U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH E. FANZO and U.S. POSTAL SERVICE,
POST OFFICE, Pittsburgh, PA

Docket No. 03-702; Submitted on the Record;
Issued May 21, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant sustained a recurrence of disability for the period March 22, 1995 to September 11, 1996.

This case has been before the Board on two previous occasions. By decision dated September 19, 1997, the Board found the case not in posture for decision because a conflict in medical opinion existed with respect to whether appellant was able to return to full-time work on March 23, 1995. The Board remanded the case to the Office of Workers' Compensation Programs to refer appellant, along with an updated statement of accepted facts, for an impartial medical evaluation to address the nature and extent of appellant's employment-related condition.[1]

Subsequent to the Board's September 19, 1997 decision,[2] by letter dated July 30, 1998, the Office referred appellant, together with the medical record, a set of questions and an updated statement of accepted facts,[3] to Dr. Patrick G. Laing, a Board-certified orthopedic surgeon, for an impartial medical evaluation.

By decision dated August 27, 1999, the Office credited the weight of medical opinion to Dr. Laing and denied that appellant sustained a recurrence of disability. By letter dated September 26, 1999, appellant requested reconsideration and submitted additional medical

[1] Docket No. 97-83.

[2] The Board notes that appellant returned to work on September 9, 1996. On September 24, 1996 appellant filed a recurrence claim, stating that on September 23, 1996 he sustained pain and blurred vision while sitting in a chair repairing mail. He did not stop work but missed intermittent periods thereafter until he was terminated in 1997. By decision dated January 16, 1997, the Office denied that appellant sustained a recurrence of disability on September 23, 1996. Appellant did not file an appeal with the Board regarding this decision.

[3] The statement of accepted facts dated July 14, 1998 provides, *inter alia*, that the Office accepted that appellant sustained an employment-related herniated disc at C4-5 with chronic pain syndrome and headaches.

evidence. In a January 5, 2000 decision, the Office denied appellant's reconsideration request, finding that the evidence submitted was duplicative.

Appellant again filed an appeal with the Board and requested an oral argument that was held on June 12, 2002. By decision dated August 16, 2002, the Board remanded the case to the Office, finding that, as Dr. Laing's report was insufficient to resolve the conflict in medical opinion, the conflict was unresolved.[4] The Board remanded the case to the Office to prepare an updated statement of accepted facts and a supplemental report from Dr. Laing, after which it was to issue a *de novo* decision.[5] The law and the facts as set forth in the previous Board decision and orders are incorporated herein by reference.

Subsequent to the Board's August 16, 2002 decision, by letter dated November 1, 2002, the Office referred appellant, together with an updated statement of accepted facts, a set of questions and the medical record to Dr. W. Scott Nettrour, a Board-certified orthopedic surgeon. Based on Dr. Nettrour's opinion, in a decision dated January 2, 2003, the Office denied that appellant sustained a recurrence of disability beginning March 23, 1995. The Office further found that, as appellant suffered no permanent employment-related impairment, he was not entitled to a schedule award. The instant appeal follows.

The Board finds that this case is not in posture for decision.

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.[6] 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.[7]

Causal relationship is a medical issue,[8] and the medical evidence required to establish a causal relationship is rationalized medical evidence. Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed

[4] The Board found that Dr. Laing did not base his opinion on an accurate history of the accepted conditions.

[5] Docket No. 00-1115.

[6] The record provides that, following his employment injury, appellant returned to limited duty on February 21, 1995.

[7] *Mary A. Howard*, 45 ECAB 646 (1994); *Cynthia M. Judd*, 42 ECAB 246 (1990); *Terry R. Hedman*, 38 ECAB 222 (1986).

[8] *Mary J. Briggs*, 37 ECAB 578 (1986).

condition and the specific employment factors identified by the claimant.[9] Furthermore, in situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[10]

Under the Federal Employees' Compensation Act,[11] the term "disability" means incapacity, because of the employment injury, to earn the wages that the employee was receiving at the time of injury. Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn the wages. An employee who has a physical impairment causally related to a federal employment injury, but who nonetheless has the capacity to earn wages she was receiving at the time of injury, has no disability as that term is used in the Act.[12]

In the instant case, the Office referred appellant to Dr. Nettrour, a Board-certified orthopedic surgeon, to provide an impartial medical evaluation. In a report dated December 4, 2002, Dr. Nettrour described appellant's complaints, his review of the medical evidence and findings on physical examination. While he advised that, at the time of his examination on December 4, 2002, appellant was capable of working an eight-hour day, he did not address the accepted conditions or whether appellant was disabled from work for the period March 22, 1995 to September 11, 1996, the relevant issue in the case.

In assessing medical evidence, the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors which enter in such an evaluation include the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of the analysis manifested and the medical rationale expressed in support of the physician's opinion.[13] Furthermore, the Office has a responsibility to secure a supplemental report from an impartial medical specialist to correct a defect in the original report.[14]

As Dr. Nettrour did not discuss appellant's accepted conditions or discuss appellant's ability to work for the period March 22, 1995 to September 11, 1996, his report was insufficient to resolve the conflict in medical opinion.[15] The Board finds that a conflict in the medical evidence remains. The case will therefore be remanded for the Office to obtain a supplemental

[9] *Gary L. Fowler*, 45 ECAB 365 (1994); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[10] *See Kathryn Haggerty*, 45 ECAB 383 (1994); *Edward E. Wright*, 43 ECAB 702 (1992).

[11] 5 U.S.C. §§ 8101-8193.

[12] *See Maxine J. Sanders*, 46 ECAB 835 (1995).

[13] *Gary R. Sieber*, 46 ECAB 215 (1994).

[14] *Richard O'Brien*, 53 ECAB ___ (Docket No. 00-1665, issued November 21, 2001).

[15] *See Leonard M. Burger*, 51 ECAB 369 (2000).

report from Dr. Nettrour to address these issues.[16] After such development as it deems necessary, the Office shall issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs January 2, 2003 is hereby set aside and the case is remanded to the Office for proceedings consistent with this opinion.

Dated, Washington, DC
May 21, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[16] When the impartial medical specialist's statement of clarification or elaboration is not forthcoming to the Office, or if the physician is unable to clarify or elaborate on the original report, or if the physician's report is vague, speculative or lacks rationale, the Office must refer the employee to another impartial specialist for a rationalized medical opinion on the issue in question. *Id.*