U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRUCE S. CAVANAUGH and DEPARTMENT OF THE ARMY, NEW CUMBERLAND ARMY DEPOT, New Cumberland, PA

Docket No. 03-1244; Submitted on the Record;
Issued September 9, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON, MICHAEL E. GROOM

The issues are: (1) whether appellant has established that he sustained a recurrence of disability beginning April 3, 1993 causally related to his July 14, 1983 employment injury; and (2) whether appellant is entitled to an increased schedule award.

This case is before the Board for the second time. In the first appeal, the Board set aside an Office of Workers' Compensation Programs' October 26, 1989 decision which granted appellant a schedule award for a five percent permanent impairment of his left leg.[1] The Board remanded the case for the Office to refer appellant for a second opinion examination on the issue of the extent of his permanent impairment of the lower extremities. The findings of fact and conclusions of law from the prior decision are hereby incorporated by reference.

Following further development of the evidence, by decision dated July 31, 1992, the Office denied appellant's claim for an increased schedule award on the grounds that the evidence did not establish that he had reached maximum medical improvement.

On April 3, 1993 appellant retired on disability from the employing establishment. He elected to receive compensation from the Office of Personnel Management in lieu of claiming workers' compensation benefits from the Office.[2] In a letter dated December 1, 1993, appellant related that he had "retrained myself at my own expense and opened my own company…."

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[1] Docket No. 90-632 (issued November 7, 1990).

[2] The Office accepted appellant's claim for a lumbar disc biotusion. He underwent a laminectomy at L4-5 and L5-S1 with removal of a L4-5 disc protrusion in August 1983. By decision dated January 12, 1988, the Office found that appellant's actual earnings working four hours a day as a supply clerk fairly and reasonably represented his wage-earning capacity. The Office further accepted that appellant sustained a recurrence of disability beginning April 9, 1992 causally related to his July 14, 1983 employment injury. He returned to work for four hours a day in January 1993.

An Office medical adviser reviewed appellant's medical records and, in a report dated October 25, 1999, recommended that the Office authorize a lumbar laminectomy and disc removal at L4-5. On October 26, 1999 the Office authorized a lumbar laminectomy at L4-5, which appellant underwent on October 27, 1999.

In a letter dated December 18, 1999, appellant advised the Office that the employing establishment had informed him that it no longer had a position available for him in January 1993. Appellant related that he took disability retirement at the recommendation of an official with the employing establishment, who told him that if he retired he would not have to continue to submit medical documentation supporting disability.

By letter dated April 10, 2000, the Office informed appellant's congressional representative that as it had approved the October 28, 1999 surgery, appellant would be entitled to compensation for the period of his recuperation. The Office requested that appellant complete the enclosed CA-7 form, claim for compensation.[3]

On November 29, 2001 appellant elected workers' compensation retroactive to April 2, 1993. He further argued that the Office had not adjudicated his request for an increased schedule award.

By decision dated October 31, 2002, the Office denied appellant's claim on the grounds that he had not established that he was totally disabled beginning April 1993 due to his July 14, 1983 employment injury. The Office further found that appellant had not established entitlement to an additional schedule award. He requested a review of the written record. In a decision dated April 7, 2003, a hearing representative affirmed the Office's October 31, 2002 decision.

The Board finds that appellant has not established that he sustained a recurrence of disability beginning April 3, 1993, causally related to his July 14, 1983 employment injury.

Where an employee, who is disabled from the job he or she held when injured on 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.[4]

In this case, appellant returned to limited-duty work following his employment injury on January 3, 1984. He worked in a part-time limited-duty position from 1988 until April 1992, when he sustained a recurrence of disability. Appellant returned to part-time limited-duty employment with the employing establishment in January 1993. On April 1, 1993 appellant retired on disability and elected to receive compensation from the Office of Personnel

[3] By letter dated June 1, 2000, appellant requested a schedule award as compensation for past and future loss of earnings.

[4] *Terry R. Hedman*, 38 ECAB 222 (1986).

Management. In a letter dated December 1, 1993, he noted that he had retrained himself and had opened a business. In a letter dated December 18, 1999, appellant argued that he had retired because the employing establishment no longer had a position available for him. However, appellant has not substantiated his allegation with evidence demonstrating that the employing establishment withdrew his limited-duty assignment. Appellant has not established a recurrence of disability due to a change in the nature of extent of his light-duty job requirements.

