U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT L. YARBERRY, II and DEPARTMENT OF ENERGY, SOUTHWESTERN POWER ADMINISTRATION, DIVISION OF TRANSMISSION MAINTENANCE, Tulsa, OK

Docket No. 03-1560; Submitted on the Record;
Issued December 9, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective April 22, 2003 on the grounds that he could not receive dual benefits under the Federal Employees' Compensation Act and from the Department of Veterans' Affairs and did not complete an election of benefits; and, (2) whether appellant established that he sustained a recurrence of disability commencing March 25, 2002.

The Office accepted that, on January 9, 1995, appellant, then a 46-year-old working foreman/high voltage electrician, sustained mechanical low back pain and a lumbar strain when he moved a heavy manhole cover.[1] Appellant stopped work on April 24, 1995 and received benefits on the daily and periodic rolls through February 1996. He returned to work for one week beginning March 4, 1996 as an inspector on light duty. Appellant's total disability compensation was reinstated effective March 11, 1996. He was removed from the employing establishment effective November 15, 1996 as there was no work available within his restrictions. Appellant's case was placed on the periodic rolls as of December 8, 1996.

The record demonstrates that appellant also received benefits from the Department of Veterans' Affairs (hereinafter, "VA"). He submitted annual affidavits of earnings and employment (Form EN-1032) from April 1997 to April 2000, stating that he received VA disability benefits for a service-connected, 40-percent disability to his eyes, ears, back and leg.

[1] The record indicates that appellant sustained a nonoccupational L2 fracture in 1989.

In a May 10, 2000 rating decision, the VA continued rating a service-related L2 compression fracture[2] with radiculopathy as 40 percent disabling.[3] In May 12 and 29, 2000 forms, the VA stated that, as of March 1, 2000, appellant received $682.00 per month in VA disability benefits.

Pursuant to an Office vocational rehabilitation plan, appellant earned an associates degree in computer studies in August 2000. In October 2000, appellant began work as a network control operator for BR&B Roofing, a private sector company under an assisted employment wage-subsidy program.[4]

By decision dated December 18, 2000, the Office determined appellant's loss of wage-earning capacity as of October 16, 2000 based on his actual earnings as a network control operator. Appellant continued to receive wage-loss compensation benefits on the periodic rolls.

On April 25, 2002 Dr. Fred M. Ruefer, an attending Board-certified orthopedic surgeon, obtained x-rays showing "significant osteoporosis and a more recent severe compression fracture at T12 with" healed fractures at L2, T10 and T 11. He diagnosed severe osteoporosis of the spine, noting that appellant could only perform sedentary work.

On February 18, 2003 appellant filed a notice alleging that he sustained a recurrence of total disability commencing March 25, 2002, as Dr. Ruefer opined that appellant's spine continued to deteriorate. Appellant noted that he was laid off from BR&B Roofing on December 5, 2002, then received unemployment benefits. He continued to receive wage-loss compensation on the periodic rolls.

In a report from the VA received by the Office on February 21, 2003, it was noted that April 25, 2002 x-rays obtained by Dr. Ruefer showed significant osteoporosis with compression fractures at T-10, T-12 and L2. On July 8, 2002 a VA physician determined that the fractures at T-11 and T-12 were "reinjur[ies]" demonstrating progressive osteoporosis, with increasing nerve root compression in the thoracic and lumbar regions causing severe pain and radiculopathy. Based on these findings, the VA assigned appellant a 60 percent disability rating for vertebral compression fractures with radiculopathy and a 20 percent disability for osteoporosis at T11 and T12, for a total of 80 percent service-connected disability. The effective date of the benefits increase was April 26, 2002.

In a March 4, 2003 letter, the Office advised appellant that the evidence was insufficient to establish that the claimed recurrence of disability was related to the accepted January 1995 injury or other work factors. The Office requested that appellant submit medical reports

[2] March 24, 2000 x-rays showed compression fractures at T12, L1 and L2.

[3] A hearing loss continued to be rated as zero percent disabling. A fracture of the third right metatarsal was increased from zero to ten percent effective February 23, 2000 and bilateral tinnitus was increased from zero to ten percent disabling. These ratings were combined to equal a rating of 50 percent disability.

