U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT P. McMILLEN and DEPARTMENT OF THE ARMY, FORT RODMAN, New Bedford, MA

Docket No. 01-428; Submitted on the Record;
Issued December 17, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits effective January 29, 1999; and (2) whether appellant met his burden of proof to establish that he suffers from a psychiatric condition, which is causally related to his 1987 accepted low back strain.

In the present case, the Office accepted that on December 17, 1987, appellant, then a 30-year-old unit administrator, sustained a low back strain when he slipped and fell, striking his back on a concrete car stop, in the performance of duty. Appellant stopped work on December 17, 1987 and has not returned.

The record reflects that on June 8, 1984, prior to his employment injury, appellant was attacked and brutally beaten in a nonemployment-related incident. He sustained severe head injuries and underwent neurosurgery wherein several metallic clips were affixed to his cranium. In July 1993, appellant came under the care of Dr. Kennard Kobrin, a Board-certified psychiatrist, for treatment of post-traumatic stress disorder (PTSD), causally related to the attack and beating. In reports dated August 29, 1994 and April 25, 1995, Dr. Kobrin noted that the severity of the signs and symptoms of appellant's PTSD increased in 1987 around the time of his employment-related back injury.

On December 10, 1999 the Office issued a notice of proposed termination and on January 25, 2000, having reviewed the additional arguments raised by appellant, issued a decision terminating appellant's compensation benefits on the grounds that the medical evidence established that his injury-related condition had resolved. The Office specifically found that the weight of the medical evidence of file was represented by the well-rationalized opinion of Dr. Roger S. Pocze, a Board-certified orthopedic surgeon and Office referral physician. Appellant disagreed with the decision and requested an oral hearing before an Office hearing representative. By decision dated September 6, 2000, the Office hearing representative affirmed the Office's decision, terminating appellant's compensation benefits effective January 29, 1999 on the grounds that the residuals of appellant's employment-related condition had resolved. The

Office hearing representative further found that appellant had not met his burden to establish that his diagnosed psychiatric condition is causally related, either by precipitation or aggravation, to his 1987 accepted back injury. The instant appeal follows.

The Board has duly reviewed the case record in the present appeal and finds that the Office failed to meet its burden of proof to terminate appellant's compensation benefits effective January 29, 1999.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[1] After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[2] Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.[3] To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.[4]

The initial medical report of record is a hospital report dated December 17, 1987, the day of the employment accident, in which Dr. Mark A. Mahoney diagnosed low back contusion with sciatic nerve irritation. On January 7, 1988 appellant came under the care of Dr. Ronald F. Kaplan, a Board-certified orthopedic surgeon, who has treated him continually since that time. In his initial report of record, Dr. Kaplan noted the history of appellant's employment injury and stated that on physical examination, appellant had tenderness in the left lower back with two thirds of the normal range of motion of his trunk, decreased straight leg raising and a questionable sensory deficit on the left in the L4-5 and L5-S1 distribution. He diagnosed only a low back sprain, causally related to the December 1987 employment accident and concluded that appellant was totally disabled. In a follow-up report documenting his treatment of appellant from February 18 through May 14, 1988, however, Dr. Kaplan noted that a computerized tomography (CT) scan, performed on March 15, 1988, revealed a mild right-sided herniated disc at L5-S1[5] and at the midline, but that electromyography and nerve conduction tests were "unrevealing." The physician again noted appellant's complaints of severe back pain radiating into his right lower extremity and documented his finding of sensory deficit at L4-5 and L5-S1, with limited trunk range of motion and limited straight leg raising. Dr. Kaplan recommended that appellant undergo a myelogram and opined that appellant was totally disabled for work. In an attending physician's form report dated September 16, 1988, he diagnosed right herniated nucleus pulposus at L5-S1 and indicated by checkmark that this

[1] *Lawrence D. Price*, 47 ECAB 120 (1995).

[2] *Id.*

[3] *Furman G. Peake*, 41 ECAB 361, 364 (1990).

