U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARTIN L. WOLFE and DEPARTMENT OF THE NAVY, NAVAL MEDICAL CENTER, San Diego, CA

Docket No. 98-264; Oral Argument Held March 7, 2000; Issued June 16, 2000

Appearances: *Martin L. Wolfe, pro se*; *Miriam D. Ozur, Esq.*, for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM, A. PETER KANJORSKI

The issues are: (1) whether appellant has met his burden of proof in establishing a recurrence of disability on and after October 26, 1995 due to his accepted July 27, 1995 employment injury; and (2) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for a merit review under 5 U.S.C. § 8128 constituted an abuse of discretion.

On July 27, 1995 appellant, then a 43-year-old sheet metal mechanic, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that he injured his back, shoulder and bottom tailbone when he slipped and fell on a soapy floor. On January 19, 1996 the Office accepted the claim for left hip contusion, chest contusion and back contusion.[1] Appellant returned to limited duty on July 31, 1995 and full duty on October 23, 1995.[2]

In a report dated September 19, 1995, Dr. Antra Priede[3] diagnosed back and hip contusion. Based upon a physical examination, Dr. Priede noted that appellant had a "slight spasm along the left paraspinous muscles in the mid back. The ROM is full and supple." In regards to appellant's work status, the physician indicated that appellant was to "[c]ontinue modified from October 19 until 23, 1995, lifting up to 20 pounds. Intermittent sitting, standing

[1] This was assigned claim number A13-1082332.

[2] Appellant was separated from the employing establishment effective December 28, 1996.

[3] An attending Board-certified occupational and environmental physician.

and walking. Return to full duty on October 23, 1995." Lastly, she anticipated that appellant would be discharged as cured at the next visit and released him to full duty on October 23, 1995.

In a duty status report (Form CA-17), dated September 19, 1995, Dr. Priede released appellant to full-time work effective October 23, 1995 with no restrictions.

In a report of termination of disability (Form CA-3), dated December 12, 1995, it was noted that appellant had returned to full duty on October 23, 1995.

In a report dated July 31, 1996, Dr. Thomas W. Harris,[4] based upon a physical examination and employment injury history,[5] diagnosed "[s]tatus post left knee arthroscopy with partial meniscectomy on June 18, 1996 a left knee medical meniscus tear due to the October 26, 1995 employment injury and "[p]robable radicular symptoms left lower extremity that are nonindustrial to the October 26, 1995 accident." In regards to any continuing disability, Dr. Harris attributed any disability to appellant's automobile accident in February 1996. As to work restrictions, Dr. Harris concluded that "any work restrictions the patient presently have are secondary to the motor vehicle accident of February 18, 1996 and the injuries received on that date." He noted that appellant had been off work since February 15, 1996 to further support his conclusion that appellant's current work restrictions were due to his February 15, 1996 automobile accident.

Dr. Priede diagnosed left knee medial meniscus tear, left sciata and chronic pain syndrome in a September 3, 1996 report. She noted that an August 26, 1996 magnetic resonance imaging (MRI) test of appellant's LS spine revealed no significant abnormality. Regarding appellant's back condition, Dr. Priede noted that appellant continued to have complaints of pain in his lower back and estimated a discharge date of April 1997.

On September 21, 1996 appellant filed a recurrence claim alleging that he sustained a recurrence of disability on October 26, 1995, noting that he had stopped work on February 15, 1996.

In an October 3, 1996 report, Dr. Priede diagnosed left knee medial meniscus tear, left sciatica and chronic pain syndrome and released appellant to work on October 3, 1996 with restrictions.

By letter dated October 22, 1996, the Office advised appellant as to the definition of a recurrence and the evidence necessary to support his burden of proof. The Office noted that appellant had "undergone several intervening incidents that would appear to disqualify your

[4] A second opinion physician.

[5] Dr. Harris noted that appellant had sustained employment injuries on July 31 and October 26, 1995 while he was working. The record contains a July 19, 1996 letter from the Office noting that the injury sustained to his knees would be considered a new claim. The Office also informed appellant that he was not authorized for any treatment for his knee injury under claim number A13-1082332. The October 26, 1995 knee injury was assigned claim number A13-1068772.

claim of a recurrence," the October 26, 1995 knee injury, the February 18, 1996 automobile accident and the June 18, 1996 arthroscopy of his left knee.

Dr. Priede diagnosed muscular back pain, left knee medial meniscus tear and chronic pain syndrome in an October 25, 1996 report. She indicated that appellant was unable to perform his usual employment of sheet metal mechanic and indicated that appellant had lifting restrictions of 26 to 40 pounds as well as restrictions on repetitive bending, kneeling, climbing, squatting or walking on precarious heights or prolonged overhead reaching.