[4] In affidavits of earnings and employment dated April 17, 2001 and April 15, 2002, appellant stated that, from October 2000 to December 2001, he worked as an information specialist for BR&B Roofing. Appellant continued to receive vocational rehabilitation services through May 2001.

containing a complete history of injury, findings on examination, a definite diagnosis and an explanation as to how and why work factors would cause the claimed recurrence of disability. Appellant was afforded 30 days to submit such evidence.

In a second March 4, 2003 letter, the Office noted that a recent VA report gave appellant a 60 percent disability rating plus 20 percent for osteoporosis and that his VA benefits increased from $487.00 per month as of the January 9, 1995 lumbar sprain, to $2,318.00 per month. The Office advised appellant that the increase in VA benefits constituted a dual benefit not allowed under the Act. The Office advised appellant that he was required to elect to receive compensation benefits through the Office or disability benefits from the VA. If appellant elected to retain the increased VA benefits as of January 2003, he would no longer be eligible for wage-loss compensation. The Office stated that, if appellant failed to return an enclosed election form, the Office would terminate all compensation payments to discontinue the dual benefit period. The record indicates that appellant did not return the election form to the Office prior to April 22, 2003.

By decision dated April 18, 2003, the Office denied appellant's claim for recurrence of disability on the grounds that the medical evidence did not establish a causal relationship between the January 9, 1995 lumbar sprain and his medical condition on and after March 25, 2002.

By decision dated April 22, 2003, the Office terminated appellant's compensation benefits effective that day for failure to elect between Office benefits and his increase in VA benefits. The Office indicated that the purpose of the termination was to prevent further overpayment of compensation.[5]

The Board finds that, while the Office properly determined that appellant was not entitled to receive dual benefits, the Office improperly terminated appellant's wage-loss compensation benefits effective April 22, 2003 on the grounds that he failed to elect between the Act and VA benefits.

Section 8116(a) of the Act provides:

> "(a) While an employee is receiving compensation under this subchapter or if he has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, he may not receive a salary, pay or remuneration of any type from the United States, except --

[5] The record contains two versions of the Office's April 23, 2003 preliminary determination of a $19,159.61 or $19,216.72 overpayment of compensation, as appellant failed to make an election between receiving benefits under the Act and the increase in the VA benefits for a service-connected disability. The Office also made a preliminary finding that appellant was at fault in creation of the overpayment. Although a May 5, 2003 letter from the Office refers to a "decision declaring the overpayment," there is no final decision of record regarding the overpayment. As there is no final decision of record regarding the overpayment issue, the Board does not have jurisdiction over this issue on appeal. 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

* * *

> (3) other benefits administered by the [VA] unless such benefits are payable for the same injury or the same death.…"[6]

The Office's procedures provide that if information is obtained from the VA that a claimant, currently receiving compensation under the Act, is also receiving a veterans' award other than "pension for service in the Army, Navy or Air Force," the claims examiner must first determine if the VA award is based on the same disability for which the Act benefits are payable. If so, the claimant must elect between these benefits under 5 U.S.C. § 8116(a).[7]

In this case, the record establishes that appellant received a prohibited dual benefit. He received compensation benefits under the Act for intermittent periods beginning April 24, 1995 for an accepted January 9, 1995 lumbar sprain. Appellant also received disability payments from the VA for a service-connected spinal disc condition preexisting the January 9, 1995 occupational injury, rated as a 40 percent disability. As of April 26, 2002, while receiving wage-loss compensation, appellant's service-connected spinal condition was increased from a 40 percent disability to a 60 percent disability, plus an additional 20 percent for osteoporosis. Therefore, the Office properly found that the April 26, 2002 increase in VA disability benefits constituted a dual benefit prohibited under section 8116(a) of the Act.

