U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID MAZZA and DEPARTMENT OF THE NAVY,
NAVAL SHIPYARD, Philadelphia, PA

Docket No. 99-1851; Submitted on the Record;
Issued June 22, 2001

DECISION and ORDER

Before WILLIE T.C. THOMAS, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issue is whether appellant sustained a recurrence of disability from August 6, 1996 to August 7, 1997 due to an accepted May 12, 1987 left knee injury.

This is the second appeal in this case. The Office of Workers' Compensation Programs accepted that on May 12, 1987 appellant, then a 27-year-old warehouse worker, sustained a torn left medial meniscus requiring June 17 and September 18, 1987, February 10, 1992 and August 6, 1997 meniscectomies.[1] Appellant then claimed a schedule award. By decisions dated August 15, 1991 and February 29, 1993, the Office granted appellant compensation for a 31 percent permanent impairment of the left lower extremity. Appellant disagreed with this decision and requested an oral hearing. By decision dated and finalized January 19, 1994, the Office hearing representative affirmed the finding of a 31 percent permanent impairment. Appellant then filed an appeal with the Board. By decision issued July 12, 1996, the Board set aside the January 19, 1994 decision on the grounds that there was an outstanding conflict of medical opinion evidence regarding the percentage of permanent impairment of appellant's left lower extremity between Dr. Roy Lerman, a Board-certified physiatrist and second opinion physician, and Dr. Ronald Goldberg, an attending osteopath Board-certified in general practice and specializing in physiatry. To resolve this conflict, the Board directed that the Office refer appellant, the record and a statement of accepted facts to an appropriate Board-certified specialist for an evaluation of the percentage of permanent impairment of appellant's left lower extremity according to the American Medical Association, *Guides to the Evaluation of Permanent*

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[1] Claim No. A03-0124003.

Impairment. The law and facts of the case as set forth in the Board's prior decision and order are incorporated by reference.[2]

Appellant submitted chart notes from Dr. Goldberg dated September 1994 to March 1995, diagnosing degenerative joint disease of the left knee with weakness, pain and difficulty in active extension. Dr. Goldberg advised that, while appellant was a candidate for arthroplasty, he had delay this as long as possible.

When the employing establishment closed in September 1995, appellant accepted a position as a medical clerk for the Department of the Army at Fort McPherson, Georgia and moved there with his family.

The Office accepted that, on October 10, 1995, appellant sustained a bilateral knee strain while working as a medical clerk at Fort McPherson, with right knee arthroscopy performed in December 1995 in Georgia.[3]

In an undated report associated with the October 10, 1995 injury report, Dr. S.I. Naidu, an orthopedist, noted appellant's multiple left knee surgeries, but commented that "this pain is new" since the October 10, 1995 injury "and is a sharp burning pain. Both knees." On examination of the left knee, Dr. Naidu found limited extension, positive lateral joint line tenderness and a positive MacMurray's sign. Regarding the right knee, Dr. Naidu found "maximum tenderness of the medial joint line and medial ligament of the knee," "minimal swelling," and a positive MacMurray's sign. Dr. Naidu diagnosed "[I]nternal derangement in both knees" and recommended that appellant continue to use crutches.

In a November 3, 1995 report, Dr. Naidu noted that appellant's right knee was "swollen and tender," while the left knee no longer showed signs of the October 10, 1995 injury. Dr. Naidu noted that appellant was "going to New Jersey for Thanksgiving and does not want to have surgery done before then because he has to drive all the way."

Appellant and his family returned to New Jersey in November 1995 for the Thanksgiving holiday. The record indicates that appellant had been unable to sell his house in New Jersey, that his family did not like living in Georgia and that they refused to go back with him. Appellant returned to Georgia and underwent right knee surgery on December 31, 1995 to repair tears of the lateral and medial menisci. In February 1996, appellant moved back to New Jersey. The employing establishment at Fort McPherson then offered appellant a light-duty position as a medical clerk, a sedentary position with lifting under 20 pounds. Appellant was instructed to report for duty by August 5, 1996.

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[2] Appellant received compensation intermittently from May 29, 1993 to May 22, 1999.

