U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JERRY M. JOBES and DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, Bremerton, WA

Docket No. 99-1411; Submitted on the Record;
Issued March 16, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, BRADLEY T. KNOTT

The issue is whether appellant has established that he sustained a recurrence of disability on October 2, 1995 causally related to his January 27, 1990 employment injury.

On January 30, 1990 appellant, then a 26-year-old sandblaster, filed a claim alleging that he sustained an injury on January 27, 1990 in the performance of duty. The Office of Workers' Compensation Programs accepted his claim for low back strain, a herniated disc at L5-S1 and bilateral radiculopathy. The Office authorized a lumbar laminectomy, which appellant underwent on April 22, 1992.

By decision dated May 30, 1995, the Office determined that appellant had no loss of wage-earning capacity effective June 5, 1994 based on its finding that his actual earnings as an engineering technician fairly and reasonably represented his wage-earning capacity.[1]

The record indicates that the employing establishment terminated appellant on October 2, 1995. The employing establishment informed him that the basis for his termination was his inability to adapt to the work environment and his expression of "homicidal thoughts" towards his coworkers.

On October 15, 1996 appellant filed a claim for compensation on account of traumatic injury or occupational disease (Form CA-7) requesting compensation from October 2, 1995 to October 2, 1996. In a subsequent letter to the Office, he related that the employing establishment did not place him in a permanent position and that he "was laid off unfairly and without consideration [for] my disabilities." A claims examiner spoke on the telephone with appellant, who indicated that he was off work due to stress. The claims examiner advised him to pursue the denial of his emotional condition claim.

[1] In a decision dated March 27, 1995, the Office granted appellant a schedule award for a one percent permanent impairment of both legs.

On September 21, 1999 appellant filed a notice of recurrence of disability on October 2, 1995 due to his January 27, 1990 employment injury. By decision dated October 26, 1999, the Office denied his claim on the grounds that the evidence did not establish that he was disabled on or after October 2, 1995 causally related to his accepted employment injury.

In a letter dated November 7, 1999, appellant requested a hearing before an Office hearing representative. By decision dated June 17, 2000 and finalized June 20, 2000, the hearing representative affirmed the Office's October 26, 1999 decision.[2] The hearing representative found that appellant had not submitted sufficient medical evidence to establish that he stopped work on October 2, 1995 because he was physically unable to perform his employment duties.[3]

The Board has duly reviewed the case record in the present appeal and finds that appellant has not met his burden of proof to establish that he sustained a recurrence of disability on or after October 2, 1995 causally related to his accepted employment injury.

Where 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 or she 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.[4]

In this case, appellant sustained low back strain, a herniated disc at L5-S1 and bilateral radiculopathy. He returned to work as an engineering technician effective June 5, 1994, which the Office found fairly and reasonably represented his wage-earning capacity. On October 2, 1995 the employing establishment terminated appellant for cause. The Board notes that termination for cause does not itself give rise to a compensable disability. The term disability is defined as "the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of the injury."[5] The Office procedure manual defines a recurrence of disability to include the following: "Withdrawal of a light-duty assignment made specifically to accommodate the claimant's condition due to the work-related injury. This withdrawal must have occurred for reasons other than misconduct or nonperformance of job duties."[6] In this case,

[2] The hearing representative indicated that she was affirming a decision dated August 26, 1999; however, this appears to be a typographical error.

[3] On February 19, 1999 appellant appealed to the Board. On January 11, 2000 the Board dismissed his appeal on the grounds that he had not specified the decision from which he was appealing; *see* Order Dismissing Appeal, Docket No. 99-1411 (issued January 11, 2000). On October 30, 2000 the Board vacated its January 11, 2000 Order and reinstated appellant's appeal; *see* Order Vacating Prior Board Order and Reinstating Appeal, Docket No. 99-1411 (issued October 30, 2000).

[4] *Terry R. Hedman*, 38 ECAB 222 (1986).

[5] 20 C.F.R. § 10.5(17).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(1)(c) (May 1997).

the employing establishment withdrew appellant's position as an engineering technician due to his termination for cause.[7] Thus, the issue is whether the medical evidence establishes that appellant was unable to perform his position as engineering technician on or after October 2, 1995.

In a report April 1, 1999, Dr. Paul S. McCullough, a Board-certified orthopedic surgeon and appellant's attending physician, discussed appellant's complaints of back pain with sciatica and recommended a magnetic resonance imaging (MRI) scan. In an office visit note dated April 26, 1999, he indicated that he had reviewed the results of appellant's MRI scan and stated:

> "In summary, [appellant] shows no evidence of significant extradural defect, nerve root impingement or other mechanical explanation for a post-laminectomy pain syndrome. He was reassured in this regard and seems to accept that well. There is ongoing contention with [appellant's] previous employer and the Department of Labor. I plan nothing further here."

As Dr. McCullough did not find that appellant was disabled from work as an engineering technician beginning October 2, 1995 due to his accepted employment injury, his opinion is insufficient to meet appellant's burden of proof.

In an office visit note dated August 10, 1999, Dr. McCullough related:

> "[Appellant was] seen this date with persistent pain syndrome, essentially as previously outlined in notation of April 1, 1999. At this time, there is no expectation that this is necessarily going to be resolved in the forseeable future and so advised. Level of disability is essentially as outlined previously."

Dr. McCullough did not discuss whether appellant was disabled from employment or relate any condition to the accepted employment injury. Consequently, his opinion is insufficient to meet appellant's burden of proof.

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's claimed condition became apparent during a period of employment nor his belief that his condition was aggravated by his employment is sufficient to establish causal relationship.[8] As appellant failed to submit a rationalized medical report supporting that his January 27, 1990 employment injury resulted in his inability to perform his employment on or after October 2, 1995, the Office properly denied his claim for compensation.[9]

[7] While appellant generally asserted at the hearing that the employing establishment did not assign her light-duty employment, she has not substantiated this allegation with any evidence or provided a detailed description of her required employment duties.

[8] *See Walter D. Morehead*, 31 ECAB 188, 194-95 (1986).

[9] Appellant submitted new evidence with his appeal; however, the Board has no jurisdiction to review this evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c).

The decisions of the Office of Workers' Compensation Programs dated June 17, 2000 and finalized June 20, 2000 and dated October 26, 1999 are hereby affirmed.

Dated, Washington, DC
March 16, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member