United States Department of Labor
Employees' Compensation Appeals Board

THOMAS E. TORTORELLI, Appellant	)	
and	)	**Docket No. 05-284**
	)	**Issued: April 22, 2005**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Tucson, AZ, Employer	)	

Appearances:
Thomas E. Tortorelli, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On November 10, 2004 appellant filed a timely appeal of May 6 and August 11, 2004 decisions of the Office of Workers' Compensation Programs, denying his claim for a recurrence of disability commencing on or before March 7, 2003 causally related to accepted sciatica. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has merit jurisdiction over the issues in this case.

ISSUE

The issue is whether appellant established that he sustained a recurrence of disability commencing on or before March 7, 2003 causally related to accepted sciatica caused by a February 3, 2000 occupational injury.

FACTUAL HISTORY

The Office accepted that on February 3, 2000 appellant, then a 54-year-old groundskeeper and equipment operator, sustained sciatica in the performance of duty while

digging a trench with a pick and shovel. He stopped work that day and returned to modified duty in the employing establishment's laundry division in March 2000.

Appellant submitted progress notes from Dr. Lionel R. Duarte, an attending Board-certified family practitioner, from February 2000 through February 28, 2001. An April 25, 2000 magnetic resonance imaging (MRI) scan performed by Dr. Richard D. Wachter, a Board-certified radiologist, showed mild central stenosis with disc bulging and a degenerative retrolisthesis at L2-3. Appellant participated in physical therapy and a work hardening program from March through September 2000.

On August 24, 2000 appellant's coworkers observed him lifting laundry bags in excess of his work limitations and lifting a "large metal shield" weighing approximately 33 pounds from an air handler. He was then admonished for not following his physician's orders.

In a November 7, 2000 report, Dr. L. Philip Carter, an attending Board-certified neurosurgeon, noted that appellant sustained a lumbar injury in 1995, prior to the accepted February 3, 2000 injury. He also noted appellant's light-duty work in the laundry room. Dr. Carter stated an impression of possible lumbar radiculopathy related to mild central stenosis at L2-S1.[1]

On December 18, 2000 the employing establishment offered appellant a position as a telephone operator. He accepted the position but did not begin work as his physicians later found that the prolonged sitting required was not within his medical restrictions. In a December 26, 2000 report, Dr. Carter stated that the offered telephone operator position was inappropriate due to prolonged sitting. In December 26, 2000 reports, Dr. Duarte noted that the offered telephone operator position was inappropriate and recommended that appellant remain in the light-duty laundry room position.

In February 10 and 12, 2001 reports, Dr. Carter prescribed light duty with lifting limited to 40 pounds. Appellant participated in physical therapy in February 2001, followed by a functional capacity evaluation on February 26 and 27, 2001 demonstrating that he could perform light-duty work with frequent changes of position and lifting limited to 51 pounds. Based on these results, Dr. Carter opined on March 19, 2001 that appellant's herniated disc was "stationary and stable." He recommended full-time modified duty with lifting limited to 40 pounds.

On May 1, 2001 the employing establishment offered appellant a light-duty job as a file clerk in accordance with Dr. Carter's restrictions. The position required clerical duties, filing, computerized data entry and answering the telephone. Physical demands included intermittent sitting, standing and walking, intermittent pushing of file carts three to four hours a day and possible very brief periods of kneeling. Appellant would be able to change positions frequently. The employing establishment also offered three weeks of orientation training. Appellant

[1] In December 2000 and January 2001, appellant underwent a series of epidural steroid injections administered by Dr. Robert J. Berens, a Board-certified anesthesiologist.

accepted the position on May 15, 2001 noting that his acceptance was "pending on findings of referrals requested by Dr. Duarte" during the next 60 days.

In reports from May 10 to June 25, 2001, Dr. Duarte noted appellant's continuing lumbar pain with radiation into the left buttock. He opined that appellant could not perform the offered file clerk position due to stress and anxiety about his ability to perform the required tasks. Dr. Duarte recommended that appellant remain in the laundry room job until his anxiety was better managed.[2]

To obtain additional information about appellant's ability to perform the offered position, the Office referred him to Dr. Randall S. Prust, a Board-certified anesthesiologist specializing in pain management.[3] He submitted an August 9, 2001 report noting that he had treated appellant beginning July 24, 1996 for lumbar injuries sustained in a September 13, 1995 automobile accident, but had not seen him since January 2000. Dr. Prust noted that appellant also sustained injuries when he fell off a chair at work in 1991. He noted that appellant's present symptoms were "the same back pain" he described following the automobile accident. Dr. Prust noted that appellant recalled "at least two to three other back injuries" but could not remember the dates or times of these incidents. Appellant also noted a November 2000 injury "where he fell over a scale at work" and hit his head. Dr. Prust related his fear of the file clerk job, that he might injure himself and did not have the "mental capacity" to learn the new job. Appellant accused the employing establishment of "setting him up to fail" in a stressful position with frequent turnover. Dr. Prust performed an orthopedic examination, noting that appellant demonstrated all five of Waddell's nonorganic signs. He stated an impression of mild lumbar spinal stenosis with multiple bulging discs, radicular lumbar pain, nonoccupational cervical spondylosis with a herniated cervical disc and osteoarthritis. Dr. Prust found that appellant had returned to baseline from the February 3, 2000 work injury. He agreed with the lifting restrictions imposed by Dr. Carter of lifting up to 40 pounds intermittently and 20 pounds continuously, with the ability to change positions. Dr. Prust opined that appellant was able to perform the offered light-duty file clerk position. He recommended a psychological evaluation.[4]

In August 20 and 21, 2001 letters, Dr. Duarte found that appellant was physically capable of performing the offered file clerk position but still exhibited great anxiety about his ability to do the job.