[3] Claim No. A06-0636643. In an October 10, 1995 injury report, appellant stated that, while in the records room, someone came up behind him and he did not see her, "tripped on her [but] did not fall." Dr. Alan Czarkowski, an osteopath affiliated with the employing establishment's dispensary, noted "acute injury to right and left knees degenerative disease to left knee, by history" and referred appellant to an orthopedist. Wage-loss compensation under this claim was terminated effective August 4, 1996 when appellant returned to work with no loss of wage-earning capacity.

In an April 4, 1996 report, Dr. Carl Mogil, an attending Board-certified orthopedic surgeon, opined that appellant could perform the offered medical clerk position if he were "allowed to sit for most of the day" and restricted him from operating "motorized machinery with his lower extremities."

In a June 20, 1996 letter, the Office advised appellant that the job offer was suitable work. He accepted the offer on July 19, 1996. Then in a July 22, 1996 letter, appellant asserted that he could not accept the position as he could not commute to work as Dr. Mogil had forbidden him to drive.

By decision dated July 26, 1996, the Office terminated appellant's compensation on the grounds that he no longer had any loss of wage-earning capacity related to the October 10, 1995 bilateral knee injury and was scheduled to return to work on August 5, 1996.[4]

Appellant drove from New Jersey to Georgia from August 2 to 4, 1996 and reported for duty at Fort McPherson on August 5, 1996.[5]

On August 6, 1996 appellant filed a claim for recurrence of disability beginning August 5, 1996, which he attributed to the May 12, 1987 accepted injury. He stated that he had "been in excruciating pain in [his] left knee since a more recent injury on October 10, 1995." Appellant noted that sitting at a desk aggravated his left knee pain. He stopped work on August 6, 1996 and did not return.

In an August 26, 1996 report, Dr. Thomas Obade, an attending Board-certified orthopedic surgeon, who noted findings of left knee pain, crepitus, a "mild limp" and limited extension. Dr. Obade obtained x-rays showing "minimal narrowing of the medial joint compartment," with "mild diffuse degenerative changes." He recommended arthroscopy. Dr. Obade did not mention the claimed August 5, 1996 recurrence of disability.

In an August 24, 1996 letter, the Office advised appellant that the October 10, 1995 bilateral knee strain constituted an intervening injury between the May 12, 1987 left knee injury and the claimed August 5, 1996 recurrence of disability. The Office therefore recommended that

[4] The Board notes that the July 26, 1996 decision also contains a great deal of dicta regarding the penalty provisions of 5 U.S.C. § 8106(b) for refusing an offer of suitable work. The Board notes that the penalty provisions under section 8106 of the Act are irrelevant, as appellant accepted the offer of suitable work. Also, because the decision was issued approximately 10 days prior to the time appellant was to start the position he had accepted, no refusal occurred. However, the record indicates that the Office may have mistakenly believed that appellant's compensation was terminated due to a refusal of suitable work. In a July 16, 1999 file memorandum, an Office claims examiner notes that appellant's compensation was terminated August 4, 1996 on the grounds that he refused an offer of suitable work. The Board notes, however, that this appears to be nondispositive, harmless error.

[5] In a March 10, 1997 letter, the Navy noted that he reported to his Army supervisor on August 5, 1996 that he had driven from New Jersey to Georgia, approximately a 20-hour trip, and that he had slept in his truck the night before. The Army made substantially similar allegations in an August 15, 1996 letter.

appellant predicate his claim on the October 10, 1995 injury. The Office also advised appellant of the type of factual and medical evidence needed to establish his claim.[6]

In a September 4, 1996 letter, appellant, through his attorney representative, asserted that the claimed August 5, 1996 recurrence of disability was related only to the accepted May 12, 1987 left knee injury and not the October 10, 1995 bilateral knee injury.[7]

In reports from September 24, 1996 through October 1998, Dr. Carl Mogil, an attending Board-certified orthopedic surgeon, appellant "continue[d] to have bilateral knee problems related to an injury that he sustained in October 1995," in particular that appellant related his left knee problems to this injury. Dr. Mogil noted that appellant's left knee was painful, crepitant and unstable due to "advanced tricompartmental osteoarthritic disease" and "severe patellofemoral chondromalacia" with deformity." He opined that appellant required left patellofemoral arthroplasty with tibial realignment, to be preceded by intra-articular lubricant therapy in an effort to delay a total joint replacement as long as possible due to appellant's relatively young age.