[4] *Id.*

[5] The "findings" portion of the CT scan report states that there is a "suggestion" of a mild herniated disc at the L5-S1 level in the midline and to the right. However, the final impression is given as "mild right-sided herniated disc at L5-S1."

condition was causally related to appellant's employment injury. In frequent treatment reports dating from October 17, 1988 through March 9, 1999, Dr. Kaplan consistently noted appellant's complaints of pain, with spasm, limited trunk motion and limited straight leg raising and reiterated his conclusion that appellant exhibited "all the stigmata of L5-S1 nerve root compression." He repeatedly recommended that appellant undergo additional diagnostic testing, including a myelogram and magnetic resonance imaging (MRI) scan, however, appellant declined to undergo a myelogram due to a prior allergic reaction to the dye used in the testing and was unable to undergo an MRI scan due to the metallic clips in his cranium.

In a report dated May 22, 1989, Dr. Paul W. Hugenberger, a Board-certified orthopedic surgeon, who provided a second opinion evaluation for the Office, diagnosed congenital sacrilization of the sixth lumbar vertebrae, old left lumbar scoliosis and marked narrowing of the distal intervertebral disc space. He opined that appellant's December 17, 1987 employment injury had possibly aggravated appellant's preexisting abnormal conditions involving his back, lower extremities and feet and concluded that appellant was partially disabled due to both the preexisting conditions and the December 17, 1987 injury.

In a report dated February 18, 1991, Dr. Vincent P. Genovese, a Board-certified orthopedic surgeon and second opinion physician, stated that on physical examination appellant's Achilles reflexes were normal, forefoot eversion strength and plantar flexion strength of toes were normal and distracted seated straight leg raises were negative and that, therefore, appellant had "none of the classic stigmata of active radiculopathy." Dr. Genovese diagnosed left lumbar contusion by history and chronic pain syndrome, stated that appellant had been out of work for an inappropriately long period of time and recommended a comprehensive rehabilitation program.

In a report dated October 1, 1991, Dr. Arthur C. Hickey, a Board-certified orthopedic surgeon, who examined appellant at the request of the Office, noted the history of appellant's injury and his findings on physical examination and diagnosed an L5-S1 intervertebral disc herniation, as documented by CT scanning and concluded that appellant was totally disabled due to a combination of his 1984 cranial injuries and his December 17, 1987 employment injury.

On March 19, 1994 at the request of the Office, appellant was examined by Dr. Louis W. Meeks, a Board-certified orthopedic surgeon. In his report dated April 15, 1994, after noting appellant's medical, social and employment history, reviewing the medical evidence of record and documenting his findings on physical examination, Dr. Meeks diagnosed chronic arthrogenic low back pain with right and left radiculopathy secondary to a herniated nucleus pulposus at L5-S1. He explained that appellant's positive objective factors consisted of significant paravertebral muscle spasm, list and dysrythmia, lumbar scoliosis convex to the left and positive straight leg raising in the sitting and supine position, as well as the positive CT scan results. Dr. Meeks further noted that the only evidence of a preexisting condition was the fact that appellant has unilateral sacralization, but explained that recent studies have indicated that this type of syndrome does not increase the incidence of a herniated disc as previously thought. He added that he agreed with appellant's anxiety regarding undergoing additional testing such as

a myelogram or MRI scan due to his dye allergy and intercranial clips. Dr. Meeks stated that appellant could work four hours a day, within restrictions. With regard to the cause of appellant's diagnosed conditions, he stated:

> "I believe in reviewing these voluminous records that there is in fact a direct relationship between the fall on the ice striking his back and the fact that he presented promptly to an Emergency Room and at that time presented with right lower extremity pain as well as his back pain and these would be supportive of the above opinion…. In my opinion, [appellant's] low back sprain has not resolved because the sprain actually, in my opinion, involved the annulus fibrosis of the disc with associated herniation and resultant radiculopathy, right and left lower extremity. He has not had surgery to relieve this and by now the pain is chronic…."