In an October 8, 2001 chart note, Dr. Duarte noted appellant's continuing back pain with new symptoms of right leg weakness and recommended a neurologic consultation. He noted in a December 13, 2002 report that appellant had not yet started the file clerk position but remained in the light-duty laundry room job. Dr. Duarte submitted periodic reports through February 28,

[2] Appellant received Office field nurse medical management services from July 6 to November 29, 2001.

[3] Although the referral letter does not appear to be of record, Dr. Prust characterized the examination as an "independent medical evaluation" requested by the Office and that there was no doctor-patient relationship.

[4] The record contains a November 5, 2001 evaluation by Dr. Steven Gurgevich, a psychologist, diagnosing an adjustment disorder with depression and anxiety. However, the Board notes that the Office did not accept an emotional condition in the present claim.

2003 diagnosing chronic back pain with left-sided sciatica related to the February 3, 2000 injury. He recommended that appellant continue in the laundry position.

On March 7, 2003 appellant filed a claim for a recurrence of disability commencing on an unspecified date, attributable to the accepted February 3, 2000 injury. He asserted that he "never recovered" from the accepted injury. Appellant's supervisor noted that appellant was on modified duty at the time he filed the claim for recurrence of disability but that he had not stopped work.

In an April 14, 2003 report, the Office advised appellant of the type of additional medical and factual evidence needed to establish his claim. The Office specifically requested a rationalized report from his attending physician explaining how and why the claimed recurrence of disability was related to the accepted February 3, 2000 injury. The Office afforded him 30 days in which to submit such evidence.[5] Appellant did not submit additional evidence before May 22, 2003.

By decision dated May 22, 2003, the Office denied appellant's claim for recurrence of disability on the grounds that he failed to establish a causal relationship between the claimed recurrence of disability and the accepted February 3, 2000 injury. The Office found that Dr. Duarte's reports did not contain sufficient rationale explaining how and why the diagnosed chronic back pain with sciatica was related to the original injury or whether the accepted condition had worsened.

In a March 11, 2004 letter, appellant requested reconsideration, noting that he did not specify a date for the claimed recurrence of disability as his condition was continuous from February 3, 2000 onward. He submitted additional evidence.

In a June 9, 2003 chart note, Dr. Duarte stated that appellant had sciatica and low back pain with a February 3, 2000 date of injury.

In a December 12, 2003 reports, Dr. Duarte noted that appellant's back pain was unchanged. He found him capable of full-time light-duty work, with lifting limited to 25 pounds, sitting, walking, pulling, pushing and reaching limited to three hours and standing to one hour. Dr. Duarte prohibited bending, kneeling, climbing and operating a motor vehicle.

In a December 18, 2003 form report, Dr. Duarte noted that appellant had no prior history of a back injury or condition prior to the February 2000 injury. On examination he found bulging discs with central canal stenosis at L2-3 and a degenerative retrolisthesis. Dr. Duarte

[5] The April 14, 2003 letter was addressed to appellant at "6925 E Princeton Dr. Tucson, AZ 85710." This is appellant's correct address of record. However, in a June 10, 2003 letter, he contended that he did not receive the Office's April 14, 2003 letter. It is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual. *Clara T. Norga*, 46 ECAB 473 (1995). This presumption, commonly referred to as the "mailbox rule," arises when it appears from the record that the notice was properly addressed and duly mailed. *Mike C. Geffre*, 44 ECAB 942 (1993); *Michelle R. Littlejohn*, 42 ECAB 463 (1991). The Board finds that the mailbox rule applies in this case as the Office's April 14, 2003 letter was addressed to appellant at his correct address of record. The Board notes, however, that the issue of whether or not appellant received the April 14, 2003 letter is nondispositive in this case.

diagnosed chronic lumbar pain secondary to spinal stenosis. He checked a box "yes" indicating his support for a causal relationship to the February 3, 2000 injury, noting that there was a "reasonable medical probability" that the symptoms described were caused by the February 3, 2000 injury. Dr. Duarte referred to Dr. Thomas Martin, a neurosurgeon.

