U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JESSE J. HARRIS and U.S. POSTAL SERVICE,
POST OFFICE, Philadelphia, PA

Docket No. 98-247; Submitted on the Record;
Issued April 20, 2000

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether appellant established a recurrence of disability beginning May 14, 1996 causally related to his 1979 employment injury.

On December 19, 1979 appellant, then a 59-year-old letter carrier sustained an injury to his left buttocks in the performance of duty when he fell down a flight of stairs while delivering mail. The Office of Workers' Compensation Programs accepted the claim for coccyalgia and lumbosacral strain. On December 11, 1989 appellant returned to work in a part-time position, working four hours per day as a modified rewrap clerk. In a decision dated January 24, 1990, the Office determined that appellant's wages in the modified position fairly and reasonably represented his wage-earning capacity. He received compensation for partial wage loss based on the Office's January 24, 1990 decision.[1] Appellant continued to receive benefits for partial disability, based on a four-hour a day limited position until April 13, 1996, when it was determined that he was capable of working full time in a limited-duty position for eight hours per day.[2] He returned to full-time work on April 13, 1996.

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[1] Appellant stopped work on January 27, 1990 and filed a claim for a recurrence of total disability, but that claim was denied by the Office in a decision dated February 13, 1992. He continued to receive wage-loss compensation for partial disability based on his wage-earning capacity in the modified rewrap clerk position.

[2] On April 13, 1995 an impartial medical specialist, examined appellant to resolve a conflict in the evidence between appellant's treating physicians and an Office referral physician as to whether appellant had any continuing disability related to his December 1979 work injury. The impartial medical adviser indicated that appellant had medical residuals but was able to work for eight hours per day with restrictions of no more than 10 pounds of lifting on a frequent basis and no more than 30 pounds on an occasional basis. The employing establishment offered appellant a full-time position as a manual distribution clerk based on the physical restrictions provided by the impartial medical specialist. The Office determined that the position constituted suitable work in a letter dated November 16, 1995. Appellant accepted the offered job and returned to work on April 13, 1996.

Appellant stopped working on a full-time basis and began working only four hours per day on May 14, 1996. He continued to work in that capacity, maintaining that he was not physically able to work an eight-hour shift. Appellant filed a series of CA-8 forms claiming wage loss for four hours per day.

In support of his disability claim, appellant submitted an attending physician's report (Form CA-20a) dated May 17, 1996 from Dr. Gregory A. Nelson, a Board-certified internist. He reported that appellant was last examined on January 19, 1996. Dr. Nelson described appellant's history of injury on December 19, 1979 and noted that he had continuing back pain. He opined that he should only work four hours per day.

In a June 19, 1996 letter, the Office advised appellant that he needed to submit medical evidence in support of his CA-8 wage-loss claim that addressed his disability for work beginning May 14, 1996.

In a report dated July 19, 1996, Dr. John Aaron, a Board-certified internist in partnership with Dr. Nelson, diagnosed cervical/dorsal/lumbar strain/sprain and bulging disc at L5-S1. He noted that appellant's prognosis was guarded and considered appellant to be disabled from his job.

In a decision dated September 18, 1996, the Office denied compensation on the grounds that the medical evidence was insufficient to establish that appellant was partially disabled and that his partial disability was causally related to his work injury on December 19, 1979.

In a letter dated September 20, 1996 appellant, through counsel, requested a hearing.

Appellant was referred by his treating physicians for a nerve conduction study on November 22, 1996, which were interpreted as normal.[3]

Appellant was also referred by his treating physicians to Dr. Zohar Stark, a Board-certified orthopedic surgeon for a consultative evaluation. In a December 4, 1996 report, he discussed appellant's work injuries, magnetic resonance imaging scans and physical findings. Dr. Stark diagnosed that appellant had degenerative disc disease of the lumbosacral spine. He did not discuss the etiology of that condition or whether it was causally related to appellant's work injury.

Appellant submitted a series of attending physician reports (Form CA-20a) signed by Dr. Nelson between October 1996 and July 1, 1997, which diagnosed chronic lumbar strain and a bulging disc with chronic pain due to the December 19, 1979 work injury. These reports also stated that appellant could only work four hours per day.[4]

[3] Appellant had previously undergone nerve conduction studies on February 6, 1993 that revealed an L5 root irritation on the left.