On March 26, 1999 the Office referred appellant to Dr. Roger S. Pocze, a Board-certified orthopedic surgeon, for a second opinion evaluation. In his report dated April 19, 1999, Dr. Pocze opined that appellant has chronic low back pain without any clear-cut diagnosis to be made. He stated that at various times examiners documented some evidence of sciatic nerve root irritation, but noted that his own examination did not reveal any reproducible evidence of sciatic nerve root irritation, but rather elicited evidence of symptom magnification. Dr. Pocze further stated:

> "I do not find any evidence in the medical records of a clear-cut anatomic abnormality that would account for his pain. The episode in December of 1987 appears to have been a precipitating cause of the majority of his complaints. Dr. Kaplan does not offer any convincing physical examination evidence of a herniated disc and such a diagnosis cannot be unequivocally made. The CT scan may well have shown some abnormalities in the L5-S1 disc but this does not necessarily correlate to [appellant's] subjective complaints of pain. At best, it could be stated that the traumatic events of December 1987 resulted in a nonspecific lumbosacral strain injury, possibly involving a disc injury. At this point his subjective complaints of pain are far greater than the objective evidence at hand. The psychological problems documented by psychiatrists which result from the assault in 1984 may very well play a significant part in [appellant's] current perception of pain."

In a supplemental report dated September 27, 1999, Dr. Pocze clarified his earlier opinion, stating:

> "I do not believe that [appellant] continues to experience pain in his low back as a result of a low back sprain sustained in 1987. He complains of pain but as I discussed at length in my original report, these complaints of pain cannot be correlated to any particular identifiable anatomic abnormality. There is certainly evidence that [appellant] is exaggerating his complaints of pain in the low back. I think that this is tied up with his multitude of other problems including chronic pain in many other areas of his body.

> "I do n[o]t really understand what you mean by 'residuals of the work-related condition.' He has subjective complaints of pain but he has no demonstrable physical abnormalities that could be considered a residual of a work-related incident.
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> "The degenerative arthritis at L5-S1 and congenital sacralization of L6, etc. could contribute to back pain but cannot be determined to be the sole cause. Appellant certainly has concurrent nonwork-related conditions but the degree to which they may cause him pain is impossible to determine."

Section 8123(a) of the Federal Employees' Compensation Act,[6] provides, "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." In this case, in terminating appellant's compensation benefits, the Office relied upon the opinion of Dr. Pocze, who opined that appellant had no objective evidence of any physical condition causally related to his employment injury. Appellant's treating physician, Dr. Kaplan, repeatedly diagnosed employment-related herniated nucleus pulposus at L5-S1 with associated chronic pain. The Board, therefore, finds that a conflict in medical evidence exists between the opinions of appellant's treating physician and Dr. Pocze regarding whether appellant continues to suffer from residuals of his December 17, 1987 employment injury. The Office, thus, did not meet its burden of proof in terminating appellant's compensation effective January 29, 1999.[7]

The Board further finds that appellant failed to meet his burden of proof to establish that he suffers from a psychiatric condition, which is causally related to his 1987 accepted low back strain.

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.[8] As is noted by Professor Larson in his treatise: "[O]nce the work-connected character of any injury, has been established the subsequent progression of the condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause."[9]

Applying the principles noted above regarding a consequential injury, the Board finds that the medical evidence in this case relevant to appellant's psychiatric condition is insufficient to provide support that appellant's post-traumatic stress disorder is causally related to the December 17, 1987 employment injury. In his report dated August 29, 1994, Dr. Kobrin noted

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[6] 5 U.S.C. §§ 8101-8193, 8123(a).

[7] *See Gail D. Painton*, 41 ECAB 492 (1990).

[8] Larson, *The Law of Workers' Compensation* § 13.00; *see also Stuart K. Stanton*, 40 ECAB 859 (1989); *Charles J. Jenkins*, 40 ECAB 362 (1988).

