U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THURSTON JENIOUS and DEPARTMENT OF VETERANS AFFAIRS, PUGENT SOUND HEALTH CARE SYSTEM, Seattle, WA

Docket No. 02-787; Submitted on the Record;
Issued January 9, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant established a recurrence of disability causally related to his accepted work injury.

On June 15, 1997 appellant, then a 49-year-old food service worker, filed a notice of traumatic injury alleging that he pulled a muscle in his lower back while delivering bulk juices in the performance of duty. The Office of Workers' Compensation Programs accepted the claim for a lumbar strain and appellant received appropriate compensation benefits.

An x-ray of the lumbar spine dated August 12, 1997 was interpreted as normal with no evidence of significant osteoarthritis.

On August 6, 1998 appellant filed a notice of traumatic injury alleging that, on that date, he was taking out a heavy bag of garbage when he felt pain in his neck and the upper part of the back. The Office accepted the claim for cervical and thoracic subluxation. Appellant received compensation for intermittent periods of disability between August 6 and September 13, 1998.

On September 17, 1998 appellant was seen by Dr. Jennifer Carl in consultation with Dr. Eric D. Hansen. Dr. Carl is Board-certified in physical medicine. She indicated that appellant had a negative electromyogram study with objective findings limited to some restriction of motion of the cervical spine. Dr. Carl diagnosed cerviothoracic and lumbar staining injury. She felt that appellant was gradually responding to chiropractic care but opined that he would benefit from physical therapy and massage treatment.

In a November 18, 1998 treatment note, Dr. Hansen indicated that appellant's manipulation treatment was down to once every ten days and reported continued improvement. He subsequently discharged appellant in a January 27, 1999 progress report, noting that appellant was to see him in the future on an "as needed" basis. Dr. Hansen stated that if appellant did not come in during the next 30 to 45 days the claim could be closed.

On March 22, 1999 Dr. Hansen noted that appellant experienced a flare-up on January 27, 1999 at work and was suspended from his job when he asked his supervisor if he could go home early and got in an argument with the supervisor when the request was denied.

The record indicates that appellant went to see Dr. Hansen for flare-ups on a regular basis, about four times per month, from January 27 until May 3, 1999. He felt that appellant would benefit from acceptance into the United Backcare program and sent him for an evaluation by Dr. Dan A. Welch. In subsequent correspondence between theses physicians, it was noted that appellant did not seem interested in participating in the work-hardening program conducted at United Backcare and preferred to rely on occasional chiropractic treatment. It was noted that the goal was to get appellant back to work on a full-time basis.

Appellant was referred by Dr. Hansen for a physical capacity evaluation on May 25, 1999. He was found to meet the light- to medium-work category. He was able to tolerate a mid-level lift on a "seldom" basis of 35 pounds. Appellant was able to tolerate 25 pounds on an occasional basis. It was further noted that appellant related difficulty with prolonged sitting and standing and felt he was very limited in his activities secondary to pain.

On August 21, 1999 the Office requested a reasoned opinion from Dr. Welch outlining appellant's medical condition and the recommended course of clinical treatment.

In a November 10, 1999 report, Dr. Welch noted that appellant's "objective" findings including loss of range of motion and his complaints of pain.. He stated that appellant was not gaining anything from being off work and not being functionally active. Dr. Welch's diagnosis was degenerative disc and joint disease in the lumbar spine aggravated by his work-related lifting injuries. He again recommended that appellant participate in a work-hardening program which would aid in identifying appellant's level of functioning with chronic back pain.

The Office scheduled appellant for a second opinion evaluation with Dr. Scott Van Linder on June 7, 2000. Appellant's chief complaint was listed as chronic neck and mid back pain. After reviewing the medical record, Dr. Linder opined that appellant's chronic lumbar symptoms were originally due to the June 15, 1997 lifting incident and further aggravated by the August 8, 1998 work injury. He stated that appellant continued to suffer residuals from his accepted work injuries and was in need of muscoskeletal active rehabilitation and reconditioning.

In a work capacity evaluation form completed by Dr. Linder on June 7, 2000, he reported that appellant was unable to work eight hours per day. He noted restrictions of 1 to 2 hours of sitting, walking and standing. Appellant was to push and pull no more than 60 pounds and lift no more than 30 pounds. He was instructed to avoid squatting, kneeling and climbing.

In an August 3, 2000 progress note, Dr. Hansen noted that appellant was seen on an "as needed" basis and had been to his office 13 times form June through August 2000. He indicated that spinal adjustments continued to offer appellant relief from back pain and enabled him to participate in daily activities.

On August 10, 2000 Dr Welch discharged appellant from his care. He noted that appellant was not interested in participating in the work hardening program. Dr. Welch further

noted that overall appellant did not have major lower back or radicular symptoms to the point where he needed further diagnostic tests or surgery or any kind of injections.

In an October 21, 2000 letter, appellant's supervisor noted that appellant returned to duty with light-duty restrictions that the employing establishment was unable to accommodate. She noted that appellant was scheduled to return to regular duties on November 2, 2000.