However, the Office's termination of appellant's compensation benefits based on his failure to make an election was improper. The Board finds that appellant was not provided sufficient information to make an informed election of benefits. The Office's procedures provide that, where a claimant is required to elect between the Act and VA benefits under 5 U.S.C. § 8116(a), the claims examiner must advise the claimant of the full amount and terms of the Act entitlement and obtain an election in narrative form, between the two benefits.[8] However, the Office's March 4, 2003 letter did not advise appellant of the full amount and terms of his benefits under the Act. The Office did not provide appellant with a financial comparison of the two benefits, but only notified appellant that he was required to make an election. Appellant did not have sufficient information to make a fully informed election.[9]

Therefore, the case will be remanded to the Office to afford appellant the opportunity, based on pertinent information, to elect between benefits under the Act and the increased disability benefits from the VA. This development shall include providing appellant with all of the financial information necessary for him to make an informed election between benefits under the Act and VA benefits, including, but not limited to, a comparison of the two benefits listing

---

[6] 5 U.S.C. § 8116; *see also* 20 C.F.R. § 10.435(a).

[7] Federal (FECA) Procedure Manual, Part 2 -- *Claims, Dual Benefits*, Chapter 2.1000.8(b) (February 1995). *See also Adeline N. Etzel (Bernard E. Etzel)*, 21 ECAB 151 (1989).

[8] Federal (FECA) Procedure Manual, Part 2 -- *Claims, Dual Benefits*, Chapter 2.1000.f(3) (December 1997).

[9] *See also Robert L. Johnson*, 51 ECAB 480 (2000); *Fidel E. Perez*, 48 ECAB 663 (1997) (the Office is required to make findings of fact and a statement of reasons regarding the material facts of the case, so that the parties in interest will have a clear understanding of the basis for the Office's determination).

the appropriate dollar amounts. Following this and any other development deemed necessary, the Office shall issue an appropriate decision in the case.

The Board also finds that appellant has not established that he sustained a recurrence of total disability commencing March 25, 2002.

A recurrence of disability is defined by Office regulations as an inability to work, caused by a spontaneous change in a medial condition resulting from a previous injury or illness without an intervening injury or new exposure to the work factors that caused the original injury or illness.[10] When an employee claims a recurrence of disability causally related to an accepted employment injury, he or she has the burden of establishing by the weight of the reliable, probative and substantial medical evidence that the claimed recurrence of disability is causally related to the accepted injury. This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.[11] An award of compensation may not be made on the basis of surmise, conjecture, speculation or on appellant's unsupported belief of causal relation.[12]

In support of his claim, appellant submitted the April 25, 2002 report of Dr. Ruefer, an attending Board-certified orthopedic surgeon. He diagnosed compression fractures at T11 and T12 with severe osteoporosis, but did not mention work factors or the January 1995 lumbar sprain in his report. As Dr. Ruefer did not address causal relationship in his report, his opinion is of diminished value in ascertaining the required relationship of work factors to the claimed period of disability.[13] Similarly, the report from the VA received by the Office on February 21, 2003 merely noted that appellant's condition had worsened over time.[14] Consequently, appellant submitted insufficient rationalized medical evidence to establish a recurrence of disability on and after March 25, 2002.

[10] *Bernitta L. Wright*, 53 ECAB ___ (Docket No. 01-1858, issued May 1, 2002).

[11] *Ronald A. Eldridge*, 53 ECAB ___ (Docket No. 01-67, issued November 14, 2001); *see Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

[12] *Patricia J. Glenn*, 53 ECAB ___ (Docket No. 01-65, issued October 12, 2001); *Ausberto Guzman*, 25 ECAB 362 (1974).

[13] *Lucrecia M. Nielsen*, 42 ECAB 583 (1991).

[14] Determinations of other federal administrative agencies with respect to whether an employee is disabled are not binding on the Office or the Board with respect to whether the individual is disabled under the Act. *See James E. Norris*, 52 ECAB 93 (2000).

The decision of the Office of Workers' Compensation Programs dated April 22, 2003 is affirmed in part regarding the finding of a dual benefit under 5 U.S.C. § 8116 and set aside in part regarding the termination of wage-loss compensation and the case is remanded for appropriate development in accordance with this decision and order. The decision of the Office dated April 18, 2003 denying appellant's claim for recurrence of disability is hereby affirmed.

Dated, Washington, DC
December 9, 2003

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member