By decision dated November 22, 1996, the Office denied appellant's claim for a recurrence of disability. The Office noted that the October 25, 1996 report by Dr. Priede was insufficient to support his claim as it failed to discuss how his current disability was related to his accepted back and left hip injuries or discuss the effect of the intervening automobile accident on his alleged recurrence claim.

On February 17, 1997 appellant requested reconsideration and submitted additional evidence in support of his request. The medical evidence submitted included an August 26, 1996 MRI test which noted no significant abnormality in the lumbosacral spine, a report dated October 25, 1996 and chart notes dated August 7 and 16, 1996 from Dr. Priede, reports dated March 4 and 25, April 8 and 15, July 1 and 29 and October 14, 1996 from Dr. James D. Brown.[6]

Dr. Brown's reports dated March 4 and 25, April 8 and 15, July 1 and 29, 1996 primarily described his treatment for injuries sustained in the February 1996 automobile accident although he did note that appellant had sustained employment injuries in 1995 in his March 4, 1996 report. In his October 14, 1996 report, he noted that appellant had injured his back in April 1995 and his left knee in July 1995 on the job. Dr. Brown stated that appellant believed his accepted back injury had been aggravated by the automobile accident in February 1996.

By merit decision dated March 4, 1997, the Office denied appellant's request for modification of the prior decision.

By letter dated March 12, 1997, the Office, in response to a request by appellant, advised appellant as to the deficiencies in the medical evidence as well as advising him as to the evidence necessary to support his recurrence claim.

Appellant requested reconsideration in an undated letter received by the Office on June 24, 1997 and enclosed a copy of the Office of Personnel Management's (OPM) decision denying his request for disability retirement.

By letter dated August 25, 1997, Congressman Duncan Hunter submitted correspondence from appellant dated September 27 and December 20, 1996.

By decision dated September 5, 1997, the Office denied appellant's request for reconsideration on the basis that the evidence submitted was of an immaterial and repetitious nature and thus insufficient to warrant review of the prior decision.

[6] An attending Board-certified orthopedic surgeon.

The Board finds that appellant has not met his burden of proof in establishing a recurrence of disability on and after October 26, 1995 due to his accepted July 27, 1995 employment injury.

Where an employee alleges that he sustained a recurrence of disability due to an accepted employment-related injury, the employee has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disabling condition for which compensation is sought is causally related to the accepted employment injury.[7] As part of this burden, the employee must submit rationalized medical evidence based upon a complete and accurate factual and medical background showing a causal relationship between the current disabling condition and the accepted employment-related condition.[8] Neither the fact that the condition became manifest during a period of federal employment, nor the belief of appellant that the condition was caused or aggravated by employment conditions or factors, is sufficient to establish causal relationship.[9]

Furthermore, it is an accepted principle of workers' compensation law, and the Board has so recognized that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause which is attributable to the employee's own intentional conduct.[10]

In discussing how far the range of compensable consequences is carried, once the primary injury is causally connected with the employment, Professor Larson notes:

> "[W]hen the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury, the rules that come into play are essentially based upon the concepts of 'direct and natural results' and of claimant's own conduct as an independent intervening cause. The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury."[11]

Thus, it is accepted that once the work-connected character of any condition is established, "the subsequent progression of that condition remains compensable *so long as the worsening is not shown to have been produced by an independent nonindustrial cause.*"[12]

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[7] *Kevin J. McGrath*, 42 ECAB 109 (1990).

[8] *Herman W. Thorton*, 39 ECAB 875, 887 (1988); *Henry L. Kent*, 34 ECAB 361, 366 (1982); *Steven J. Wagner*, 32 ECAB 1446 (1981).

[9] *Manuel Garcia*, 37 ECAB 767 (1986); 20 C.F.R. § 10.110(a); *see also Vernon O. Fein*, 34 ECAB 78 (1982); *George Axelrod*, 15 ECAB 235 (1964); *Maria Olivencia Valentin*, 7 ECAB 665 (1955).

[10] *Robert W. Meeson*, 44 ECAB 834 (1993).

[11] A. Larson, *The Law of Workers' Compensation* § 13.11 (1993).

[12] *Id.* at § 13.11(a); *see also Dennis J. Lasanen*, 41 ECAB 933 (1990).

(Emphasis added.) If a member weakened by an employment injury, contributes to a later fall or other injury, the subsequent injury will be compensable as a consequential injury, if the further medical complication flows from the compensable injury, *i.e.*, "so long as it is clear that the real operative factor is the progression of the compensable injury, with an exertion that in itself would not be unreasonable in the circumstances."[13]

In a similar case, *Robert W. Meeson*,[14] the employee sustained an employment-related injury which was accepted for lumbar strain. He remained off work, returned to light duty and then to regular duty. The employee's automobile struck a deer in a nonemployment-related accident. Thereafter, the employee filed a notice of recurrence of disability alleging that he experienced the same symptoms of low back pain and radiculopathy that he had experienced as a result of the accepted injury. Applying the principles noted above, the Board found that the triggering episode for the employee's claimed recurrence of disability was the nonemployment-related automobile accident and not due to the "natural progression" of his prior back condition.