[9] *Id*. at § 13.11(a).

that appellant had suffered a murderous physical assault in 1984, after which he was out of work for approximately six months. He stated that appellant developed the signs and symptoms of post-traumatic stress disorder shortly after the 1984 attack and that these symptoms increased in severity in 1987. Dr. Kobrin concluded that appellant has been psychiatrically disabled since 1987 as a consequence of his phobic avoidance, recurrent flashbacks, intense anxiety, inability to relate to others without becoming overwhelmed, paranoid fearfulness and general expectation that he will suffer a similar fate which occurred to him once before. In a follow-up report dated April 25, 1995, he opined that appellant was totally disabled and unable to participate in a vocational rehabilitation, stating:

> "Following the assault that he experienced in 1984 he was disabled temporarily at that time as a consequence of his physical injuries and when he recovered from the physical injuries he went back to work. Evidently he was not yet experiencing the psychological sequelae of [PTSD] so he was then able to continue to work until December of 1987 when he fell and hurt his back. This was probably the precipitant at that time. This was in addition to his having found out in 1987 that the assailants were paroled. It was after that that the phobic avoidance symptomatology became apparent to where he felt completely unsafe outside of his home. He became unable to drive near woods in the dark and rain etc. so that he was limited to driving for short distances in the daytime and in general felt unsafe when he was not at home. This subsequent disability has been in large part to the [PTSD] as well as his physical difficulties."

On August 25 and September 1, 1995 at he request of the Office, appellant underwent additional psychiatric examination by Dr. Jonathan Schwartz, a Board-certified psychiatrist. In his report dated September 11, 1995, Dr. Schwartz confirmed Dr. Kobrin's opinion that appellant suffers from totally disabling post-traumatic stress disorder and is unable to participate in vocational rehabilitation. In discussing the longevity of appellant's psychiatric condition, Dr. Schwartz explained that appellant reexperienced the stimuli that caused his PTSD in 1985 and 1986 during the lengthy trial of the men that assaulted him. Then, when appellant was informed that these felons had been paroled in 1987, "a whole new raft of stimuli to retraumatize him appeared." Dr. Schwartz explained that appellant continued to live in fear that that these men would hunt him down and injure or murder him, as evidenced by the fact that appellant sleeps with a machete by his bed. With respect to the fact that appellant was able to return to work after the 1984 attack and did not stop work until after his 1987 back injury, Dr. Schwartz stated:

> "It is certainly puzzling that [appellant] stopped work only after the fall in December 1987 rather than before. The orthopedic reports vary in their opinions regarding the extent an nature of the low back injury sustained at that time. It is possible that the 1987 fall and ensuing back injury was in a sense the 'last straw' for [appellant], who had much more difficulty functioning at work prior to the 1987 accident than he had anticipated and may just have not been able to bounce back from yet another injury. As stated above, [appellant] apparently returned to work following the 1984 assault much sooner than he truly should have and found that not only was his ability to function compromised but that the folks with whom he worked were either unsupportive or even cruel."

Neither the opinion of Dr. Kobrin, nor the opinion of Dr. Schwartz is sufficient to meet appellant's burden. While Dr. Kobrin noted that appellant's PTSD increased in severity in 1987 after appellant's fall, his opinion that the 1987 employment injury was "probably the precipitant" of appellant's disabling PTSD is too speculative, especially in light of the simultaneous parole of his assailants occurring in 1987, to constitute a rationalized medical opinion. Similarly, Dr. Schwartz's opinion that it is "possible" that appellant's 1987 fall and ensuing back injury was in a sense the 'last straw' for appellant, is also too speculative to support appellant's burden of proof. In order to establish causal relationship, a physician's opinion must be based on a complete factual and medical background and must be supported by medical rationale which establishes that the diagnosed condition resulted from the specific employment activities. A 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 medical certainty, but neither can the opinion be speculative or equivocal.[10] As appellant failed to provide rationalized medical evidence attributing his psychiatric condition to the December 17, 1987 incident, either by precipitation or aggravation, he has failed to discharge his burden of proof. Accordingly, the Board finds that appellant has not established a psychiatric condition causally related to the December 17, 1987 incident.

The September 6, 2000 decision of the Office of Workers' Compensation Programs is affirmed in part and reversed in part and this case is remanded for further proceedings, consistent with this opinion.

Dated, Washington, DC
December 17, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

[10] *Roger Dingess*, 47 ECAB 123 (1995).