The record indicates that appellant was seen a the VA Health clinic by a nurse practitioner on October 20, 2000 and placed on light duty for two weeks, returning to usual duties thereafter.

In a "time loss/restriction authorization" form dated November 10, 2000, Dr. Hansen advised that appellant was under his care and should be excused from work from November 3 to 8, 2000 to avoid further aggravation of his back condition.

In several CA-7 forms, appellant sought leave buyback for the period of October 21 through December 1, 2000. The record indicates that he resigned from his position effective December 1, 2000. The Office approved the Form CA-7 application for leave buy back on July 16, 2001 for the period October 21 to November 29, 2000.

In July 25, 2001 report, the Office requested information from Dr. Welch regarding appellant's medical status following the accepted August 6, 1998 work injury and when it was anticipated that appellant could be released to light duty or part-time work.

The Office referred appellant for a second opinion evaluation on August 17, 2001 with Dr. Alan R. Wilson, a Board-certified orthopedist. In a report dated August 17, 2001, Dr. Wilson reviewed a statement of accepted facts and discussed appellant's medical history and work injuries. Physical findings were reported and a lumbar magnetic resonance imaging (MRI) scan dated June 12, 2000 was noted as showing bulging at L45-S1 and evidence of degenerative disc disease. Lumbar and cervical x-rays were reviewed and revealed no subluxation. Dr. Wilson expressed some doubt as to whether appellant ever had subluxations corroborated by x-ray evidence, but nonetheless opined that he had returned to baseline status prior to his work injuries. He noted that appellant had a psychological overlay to his complaints of pain as he perceives that his back condition has worsened over time despite frequent chiropractic visits. Dr. Wilson recommended that appellant undergo in depth psychological evaluation. He completed an Office form based "solely on subjective rather than objective findings." Dr. Wilson reported that appellant could work 8 hours per day with a 30-pound pushing and pulling limitation and a 20-pound lifting restriction.

On September 10, 2001 appellant filed a claim alleging a recurrence of disability beginning August 6, 1998. The dated of original injury was listed as June 15, 1997. On the reverse side of the Form CA-2a claim form, appellant's supervisor noted that they were unable to accommodate appellant's medical restrictions as his condition worsened. It was noted that appellant resigned on December 1, 2000.

On October 2, 2001 the Office sent a copy of Dr. Wilson's report to Dr Hansen for review and comments. It was noted that,if a report was not received by Dr. Wilson in 30 days, the Office would assume that he agreed with the findings of Dr. Wilson.

In an October 29, 2001 letter, Dr. Welch indicated that he agreed with the Dr. Wilson's recommendation that appellant obtain psychological testing. He reiterated that appellant should be considered for the pain clinic.

In a decision dated December 31, 2001, the Office denied appellant's claim for a currence of disability.

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 of record establishes that he or she 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 show that he or she cannot perform such light duty. As part of this burden, the employee must show either a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.[1]

In this case, appellant is seeking compensation for wage-loss disability beginning December 1, 2000 when he resigned from his light-duty job with the employing establishment. The CA-2a form signed by appellant's supervisor indicates that the employing establishment was unable to accommodate appellant's medical restrictions as set forth by his treating physician. The Board, notes that the Office did not properly develop the issue of whether appellant established a recurrence of disability due to the unavailability of light-duty work.

Moreover, the Office did not advise appellant of the medical or factual evidence required to establish his claim for compensation. The Office correctly notes that the opinion of Office referral physician, Dr. Wilson, and the October 29, 2001 treatment note by Dr. Welch are insufficient to establish a recurrence of disability. However, Dr. Wilson does not specifically address appellant's work capacity subsequent to December 1, 2000 and prior to the date of his report.[2]

The Office procedures indicated that the Office must advise a claimant of the defects in his or her claim.[3] It is well established that proceedings under the Federal Employees' Compensation Act are not adversarial in nature and, while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.[4]

[1] *Gus N. Rodes*, 46 ECAB 518 (1995).

[2] The Office's decision implies that Dr. Wilson's second opinion evaluation was obtained to address appellant's claim for a recurrence of disability; however, appellant's Form CA-2a application was filed subsequent to the physician's opinion. The Office did not undertake any direct medical development of the recurrence of disability claim and did not provide appellant with any information pertaining to his burden of proof.

[3] Federal (FECA) Procedure Manual, Part 2 -- Claims, Occupational Illness, Chapter 2.806.6 (April 1991); *Shirley A. Temple,* 48 ECAB 404 (1997).

[4] *Shirley A. Temple*, 48 ECAB 404 (1997); *Dorothy L. Sidwell*, 36 ECAB 699 (1985).

In light of the failure of the Office to ascertain whether or not light-duty work was made available to appellant after December 1, 2000 and to further advise appellant of his burden of proof, the Board finds that the denial of compensation was improper.

The decision of the Office of Workers' Compensation Programs dated December 31, 2001 is hereby vacated and the case is remanded for further consideration consistent with this opinion.

Dated, Washington, DC
January 9, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member