In a February 24, 1997 letter, the Office advised appellant that the medical evidence of record did not "link [his] recurrence of August 5, 1996 to [his] original date of injury" and to request that his "physician submit a report linking your recurrence to the original injury of May 12, 1987."

By decision dated May 27, 1997, the Office denied appellant's claim for an August 5, 1996 recurrence of disability on the grounds that causal relationship was not established. The Office noted that Dr. Mogil had approved the offered position. The Office found that there was no medical evidence of record indicating that the accepted conditions "worsened when [he] returned to work." The Office also noted that, although Dr. Mogil had restricted appellant from operating motorized machinery with his lower extremities, appellant drove from New Jersey to Georgia from August 2 to 4, 1996.[8]

Appellant disagreed with this decision and by June 13, 1997 letter requested an oral hearing, held October 27, 1998. At the hearing, he stated that, following his three-day drive from New Jersey to Georgia from August 2 to 4, 1996, he experienced an increase of left knee symptoms after reporting for duty on April 5 and 6, 1996. However, appellant attributed this

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[6] The record indicates that appellant was absent without leave (AWOL) from August 6, 1996 onward as he did not report as instructed to the employing establishment in Georgia on August 8, 1996 with medical evidence supporting a recurrence of disability.

[7] Appellant was terminated from the medical clerk position at Fort McPherson effective November 15, 1996 on the grounds that he had been AWOL since August 6, 1996.

[8] On March 4, 1998 appellant claimed an increased schedule award for left knee impairment and a new schedule award for impairment of the right knee. Following issuance of the Office's decision dated and finalized January 11, 1999, the Office conducted additional development regarding appellant's schedule award claim. In a July 1, 1999 report, an Office medical adviser stated that there was insufficient medical information of record regarding the left knee to calculate a schedule award. As there is no final decision of record regarding the schedule award claim, this aspect of the case is not before the Board on the present appeal.

increase in symptoms to sitting at his desk in the performance of duty, and not to driving. He submitted additional evidence.

An August 6, 1997 left knee arthroscopy showed "severe patellofemoral chondromalacia, as well as chondromalacia of the lateral and medial femoral condyles. The Office accepted appellant's claim for a recurrence of disability beginning August 4, 1997 due to the August 6, 1997 arthroplasty.

In a January 15, 1998 report, Dr. Neven A. Popovic, an Office medical adviser opined that "[a]dditional knee surgery such as the eventual total knee arthroplasty should be authorized as the need for additional surgery is the product of continuing knee deterioration."

By decision dated and finalized January 11, 1999, an Office hearing representative affirmed the May 28, 1997 decision of the Office, finding that there was insufficient medical evidence to establish a causal relationship between the accepted May 1987 left knee injury and appellant's condition from August 6, 1996 to August 7, 1997. The hearing representative noted that Dr. Mogil had approved the sedentary, light-duty position and that appellant had not submitted rationalized medical evidence establishing a worsening of his condition on August 6, 1996, or that he was medically unable to perform the light-duty position. The hearing representative also noted that, although Dr. Mogil had restricted appellant from operating motorized machinery with his lower extremities, appellant drove from New Jersey to Georgia, clearly violating those restrictions.

The Board finds that appellant has not established that he sustained a recurrence of disability from August 6, 1996 to August 7, 1997 due to the accepted May 12, 1987 left knee injury.

