United States Department of Labor
Employees' Compensation Appeals Board

ROBERT E. FENZEL, Appellant	)	
and	)	**Docket No. 04-1222**
	)	**Issued: September 10, 2004**
DEPARTMENT OF THE ARMY, YUMA PROVING GROUND, Yuma, AZ, Employer	)	

Appearances:
Robert E. Fenzel, pro se
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On April 6, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated January 8, 2004, denying a claim for a recurrence of disability and finalizing an overpayment determination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has established a recurrence of disability as of March 2, 2002; and (2) whether the Office properly adjudicated the overpayment of compensation issue.

FACTUAL HISTORY

On June 7, 1991 appellant, then a 39-year-old explosives test operator, filed a claim alleging that on June 6, 1991 he sustained injury to his legs when a bag of munitions detonated. By letter dated August 15, 1991, the Office accepted the claim for shrapnel injuries to both legs. The record contains little evidence with respect to the claim until November 8, 1999, when

appellant filed a notice of recurrence of disability commencing August 10, 1999. The Board notes that the record does contain a March 22, 1996 report from Dr. John R. Sobotka, a psychiatrist, who stated that he had treated appellant since August 9, 1991. The physician noted that appellant had been involved in an explosion at work and was suffering from an adjustment disorder with depression. Dr. Sobotka stated that appellant had a biological depression that was markedly exaggerated by the explosion and the emotional trauma caused by the explosion.

In a letter from the Office to Dr. Sobotka dated June 27, 1996, it noted that appellant had been referred for evaluation and treatment concerning any psychiatric component directly attributable to the explosion incident of June 6, 1991. According to the Office, Dr. Sobotka had reported on March 17, 1993 that appellant was then quite stable and without significant psychiatric difficulties and the Office closed the case in 1993. The Office concluded that the case file dealt only with medical conditions caused by the June 1991 injury and all other conditions, whether preexisting or subsequently acquired, would not be covered.

By letter dated January 26, 2000, the Office noted that it accepted intra-articular debris and shrapnel in the right knee joint as employment related and authorized right knee surgery. On February 23, 2000 appellant underwent right knee surgery. On October 17, 2001 appellant filed a Form CA-2a and by letter dated December 20, 2001, the Office stated that the claim was accepted for open wound of the leg with tendon involvement.

In a Form CA-3 (report of termination of disability and/or payment), the employing establishment reported that appellant returned to a light-duty job on February 14, 2002. On April 27, 2002 he filed a Form CA-2a indicating that he stopped working on March 2, 2002. Appellant stated that he had a post-traumatic stress disorder since 1996, when treatment was "cut off" and his knee pain had increased.

In a report dated April 19, 2002, Dr. Eva McCullers, a psychiatrist and associate of Dr. Sobotka, noted that appellant's history indicated a prior treatment with Dr. Sobotka "and reported that treatment should have been under workers' comp[ensation] in relation to the industrial injury." Dr. McCullers diagnosed a bipolar disorder mixed with compulsive behavior and stated that appellant's most recent bout with decompensated mental status was secondary to pain medication addiction, stress from work and knee problems. Dr. McCullers stated that he should able to return to work by May 1, 2002.

The record contains a June 24, 2002 letter from the employing establishment regarding appellant's recurrence of disability claim. The employing establishment noted that appellant stated he was suffering from post-traumatic stress disorder and "this was at one time an accepted condition until a second opinion physician indicated that, although [appellant] has some preexisting and ongoing conditions, they were not residuals of the 1991 injury."

Appellant under went right knee surgery on July 15, 2002. In a letter dated July 16, 2002, the Office stated that compensation was being paid from June 17 until July 19, 2002. He was advised to submit claims for compensation for additional compensation after July 19, 2002.

By decision dated September 13, 2002, the Office denied appellant's claim for a recurrence of disability. The Office noted that Dr. McCullers had reported that he received

treatment under workers compensation, but found that this was incorrect, citing the June 27, 1996 letter. The Office found that the medical evidence did not establish a causal relationship between any emotional condition and the work injury.

By letter dated October 3, 2002, appellant requested an oral hearing.

By letter dated May 30, 2003, the Office advised appellant that it had made a preliminary determination that a $6,327.95 overpayment of compensation was created. The Office stated that appellant had returned to work on December 19, 2002 but had received compensation for total disability through March 22, 2003. The Office also made a preliminary determination that he was at fault in creating the overpayment. Appellant requested a prerecoupment hearing on the overpayment issues.