[4] Treatment notes for the same period indicate that appellant was seen for neck pain and numbness in the arms and legs. There is also a range of motion chart.

In a report dated January 27, 1997, Dr. John Aaron, a Board-certified internist, noted that appellant was under his care for treatment of "cervical sprain with bone spurs and radiculopathy and lumbar disc bulge with radiculopathy sustained as a result of an accident ... on December 19, 1979." He further reported that appellant was restricted from lifting or carrying anything greater than 5 pounds and was restricted from walking or standing longer than 15 minutes at a time. Dr. Aaron also stated that appellant was unable to work in an environment less than 65 degrees in temperature.

In a joint report dated May 19, 1997, Dr Aaron along with his partner, Dr. Nelson, advised that appellant had been under their care since November 18, 1992 for treatment of cervical strain, dorsal strain and lumbosacral sprain and strain resulting from a December 19, 1979 work injury. They noted that appellant underwent a series of acupuncture, home exercise, and physical therapy with chiropractic manipulation, but that appellant still complained of persistent back pain. Drs. Aaron and Nelson briefly summarized intermittent office visits with appellant between July 28, 1993 and May 13, 1997.[5] They reported that appellant was approved for light duty in a warm climate, working only four hours per day. Drs. Aaron and Nelson concluded their report by attributing appellant's continuing back condition to the December 19, 1979 work injury.

A hearing was held on May 20, 1997 and appellant testified with respect to his claim.

In a decision finalized on August 5, 1997, an Office hearing representative affirmed the Office's September 18, 1996 decision.

The Board finds that appellant failed to establish that he sustained a recurrence of partial disability on May 14, 1996 causally related to his employment injury.[6]

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 the medical evidence of record establishes that he 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 or partial disability and show that he can no longer 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 requirements.[7] This burden also 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 causally related to

[5] According to Drs. Aaron and Nelson, on January 19, 1996, appellant had physical findings including tenderness to palpation of the lumbar spine muscles and limited range of motion, for which they diagnosed chronic lumbosacral sprain and strain and recommended that appellant not return to work. When appellant was next examined on June 21, 1996, Drs. Aaron and Nelson reported that his motion of the lumbar spine was restricted to 60 degrees flexion.

[6] Appellant submitted evidence subsequent to the Office's August 5, 1997 decision. The Board does not have jurisdiction to review evidence that was not before the Office at the time it issued its final decision; *see* 20 C.F.R. § 501.2(c).

[7] *Cynthia M. Judd*, 42 ECAB 246 (1990); *Terry R. Hedman*, 38 ECAB 222 (1986).

the employment injury and supports that conclusion with sound medical reasoning.[8] An award of compensation may not be made on the basis of surmise, conjecture or speculation or on appellant's unsupported belief of causal relation.[9]

In the instant case, appellant has not alleged that his light-duty requirements in the manual distribution clerk position changed from the time he accepted the job in April 1996 and the time he stopped working full time in that position on May 14, 1996. The medical evidence of record also does not support that there was a change in the nature and extent of his injury-related condition. Although Drs. Aaron and Nelson conclude in a number of attending physician reports and their joint report dated May 19, 1997, that appellant can only work four hours per day, they have not provided a rationalized opinion explaining how appellant's continuing back symptoms are causally related to a lumbosacral strain sustained by appellant almost twenty years prior. This is particularly relevant since Dr. Stark has suggested that appellant has degenerative disc disease, a condition that has not been attributed as yet to appellant's work injury.

Furthermore, the Board notes that based on a review of the entire record that Drs. Aaron and Nelson have only reiterated, after May 14, 1996, a position they have maintained throughout their treatment of appellant, that he should not work an eight-hour shift. The Office previously resolved the issue of whether appellant was able to work an eight-hour shift, when it had appellant examined by an impartial medical specialist. The impartial medical specialist approved appellant for an eight-hour shift as a modified manual distribution clerk and the Office found the job to be suitable work. In the absence of a rationalized medical opinion explaining why appellant sustained a recurrence of partial disability on May 14, 1996, the Board finds that the Office properly denied appellant's claim for continuing compensation.

[8] *See Nicolea Bruso*, 33 ECAB 1138 (1982).

[9] *Ausberto Guzman*, 25 ECAB 362 (1974).

The decision of the Office of Workers' Compensation Programs dated August 5, 1997 is hereby affirmed.

Dated, Washington, D.C.
April 20, 2000

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member