In the instant case, the Office found that the evidence of record failed to contain any rationalized medical opinion evidence establishing a causal relationship between appellant's July 27, 1995 employment-related injury and his alleged recurrence of disability on October 26, 1995. Appellant has failed to submit any rationalized medical reports to support a causal relationship between his accepted July 27, 1996 employment injuries. The majority of the reports by Dr. Brown concerned treatment for appellant's automobile accident. However, in his October 14, 1996 report, he did refer to two employment injuries, but the dates were incorrect. Dr. Brown referred to a back injury sustained in April 1995 and a knee injury sustained in July 1995 when the record indicates that appellant sustained a back injury on July 27, 1995 and a knee injury on October 25, 1995. Furthermore, he does not provide an opinion as to whether appellant's current disability is causally related to his accepted July 27, 1995 employment injury. As Dr. Brown's opinion is based upon an inaccurate and incomplete history of injury, it has little probative value.[15] In addition, his opinion is further diminished as the physician failed to provide any opinion stating that appellant's current disability was causally related to his accepted employment injury.[16]

Appellant also submitted an October 25, 1996 report from Dr. Priede in support of his recurrence claim and which is insufficient to support his claim. This report is contradictory in that Dr. Priede initially attributed appellant's ongoing back problems to his July 27, 1995 employment injury, but later negated any causal relationship by attributing appellant's current work restrictions to his automobile accident, and not his July 27, 1995 employment injury. Her contradictory statements regarding the cause of appellant's work restrictions diminish the probative value of the report. The report's probative value is further diminished by Dr. Priede's failure to provide sufficient medical rationale explaining how or why appellant's disability was

[13] *Supra* note 7.

[14] *Id.*

[15] *Geraldine H. Johnson*, 44 ECAB 745 (1993).

[16] *Ern Reynolds*, 45 ECAB 690 (1994).

causally related to his accepted July 27, 1995 employment injury or took into consideration appellant's intervening February 1996 automobile accident and intervening October 1995 knee injury. Without any explanation or rationale, a medical report has diminished probative value and is insufficient to establish causal relationship.[17] Therefore, Dr. Priede's report does not establish that appellant sustained a recurrence of disability or any medical condition after October 26, 1995 causally related to his July 27, 1995 employment injury.

As appellant has failed to provide any rationalized medical evidence establishing continued disability or a medical condition causally related to his July 27, 1995 employment-related left hip contusion, chest contusion and back contusion, the Office properly determined that appellant had not established a recurrence of disability on after October 26, 1995.

The Board finds that the refusal by the Office to reopen appellant's for further review under 5 U.S.C. § 8128 did not constitute an abuse of discretion.

Section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.[18] Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.[19] Where a claimant fails to submit relevant evidence not previously of record or advance legal contentions not previously considered, it is a matter of discretion on the part of the Office to reopen a case for further consideration under section 8128 of the Act.[20]

In the present case, appellant has not shown that the Office erroneously applied or interpreted a point of law; he has not advanced a point of law or fact not previously considered by the Office; and he has not submitted relevant and pertinent evidence not previously considered by the Office. The only evidence submitted by appellant with his June 24, 1997 reconsideration request was an OPM decision denying his request for disability retirement and a letter from Congressman Hunter dated August 4, 1997 which enclosed correspondence from appellant. Appellant did not submit any medical evidence with his request for reconsideration. This is important since the outstanding issue in the case -- whether appellant sustained a recurrence of disability beginning October 26, 1995 that was causally related to his accepted July 27, 1995 employment injury -- is medical in nature. Additionally, appellant's June 24, 1997 letter did not show that the Office erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by the Office. Although appellant

[17] *Deborah S. King*, 44 ECAB 203 (1992); *Donald W. Long*, 41 ECAB 142 (1989).

[18] 20 C.F.R. § 10.138(b)(1).

[19] 20 C.F.R. § 10.138(b)(2).

[20] *Gloria Scarpelli-Norman*, 41 ECAB 815 (1990); *Joseph W. Baxter*, 36 ECAB 228 (1984).

contended that the employing establishment lied to the Office, that he was denied due process of law and the automobile accident was used as an excuse to terminate appellant's employment, the record does not support his contentions. In addition, appellant has not shown that the Office erroneously interpreted or applied a fact of law or that the Office had not considered a point of law or fact not previously considered. Therefore, the Office did not abuse its discretion in refusing to reopen appellant's claim for a review on the merits.

The decisions of the Office of Workers' Compensation Programs dated September 5 and March 4, 1997 and November 22, 1996 are hereby affirmed.

Dated, Washington, D.C.
June 16, 2000

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member