U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GREGORY TURNER and U.S. POSTAL SERVICE,
POST OFFICE, Memphis, TN

Docket No. 97-2835; Submitted on the Record;
Issued August 2, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether appellant met his burden of proof in establishing a recurrence of disability after December 15, 1995 that was causally related to his accepted August 12, 1995 employment injury; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration pursuant to section 8128 of the Federal Employees' Compensation Act.

On August 12, 1995 appellant, then a 32-year-old mail carrier, filed a notice of traumatic injury and claim, alleging that he sustained injury to his back while picking up a tray of catalogues. Appellant stopped work on August 18, 1995. The Office accepted appellant's claim for lumbar strain and herniation of the nucleus pulposus at L4 to L5. Appellant returned to light-duty work on November 29, 1995. In December 1995 appellant complained of back pain and stopped work. On January 6, 1996 appellant filed a claim for recurrence of disability beginning December 15, 1995. In a letter decision date January 22, 1996, the Office suspended payment of appellant's compensation on the grounds that he failed to fully cooperate with a medical examination. By decision dated January 30, 1996, the Office denied appellant's claim for recurrence of disability. However, in a decision dated April 1, 1996, an Office hearing representative set aside the January 22 and 30, 1996 decisions of the Office on the grounds that appellant made a good faith effort to be examined by someone else when he encountered problems with the Office referral physician evidencing compliance and had presented a *prima facie* case of recurrence sufficient to warrant further development of the medical evidence. By decision dated July 9, 1996, the Office denied appellant's claim for recurrence of disability beginning December 15, 1995 on the grounds that the weight of the medical evidence did not establish a recurrence. In a decision dated May 9, 1997 and finalized May 12, 1997, an Office hearing representative affirmed the July 9, 1996 decision of the Office. In a decision dated July 17, 1997, the Office denied appellant's request for reconsideration as *prima facie* insufficient to warrant review of the prior decision.

The Board has carefully reviewed the entire case record on appeal and finds that this case is not in posture for decision.[1]

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position, or medical evidence of record establishes that he can perform a the work of a light-duty position, the employee has the burden of establishing by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he cannot perform such light duty. As part of the 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.[2]

In the present case, the Office denied appellant's claim for recurrence based on the June 6, 1996 report of Dr. Harry Friedman, a Board-certified neurosurgeon and Office referral physician, as amended June 25 and July 2, 1996. In his June 6, 1996 report, Dr. Friedman noted appellant's history of injury and diagnosed lumbosacral strain. He indicated that he would review appellant's x-rays and old records and stated, "It is my opinion that the patient is probably fit for work." After reviewing the x-rays, he noted that the computerized tomography (CT) scan of February 16, 1996, was "probably normal, except for bulging at the L4-5." By letter dated June 21, 1996, the Office requested further information of Dr. Friedman including his medical rationale and objective findings concerning whether appellant was totally disabled from work beginning December 1, 1995 and whether appellant's accepted employment injuries had resolved. In a report dated June 25, 1996, Dr. Friedman indicated that it was "an extremely difficult question" for him to answer regarding appellant's claimed recurrence of disability beginning December 1, 1995 as he did not examine appellant at that time, but that "based on the other physicians who saw him, it would suggest that he probably was not totally disabled although he continued to exhibit complaints of pain." Dr. Friedman then concluded that appellant's work-related conditions had resolved. After the Office again requested a medical rationale for his conclusion, Dr. Friedman provided a statement dated July 2, 1996, in which he indicated that appellant's work-related condition had resolved as his physical examination of appellant was normal. None of the reports by Dr. Friedman is sufficient to establish that appellant did not sustain a recurrence of disability beginning December 15, 1995, or that his work-related condition had resolved. The June 6 and 25, 1995 reports by Dr. Friedman are speculative as he indicates that appellant was "probably" fit for work and his prior medical report evidence "suggests" he was not totally disabled in December 1995.[3] Dr. Friedman then concluded that appellant's employment-related conditions had resolved based on a normal examination. However, he diagnosed lumbosacral strain on examination and noted objective evidence of disc bulging at the L4 to L5 by CT scan. As Dr. Friedman's conclusions are inconsistent with his physical and objective findings or are speculative, his reports cannot

[1] The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal. As appellant filed his appeal with the Board on September 4, 1997, the only decision before the Board are the Office's May 12 and July 17, 1997 decisions; *see* 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[2] *Jackie B. Wilson*, 39 ECAB 915 (1988); *Terry R. Hedman*, 38 ECAB 22 (1986).

[3] *Charles A. Massenzo*, 30 ECAB 844 (1978).

constitute the weight of the medical evidence. Consequently, this case must be remanded for further development of the medical evidence. On remand the Office should prepare a statement of accepted facts and refer appellant together with his medical records to and appropriate medical specialist for a rationalized medical report concerning whether appellant sustained a recurrence of disability beginning December 15, 1995. After such further development as the Office deems necessary, a *de novo* decision should be issued.[4]

The decisions of the Office of Workers' Compensation Programs dated July 17 and May 12, 1997 are set aside and the case is remanded for further proceedings consistent with this decision.

Dated, Washington, D.C.
August 2, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

[4] In view of the disposition on the merits in this case, the issue regarding the Office's denial of merit review under section 8128 of the Act is deemed moot.