By decision dated May 6, 2004, the Office denied modification of the May 22, 2003 decision. The Office found that Dr. Duarte's December 18, 2003 report was insufficient to outweigh the August 9, 2001 opinion of Dr. Prust, which noted appellant's history of prior lumbar injuries including a September 13, 1995 motor vehicle accident. He found that appellant's back pain as of August 9, 2001 was identical to his symptoms after the 1995 car accident. The Office found that as Dr. Duarte noted that appellant had no back injuries prior to February 2000, his opinion was based on an incomplete or inaccurate history and, therefore, of diminished probative value. The Office concluded that the weight of the medical evidence demonstrated that he had no residuals of the February 3, 2000 work injury.

Appellant requested reconsideration by form letter dated June 14, 2004. He submitted a May 28, 2004 letter by Dr. Duarte, who stated that, although appellant sustained lumbar injuries prior to February 3, 2000, it was the February 3, 2000 injury that caused a permanent change in his work status. He opined that appellant required "continued active treatment for his chronic back pain."

By decision dated August 11, 2004, the Office denied modification of the May 6, 2004 decision. The Office found that Dr. Duarte's May 28, 2004 letter contained insufficient medical rationale to establish that appellant's medical condition continued to be related to the accepted February 3, 2000 injury. He did not support a material change in appellant's back condition related to the February 3, 2000 injury such that he was unable to perform the modified file clerk position.

LEGAL PRECEDENT

As used in the Federal Employees' Compensation Act,[6] the term "disability" means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.[7] When 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.[8] This 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

[6] 5 U.S.C. §§ 8101-8193.

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

[8] *Albert C. Brown*, 52 ECAB 152 (2000); *see also Terry R. Hedman*, 38 ECAB 222 (1986).

causally related to employment factors and supports that conclusion with sound medical reasoning.[9] An award of compensation may not be made on the basis of surmise, conjecture, speculation or on appellant's unsupported belief of causal relation.[10]

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 on a complete and accurate medical and factual background of the claimant.[11] Medical conclusions unsupported by medical rationale are of diminished probative value and are insufficient to establish causal relation.[12]

ANALYSIS

The Office accepted that appellant sustained sciatica in the performance of duty on February 3, 2000. Appellant returned to light duty in March 2000 in the employing establishment's laundry facility. On March 7, 2003 he filed a claim for a recurrence of total disability commencing on an unspecified date. He asserted that his condition following the February 3, 2000 injury had never resolved. In order to prevail, appellant must demonstrate either a change in the nature and extent of his accepted sciatica or in the nature and extent of his light-duty job requirements.[13]

Appellant did not claim that his light-duty job requirements had changed. Rather, he noted that his duties would change, as the employing establishment had offered him a light-duty position as a file clerk on May 1, 2001. However, there is no evidence of record that appellant actually performed the duties of this position. Thus, the relevant issue is whether he demonstrated a change in the nature and extent of his duties in the laundry. The Board finds that appellant has not asserted or proven such a change. Although he expressed repeatedly to his physicians that he did not feel he was capable of learning the offered file clerk position, he did not claim that his duties in the laundry had changed. The Board notes that in August 2000, appellant was observed exceeding his physical limitations in the laundry position such that he was admonished for insubordination. His job duties were not increased as a result of this incident. Thus, appellant has not established a change in the nature or extent of his light-duty job requirements.

[9] *Ronald A. Eldridge*, 53 ECAB 218 (2001); *see Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

[10] *Patricia J. Glenn*, 53 ECAB 159 (2001); *Ausberto Guzman*, 25 ECAB 362 (1974).

[11] *Conard Hightower*, 54 ECAB ___ (Docket No. 02-1568, issued September 9, 2003).

[12] *Albert C. Brown*, *supra* note 8.

[13] *Albert C. Brown*, *supra* note 8; *Terry R. Hedman*, *supra* note 8.

Additionally, appellant has not established a change in the nature and extent of his accepted sciatica such that he was incapable of performing the light-duty laundry position. Dr. Prust, a Board-certified anesthesiologist, found that his condition had returned to baseline following the February 3, 2000 injury. He opined that appellant was physically capable of performing the laundry job as of August 9, 2001. Dr. Duarte, an attending Board-certified family practitioner, submitted periodic reports from May 10, 2001 through February 28, 2003 stating that appellant continued working in a light-duty position in the employing establishment's laundry facility. His reports through May 28, 2004 find appellant's sciatica condition unchanged and did not indicate that he was unable to perform his light-duty laundry position. Although Dr. Duarte mentioned in an October 8, 2001 report, that appellant newly exhibited right leg weakness and required a neurologic consultation, he did not find appellant disabled for work. Also, he did not mention right leg weakness in any subsequent reports. Thus, appellant has not submitted sufficient evidence to establish a change in the nature and extent of his accepted condition such that he was no longer able to perform his light-duty job.[14]

Accordingly, the Board finds that the arguments and evidence submitted by appellant in support of his claim are insufficient to establish that he sustained a recurrence of total disability as alleged.

CONCLUSION

The Board finds that the Office properly denied appellant's claim for a recurrence of disability on the grounds that he submitted insufficient evidence of a change in his medical condition or in the nature and extent of his light-duty job requirements.

[14] *Albert C. Brown*, *supra* note 8.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 6 and August 11, 2004 are affirmed.

Issued: April 22, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member