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee 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 to 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.[9] This burden includes the necessity of furnishing medical evidence from a qualified physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.[10]

In this case, appellant did not submit sufficient rationalized medical evidence showing a worsening of his accepted left knee condition on August 5, 1996 that would have totally disabled

[9] *Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Stuart K. Stanton*, 40 ECAB 864 (1989); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

[10] *Louise G. Malloy*, 45 ECAB 613 (1994); *Lourdes Davila*, 45 ECAB 139 (1989); *Robert H. St. Onge*, 43 ECAB 169 (1992).

him from performing the duties of the light-duty medical clerk position. Dr. Mogil, an attending Board-certified orthopedic surgeon, submitted an April 4, 1996 report stating that appellant was able to do the job, specifying that appellant should be "allowed to sit for most of the day." There are no medical reports of record dated from April through August 4, 1996 indicating that appellant was no longer medically capable of performing the offered position. In his August 6, 1996 claim form, appellant attributed his left knee pain to sitting at his desk, the very activity that Dr. Mogil recommended.

The medical report of record most contemporaneous to the claimed August 5, 1996 recurrence of disability is an August 26, 1996 report by Dr. Obade, an attending Board-certified orthopedic surgeon, who noted findings of left knee pain, crepitus, a "mild limp," limited extension and "mild diffuse degenerative changes." However, Dr. Obade did not mention the claimed August 5, 1996 recurrence of disability, or opine that appellant's left knee condition had worsened such that appellant would have been totally disabled from performing the medical clerk position.

Dr. Mogil submitted numerous reports dated from September 24, 1996 through March 6, 1997, none of which mention an organic worsening of either of appellant's knees beginning August 5, 1996 or opining that appellant was totally disabled from sedentary work.

Thus, appellant submitted insufficient medical evidence demonstrating a recurrence of disability beginning August 5, 1996.

Appellant attributed his claimed recurrence of disability to the original May 1987 left knee injury. However, as the Office advised appellant by August 24, 1996 letter, the October 10, 1995 injury is an intervening cause, interrupting the chain of causation from the May 1987 injury. Despite this advice, in a September 4, 1996 letter, appellant's attorney representative, asserted that the claimed August 5, 1996 recurrence of disability was related only to the accepted May 12, 1987 left knee injury and not the October 10, 1995 bilateral knee injury.

Appellant stated in his August 6, 1996 claim form that, although he attributed the alleged recurrence of disability to the May 12, 1987 injury, his chronic left knee pain had worsened "since a more recent injury on October 10, 1995." Thus, appellant himself describes the October 10, 1995 injury as an intervening cause.

In numerous reports from September 24, 1996 through March 6, 1997, Dr. Mogil noted that appellant's bilateral knee problems were "related to an injury that he sustained in October 1995." Thus, appellant's attending physician does not support a causal relationship between appellant's left knee condition on and after August 5, 1996 and the May 12, 1987 injury.

A third problem with the chain of causation in this case is that, from August 2 to 4, 1996, appellant violated Dr. Mogil's medical restrictions by driving from his home in New Jersey to Georgia. It is an accepted principle of workers' compensation law 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.[11]

In an April 4, 1996 report, Dr. Mogil, restricted appellant from operating "motorized machinery with his lower extremities." Appellant was aware of these restrictions, as he asserted in a July 22, 1996 letter that he could not commute to work as Dr. Mogil had proscribed driving. Yet, less than two weeks later, in clear violation of Dr. Mogil's restrictions, appellant drove from New Jersey to Georgia from August 2 to 4, 1996. The day after he completed this drive, he claimed a recurrence of disability beginning August 5, 1996 which he attributed to merely sitting at his desk, the one activity that Dr. Mogil recommended. Considering that appellant violated medical restrictions in such an extreme manner during the three days prior to the alleged recurrence of disability, the complete absence of any medical rationale explaining how and why three days of driving would not affect appellant's left knee, while sitting and a desk would be disabling, greatly undermines the credibility of appellant's argument that the claimed August 5, 1996 recurrence of disability was related to the May 12, 1987 work-related injury.

Consequently, appellant has not established that he sustained a recurrence of disability from August 5, 1996 through August 7, 1997, as he submitted insufficient rationalized medical evidence to establish a worsening of his condition such that he was totally disabled for work during that time period, or that his left knee condition beginning August 5, 1996 was causally related to the May 12, 1987 injury.

The decision of the Office of Workers' Compensation Programs dated and finalized January 11, 1999 is hereby affirmed.

Dated, Washington, DC
June 22, 2001

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member

[11] *Charlet Garrett Smith*, 47 ECAB 562 (1996).