Appellant further has not established that he was unable to perform his limited-duty employment on or after April 3, 1993.[5] In support of his claim, appellant submitted an office visit note dated March 17, 1999 from Dr. Robert R. Kaneda, an osteopath, who evaluated him for complaints of intermittent low back pain. Dr. Kaneda stated:

> "[Appellant] said he injured his back working in 1983. He was taking off helicopter blades. [Appellant] had disc surgery in 1983. He was retired on disability in 1993 secondary to persistent low back complaints. [Appellant] related that, when he sits for any period of time he has pain in the gluteal areas over the ischial tuberositites, but also has paresthesia that extends in his low back and down into his testicles as well."

Dr. Kaneda diagnosed low back pain and recommended a magnetic resonance imaging (MRI) scan. In an office visit note dated April 26, 1999, he diagnosed a left-sided herniated nucleus pulposus (HNP) at L4-5 and recommended epidural injections. In an office visit note dated September 17, 1999, Dr. Kaneda diagnosed an HNP at L4-5 with lumbar radiculitis and referred appellant for further testing in "anticipation of lumbar surgery." In his reports, Dr. Kaneda did not specifically address the cause of appellant's diagnosed condition of an HNP at L4-5 or find him disabled from employment. Therefore, his reports are insufficient to meet appellant's burden of proof.[6]

In a report dated October 4, 1999, Dr. Moore related that he treated appellant for "a new problem which is really an extension of his old back problem from years ago." He indicated that an MRI revealed "a moderately large disc protrusion and partial extrusion at the L4-5 level on the left side which compresses the nerve root…." Dr. Moore recommended a lumbar laminectomy, which he performed on October 27, 1999, he did not discuss appellant's history of injury or address whether he was disabled from his limited-duty employment. To establish a recurrence of disability, the evidence must contain a rationalized medical report finding that appellant's July 14, 1983 employment injury resulted in his inability to perform his employment on or after April 1993.

[5] In a report dated October 30, 1992, Dr. Barry B. Moore a Board-certified neurosurgeon, opined that appellant was totally disabled and should be considered for disability retirement. However, Dr. Moore did not address whether appellant's disability was due to his accepted employment injury. A determination made for disability retirement purposes is not determinative of the extent of physical disability or impairment for compensation purposes under the Federal Employees' Compensation Act. *James E. Norris*, 52 ECAB 93 (2000).

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

In a follow-up report dated January 6, 2000, Dr. Moore noted that appellant was doing well post surgery and that he "feels that mostly he is back almost to his old discomfort in this back, although his legs are still somewhat painful at times." Dr. Moore, however, did not address whether appellant sustained any periods of disability from employment following his surgery and thus, his opinion is of little probative value.

In a report dated January 26, 2000, Dr. Moore stated:

> "[Appellant's] present condition of acute disc extrusion has been removed surgically. It would be anticipated that he would return to his previous state of disability which included muscle spasm in the back, back pain and chronic leg pain bilaterally. There are no plans for future treatment of [appellant's] disability. His new current problem has been treated.
>
> "[Appellant] remains disabled from his original diagnosis years ago. In spite of treatment of his most recent problem, he will return to that previous disabled state, in which he is unable to perform the essential duties of his previous occupation and work position.
>
> "In summary, [appellant] continues to be totally disabled from his former position. The new treatment and surgery have been related directly to the recent current problem and in no way has this current surgery been expected to treat or reverse his previous disability."[7]

Dr. Moore did not specifically relate appellant's disability to his accepted employment injury, but instead generally attributed his disability to "his original diagnosis years ago." Although Dr. Moore found that appellant was unable to perform the duties of his employment, he did not demonstrate knowledge of appellant's part-time limited-duty job requirements or provide any rationale for his disability finding. To be of probative value, the opinion of a physician must be based on a complete factual and medical background, 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 appellant.[8]

In a report dated December 11, 2001, Dr. William Beutler, a Board-certified neurosurgeon, discussed appellant's history of surgeries in 1983 and 1999.[9] He stated:

> "[Appellant] has principally low back pain. I believe that this is related to his mild degenerative disc disease. He also has some scar tissue formation which may also give him some of his lower extremity paresthesias. [Appellant] has no

[7] In an office visit note dated March 2, 2000, Dr. Moore released appellant from further treatment.

