U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM C. PICKENS and DEPARTMENT OF THE NAVY, LONG BEACH NAVAL SHIPYARD, Long Beach, CA

Docket No. 98-1501; Submitted on the Record;
Issued December 14, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant is entitled to disability compensation benefits commencing October 1, 1997 and continuing; and (2) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's requests for a change of physicians.

In January 1989, the Office accepted that appellant, then a 43-year-old sheet metal mechanic, sustained an employment-related aggravation of degenerative joint disease of his hips. The Office authorized a bilateral hip replacement in early 1991 and paid appropriate benefits. In August 1992, appellant returned to light-duty work as a modified sheet metal worker for the employing establishment.[1]

By decision dated October 29, 1992, the Office determined that appellant's wage-earning capacity was represented by his actual wages as a modified sheet metal mechanic. By letter dated May 14, 1997, the employing establishment advised appellant that he would be subject to a reduction-in-force effective September 30, 1997 due to closure of the Long Beach Naval Shipyard. Appellant voluntarily resigned from the employing establishment, effective September 30, 1997. Appellant claimed that he was entitled to receive disability benefits on and after October 1, 1997; he also requested authorization for a change of physicians.

By decision dated December 2, 1997, the Office denied appellant's claim and his request for a change of physicians. By decision dated January 13, 1998, the Office affirmed its December 2, 1997 decision.[2]

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[1] The position restricted appellant from lifting, pushing or pulling more than 20 pounds and allowed kneeling for 1 hour, twisting for 1 hour, sitting for 2 to 7 hours, walking for 1 to 6 hours and standing for 1 to 5 hours.

[2] The record also contains a January 13, 1998 decision, which issued appellant a schedule award for 17 percent permanent impairment of both legs. Appellant has not appealed this decision and the matter is not currently before the Board.

The Board finds that appellant is not entitled to disability compensation benefits after October 1, 1997.

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 disability and show that he 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.[3]

Appellant's work stoppage effective September 30, 1997 does not constitute a change in the nature or extent of his light-duty job requirements. He resigned from the employing establishment voluntarily to avoid a reduction-in-force effective September 30, 1997. Office procedure provides that a recurrence of disability does not occur when an employee stops work due to the closure of a base or other facility; nor does it occur when there is a reduction-in-force that affects employees performing full-duty work as well as those performing light-duty work.[4]

In this case, the record shows that the employing establishment's reduction-in-force action was due to the closure of the Long Beach Naval Shipyard, an action which affected both full-duty and light-duty employees.[5] Appellant's work stoppage was not due to a withdrawal of his specific light-duty assignment by the employing establishment and, therefore, does not constitute a recurrence of disability under Office procedure.[6]

Appellant also has not shown that he experienced a recurrence of disability due to a change in his accepted injury-related condition. Dr. Clara Nguyen, an attending Board-certified internist, reported the findings of her examination on July 2, 1997 and diagnosed bilateral degenerative joint disease of the hips. Dr. Nguyen indicated that appellant's twisting and kneeling should be reduced from one hour per day to zero hours and that he should sit for half of the workday.

Although she noted a change in appellant's work restrictions, Dr. Nguyen did not explain the need for such a change. She noted that appellant had decreased hip motion but did not indicate that appellant sustained a material change in his employment-related condition. Dr. Nguyen did not provide a clear opinion that the change in work restrictions was necessitated

[3] *Cynthia M. Judd*, 42 ECAB 246, 250 (1990).

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(b)(2) (May 1997); *Id.* at *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.12 (July 1997). In cases of loss of work due to economic conditions, Professor Larson has suggested the following rule: loss of employment should not be deemed due to disability if a worker without the disability would lose employment or suffer a reduction in earnings under the same economic conditions. A. Larson, *The Law of Workers' Compensation* § 57.63 (1997).

[5] The employing establishment indicated that appellant's light-duty job would have continued to be available if not for the shipyard closing.

[6] *Id.* at *Recurrences*, Chapter 2.1500.7(a)(4) (May 1997); *see also Paulette M. Wagner*, Docket No. 97-2210 (issued April 5, 2000).

by the accepted condition, aggravation of degenerative joint disease of his hips, rather than his underlying preexisting condition, degenerative disc disease. Given this lack of medical rationale, her report is not sufficient to meet appellant's burden to show that he was entitled to receive disability compensation commencing October 1, 1997.[7]

The Board further finds that the Office acted within its discretion in denying appellant's request for a change of physicians.

Under section 8103(a) of the Act,[8] an employee is permitted the initial selection of a physician. However, Congress did not restrict the Office's power to approve appropriate medical care after the initial choice of a physician. The Office still has the general objective of ensuring that an employee recovers from his injury to the fullest extent possible in the shortest amount of time. The Office, therefore, has broad administrative discretion in choosing the means to achieve this goal within the limitation of allowing an employee the initial choice of a doctor. Section 10.401(b) of Title 20 of the Code of Federal Regulations[9] is an appropriate exercise of that discretion which does not conflict with section 8103(a). This section provides in pertinent part: "An employee who wishes to change physicians must submit a written request to the Office fully explaining the reasons for the request. The Office may approve the request in its discretion if sufficient justification is shown for the request."[10]

By letter dated November 24, 1997, appellant requested authorization to choose an orthopedic surgeon instead of those who treated him at Kaiser Permanente. Appellant indicated that he had "difficulty and hardship" receiving comprehensive medical reports regarding his condition and that Kaiser Permanente was "inclined to give the least treatment possible." In its December 2, 1997 decision, the Office denied appellant's request because his reasons were not valid. It indicated that there was no evidence that appellant did not receive regular updates on his condition or that his physicians provided the "least treatment possible."

The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.[11] The record supports the Office's reasons for denying appellant's request for a change of physicians namely, that the Office "routinely" received treatment updates from Kaiser Permanente and that the facility properly billed the Office for all necessary treatment. Therefore, the Office did not abuse its discretion in denying his request.

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[7] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (finding that a medical opinion not fortified by medical rationale is of little probative value).

[8] 5 U.S.C. § 8103(a).

[9] 20 C.F.R. § 10.401(b).

[10] *Jack B. Wood*, 40 ECAB 95, 109-10 (1988).

[11] *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

The decisions of the Office of Workers' Compensation Programs dated January 13, 1998 and December 2, 1997 are affirmed.

Dated, Washington, DC
December 14, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member