established "no call" lists in which telemarketers could be fined for each telephone call. He requested that, in view of this occurrence, the Office reinstate his benefits.

By decision dated April 29, 2002, an Office hearing representative affirmed the decision dated October 9, 2001. The hearing representative noted that appellant did not submit sufficient medical evidence to establish that he sustained a recurrence of disability in April 1997 causally related to the April 3, 1979 work injury. The hearing representative further addressed appellant's letter of February 11, 2002 requesting temporary total disability because the states of Texas and Louisiana had established no call lists for telephone solicitors. The hearing representative found that this did not affect the finding that appellant had the wage-earning capacity of a telephone solicitor, as the lack of current job openings did not equate to a finding that the position was not performed in sufficient numbers at the time it was offered to appellant as to be considered reasonably available.

The Board finds that appellant has failed to establish that he sustained a recurrence of disability commencing April 1997, causally related to his April 2, 1979 work injuries.

As used in the Federal Employees' Compensation Act,[7] the term "disability" means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.[8] When an employee, who is disabled from the job that he or she held when injured on the 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.[9]

Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence. Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[10]

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[7] 5 U.S.C. §§ 8101-8193.

[8] *Prince E. Wallace*, 52 ECAB 357 (2001).

[9] *Barry C. Peterson*, 52 ECAB 120 (2000); *Terry R. Hedman*, 38 ECAB 222 (1986).

[10] *Gary L. Fowler*, 45 ECAB 365 (1994); *Victor J. Woodhams*, 41 ECAB 345 (1989).

The medical evidence submitted by appellant, in support of his claim, that he sustained a recurrence of disability, included an MRI scan dated December 3, 1999 and reports from his treating physician, Dr. Wilson dated May 1, 1997 to September 10, 2001, Dr. Parks dated December 2, 1999 and Dr. Hilborn dated December 14, 1999. The Board, however, finds that these reports lack adequate rationale to establish a causal connection between appellant's current medical condition and his April 2, 1979 employment injury.

Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship.[11] The December 2, 1999 MRI scan is, therefore, insufficient to meet appellant's burden of proof. Likewise, while, in his May 1 and August 7, 1997 reports, Dr. Wilson noted that appellant experienced an increase of his back symptoms and advised that the effects of appellant's work injury continued, he also advised that appellant's condition had been stable since 1987. Furthermore, his reports contained contradictory opinions regarding appellant's employability. Lastly, in these reports, which are most contemporaneous with the date of the alleged recurrence, Dr. Wilson did not specifically state that appellant sustained a recurrence of disability in April 1997 causally related to the accepted employment injury of April 2, 1979.[12] In fact, in his February 18, 2000 report, Dr. Wilson noted that appellant had a recurrence in December 1999, not 1997, when appellant attempted to lift and twist in an awkward manner. He neither mentioned that this injury was a recurrence of the earlier injury of April 2, 1979 nor did he otherwise provide medical reasoning explaining why any current condition or disability was due to the April 1979 employment injury or to any other employment factors.

In her report dated December 2, 1999, Dr. Parks noted appellant's complaints of chronic low back pain that had continued for months and indicated that there was no recent injury. She, however, did not mention the 1979 work injury or provide any explanation regarding why appellant's current condition was due to employment factors. In his December 14, 1999 report, Dr. Hilborn indicated that appellant had suffered an employment injury 20 years previously which caused low back pain. Dr. Hilborn, however, did not indicate knowledge of a recurrence of disability in April 1997 and did not reference any particular employment factors as causing appellant's condition.

While 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 certainty, neither can such an opinion be speculative or equivocal. The opinion of a physician, supporting causal relationship must, be one of reasonable medical certainty that the condition, for which compensation is claimed, is causally related to federal employment and that such a relationship must be supported with affirmative evidence, explained by medical rationale and be based upon a complete and accurate medical and factual background of the claimant.[13] Medical conclusions unsupported by medical rationale are of diminished probative value and are insufficient to establish causal

[11] *Linda I. Sprague*, 48 ECAB 386 (1997).

[12] The Board has held that contemporaneous evidence is entitled to greater probative value than later evidence; *see Eileen R. Kates*, 46 ECAB 573 (1995); *Katherine A. Williamson*, 33 ECAB 1696 (1982); *Arthur N. Meyers*, 23 ECAB 111 (1971).

[13] *Samuel Senkow*, 50 ECAB 370 (1999).

relation.[14] The Board concludes that Dr. Wilson's reports were contradictory and neither he nor Dr. Parks or Dr. Hilborn provided sufficient rationale to support a change in the nature or extent of appellant's injury-related condition to establish that he sustained a recurrence of disability in April 1997 related to the April 2, 1979 employment injury.[15]

The Board also finds that the Office properly determined that appellant had not acted in good faith to comply with vocational rehabilitation efforts.

By decision dated August 3, 2000, the Board affirmed an Office decision which reduced appellant's compensation for failure to cooperate with rehabilitation efforts.[16] There is no evidence of record which establishes that appellant subsequently complied in good faith with vocational rehabilitation efforts.[17] The Board therefore, finds that, until such time as appellant makes a good faith effort to cooperate with vocational rehabilitation, the wage-earning capacity decision will remain in place.[18]

[14] *Albert C. Brown*, 52 ECAB 152 (2000).

[15] *Id.*

[16] Section 8113(b) of the Act states: "If an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed under section 8104 of this title, the [Office], on review under section 8128 of this title and after finding that in the absence of the failure the wage-earning capacity of the individual, would probably have substantially increased, may reduce prospectively the monetary compensation of the individual in accordance with what would probably have been his wage-earning capacity in the absence of the failure, until the individual in good faith complies with the direction of the [Office]. 5 U.S.C. § 8113(b) The regulation implementing this section of the Act, 20 C.F.R. § 10.519, restates section 8113(b) and then states: "If an employee without good cause fails or refuses to apply for, undergo, participate in or continue to participate in a vocational rehabilitation effort when so directed," the Office will reduce prospectively the employee's monetary compensation based on what would probably have been the employee's wage-earning capacity had there not been such failure or refusal."

[17] 20 C.F.R. § 10.519(a). "The reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of [the Office]."

[18] The Office procedure manual provides that in a case such as this where an employee refuses or impedes an Office approved training program, the employee must indicate in writing his or her intent to comply and compliance is shown by actions such as attending school on a regular basis. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Failure to Cooperate in Vocational Rehabilitation Efforts*, Chapter 2.813.11(b)(3) (November 1996).

Accordingly, the decision of the Office of Workers' Compensation Programs dated April 29, 2002 is hereby affirmed.[19]

Dated, Washington, DC
September 9, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[19] The Board notes that appellant submitted medical evidence after the April 29, 2002 decision of the Office hearing representative. The Board cannot consider this evidence; however, as its review of the case is limited to the evidence of record which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).