A hearing before an Office hearing representative was held on October 21, 2003 with respect to both the recurrence of disability and the overpayment issues. Appellant submitted a December 18, 2002 report from Dr. Jeanne Elnadry, an internist, who stated that his depression and post-traumatic stress disorder were exacerbated when his right knee pain became worse. In a report dated October 4, 2002, Dr. McCullers provided a history and reviewed medical evidence. Dr. McCullers opined that the 1991 injury had sensitized the body's defense system response to stress.

By decision dated January 8, 2004, the hearing representative affirmed the September 13, 2002 Office recurrence of disability denial. The hearing representative found that Dr. McCullers' opinion appeared to be based on the mistaken assumption that the claim had been accepted for an emotional condition. With respect to the overpayment, the hearing representative stated in a footnote, "as there is no dispute that the overpayment exists and the claimant has set the money aside, I find that the overpayment should be repaid in one lump sum."

LEGAL PRECEDENT -- ISSUE 1

When an employee who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that light duty can be performed, the employee has the burden to establish by the weight of reliable, probative and substantial evidence a recurrence of total disability. As part of this burden of proof, 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]

ANALYSIS -- ISSUE 1

In the present case, appellant filed a notice of recurrence of disability indicating that he stopped working a light-duty position on March 2, 2002. The record indicates that the Office paid compensation from June 17, 2002 through appellant's return to work on December 19, 2002. Therefore, the issue is appellant's disability for the period March 2 until June 16, 2002.

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

Appellant's claim for total disability prior to his July 15, 2002 knee surgery is primarily based on evidence with respect to an emotional condition. The Office denied the claim on the grounds that an emotional condition was not an accepted condition and the evidence did not establish causal relationship. The record transmitted to the Board, however, does not provide adequate support for the Office's findings.

The employing establishment indicated in a June 24, 2002 letter, that an emotional condition was an accepted condition in this case. Appellant has also indicated that his initial treatment with Dr. Sobotka was for a condition accepted as employment related. The September 13, 2002 Office decision refers to a June 27, 1996 letter to Dr. Sobotka to support a finding that an emotional condition was not accepted, but this letter does not resolve the issue. The letter acknowledges that appellant was referred to Dr. Sobotka for evaluation and treatment of any psychiatric component related to the employment incident and that the case was eventually closed in 1993. The Office may have initially accepted an emotional condition with respect to this claim. The record transmitted to the Board does not contain the March 17, 1993 report from Dr. Sobotka referenced in the June 27, 1996 letter, nor does it contain evidence with respect to a second opinion physician or other development of the claim with respect to an emotional condition.

Accordingly, the case will be remanded to the Office to obtain any available evidence with respect to the development of the claim from 1991 to 1993.[2] After appropriate development the Office should issue a decision with proper findings of fact and an analysis of the medical evidence on the issue of a recurrence of disability as of March 2, 2002.

LEGAL PRECEDENT -- ISSUE 2

Section 8116 of the Federal Employees' Compensation Act defines the limitations on the right to receive compensation benefits. This section of the Act provides that, while an employee is receiving compensation, he may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.[3] 20 C.F.R. § 10.500 provides that "compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury."

ANALYSIS -- ISSUE 2

The Office hearing representative noted that the Office made a preliminary determination of a $6,327.95 overpayment of compensation and that the issue of an overpayment was discussed at the hearing. The hearing representative appears to finalize the preliminary determination by briefly stating that appellant did not dispute, that the overpayment existed, that he had set the money aside and, therefore, appellant should repay the overpayment.

[2] In this regard, the Office may request medical evidence relevant to this period from the office of Dr. Sobotka and Dr. McCullers.

[3] 5 U.S.C. § 8116(a).

The Board finds that the Office failed to make proper findings of fact with respect to the overpayment. It is a well-established principle that the Office must make proper findings of fact and a statement of reasons in its final decisions.[4] Whether appellant contests the overpayment amount, the Office must issue a final decision that clearly explains how the overpayment occurred and how the amount was calculated. Moreover, appellant submitted financial evidence and, on appeal, he contests his ability to repay the overpayment. Appellant is entitled to a decision that clearly explains the findings on fault and waiver of the overpayment. The case will be remanded for an appropriate decision on the overpayment issues presented.

CONCLUSION

The Board finds that the Office failed to make proper findings with respect to the issues of a recurrence of disability and an overpayment of compensation.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs' dated January 8, 2004 is set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Issued: September 10, 2004
Washington, DC

Alec J. Koromilas
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[4] *See Arietta K. Cooper*, 5 ECAB 11 (1952); 20 C.F.R. § 10.126.