[8] *Gloria J. McPherson*, 51 ECAB 441 (2000).

[9] In an office visit note dated August 27, 2001, Dr. David T. Thoryk, who specializes in family practice, treated appellant for low back pain. As he did not address causation or the degree of appellant's disability, his report is of little probative value.

radicular findings. He does not have any particular pain which sounds radicular in origin. The foraminal stenosis at L5-S1 does not appear to be symptomatic."

Dr. Beutler recommended conservative treatment rather than a spinal fusion. In a report dated June 4, 2002, he noted an unchanged examination. As Dr. Beutler did not address either causation or the relevant issue of whether appellant was disabled from his limited-duty employment on or after April 1993, his report is of diminished probative value.

An award of compensation may not be based on surmise, conjecture, speculation or upon appellant's own belief that there is a causal relationship between his claimed condition and his employment.[10] To establish causal relationship, he must submit a physician's report, in which the physician reviews the employment factors identified by appellant as causing his condition and, taking these factors into consideration as well as findings upon examination of appellant, state whether the employment injury caused or aggravated appellant's diagnosed conditions and present medical rationale in support of his or her opinion. Appellant failed to submit such evidence in this case and, therefore, has failed to discharge his burden of proof.

The Board further finds that appellant is not entitlement to an increased schedule award.

The schedule award provisions of the Act[11] and its implementing federal regulation,[12] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, the Office has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the uniform standard applicable to all claimants.[13] Office procedures direct the use of the fifth edition of the A.M.A., *Guides*, issued in 2001, for all decisions made after February 1, 2001.[14]

On November 7, 1990 the Board set aside the Office's October 26, 1989 decision granting appellant a schedule award for a five percent permanent impairment of the left leg. On remand the Office referred appellant to Dr. J. Joseph Danyo, an orthopedist, for an impairment evaluation. In a report dated April 16, 1992, he found that appellant had reached maximum medical improvement and provided a whole person impairment determination.[15] In a report dated June 30, 1992, Dr. Moore recommended epidural stimulators to improve appellant's level of pain. In a work restriction evaluation dated July 6, 1992, he opined that appellant had not reached maximum medical improvement. By decision dated July 31, 1992, the Office denied

[10] *Donald W. Long*, 41 ECAB 142 (1989).

[11] 5 U.S.C. § 8107.

[12] 20 C.F.R. § 10.404.

[13] 20 C.F.R. § 10.404(a).

[14] *See* FECA Bulletin No. 01-5 (issued January 29, 2001).

[15] In a letter dated July 31, 1992, the Office sought clarification from Dr. Danyo regarding appellant's degree of impairment.

appellant's claim for an increased schedule award on the grounds that the evidence submitted by Dr. Moore established that appellant had not reached maximum medical improvement.[16] The Office noted that once appellant reached maximum medical improvement it would consider his entitlement to a schedule award for more than a five percent impairment of the left leg.

In this case, appellant has not submitted any evidence in support of his contention, that he is entitled to an increased schedule award. None of the medical evidence submitted by appellant contains an impairment evaluation or supports that he has reached maximum medical improvement. A schedule award is not payable until maximum improvement of a claimant's condition has been reached. The determination of maximum medical improvement is factual in nature and depends primarily on the medical evidence.[17] The only evidence addressing appellant's condition subsequent to his October 27, 1999 surgery is a report dated January 26, 2000 from Dr. Moore, who opined that it was "anticipated that [appellant] would return to his previous state of disability" subsequent to his disc extrusion. Therefore, as appellant has not submitted evidence establishing that he has more than a five percent permanent impairment of the left leg or that he has reached maximum medical improvement, he is not entitled to an increased schedule award.

The decisions of the Office of Workers' Compensation Programs dated April 7, 2003 and October 31, 2002 are affirmed.

Dated, Washington, DC
September 9, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[16] As the Board's jurisdiction is limited to review of decisions dated within one year of appellant's filing of an appeal with the Board, the Board lacks jurisdiction to review the July 31, 1992 decision; *see* 20 C.F.R. § 501.2(c); 501.3(d).

[17] *Jerre R. Rinehart*, 45 ECAB 518 (1994).