United States Department of Labor
Employees' Compensation Appeals Board

STEPHEN V. CARKNARD, JR., Appellant	)	
and	)	**Docket No. 04-2186**
	)	**Issued: August 19, 2005**
DEPARTMENT OF THE ARMY, WATERVLIET ARSENAL, Watervliet, NY, Employer	)	

Appearances:
Stephen V. Carknard, Jr., pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 7, 2004 appellant filed an appeal from decisions of the Office of Workers' Compensation Programs dated January 20 and July 1, 2004, denying his claim for a recurrence of disability from August 12, 1994 to February 21, 1995. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant has established that he sustained a recurrence of disability from August 12, 1994 to February 21, 1995, causally related to an accepted June 26, 1979 left knee injury and consequential left foot and lumbar fractures.

FACTUAL HISTORY

This is appellant's third appeal before the Board in this case. By decision dated January 13, 1998,[1] the Board set aside a January 13, 1995 wage-earning capacity determination

[1] Docket No. 95-2190 (issued January 13, 1998).

and remanded the case to the Office for further development regarding whether it considered appellant's compressed work schedule when determining appellant's compensation. The Board also affirmed an April 29, 1995 decision denying his request for a hearing as untimely filed. By decision dated February 25, 2002,[2] the Board affirmed a December 28, 1999 decision of the Office finding a $1,143.21 overpayment of compensation had occurred from October 18 to December 11, 1993, as he received total disability compensation while working, as well as a $1,342.39 overpayment of compensation for the period December 28, 1997 to October 10, 1998, as he received augmented compensation while having no eligible dependents. The Board affirmed the Office's finding that appellant was at fault in the creation of both overpayments. The law and the facts of the case as set forth in the Board's prior decisions are hereby incorporated by reference.

The Office accepted that on June 26, 1979 appellant, then a 36-year-old machinist, sustained chondromalacia of the left patella and a partial rupture of the anterior cruciate ligament of the left knee when he twisted his left leg after it got caught on a pallet. On August 23, 1979 Dr. Paul Clark, an attending orthopedic surgeon, performed a left knee arthrotomy to repair chondromalacia of the patella and rupture of a small number of fibers of the anterior cruciate ligament. Following the injury, appellant returned to work on April 14, 1980. He again stopped work on June 16, 1980 when his left knee gave way. On June 23, 1980 the left knee gave way again, causing appellant to fall. The Office then accepted a June 16, 1980 recurrence of disability and consequential June 23, 1980 injuries of a fractured L1 disc and a fractured left foot. He remained off work and submitted periodic medical reports.[3]

The Office provided vocational rehabilitation services beginning in March 1993. On August 9, 1993 the employing establishment offered appellant a light-duty part-time position as an identification clerk, with duties involving the preparation of photo identification cards for employing establishment personnel. The proposed schedule was from 12:00 p.m. to 4:00 p.m. Monday through Friday, with wages of $10.21 per hour. In an August 20, 1993 letter, the Office advised appellant that the offered position was suitable work within his medical restrictions. He began work in the identification clerk position on October 18, 1993.

In an October 14, 1993 report, Dr. Shashi Patel, an attending Board-certified orthopedic surgeon, diagnosed chronic low back pain syndrome secondary to an old L1 compression fracture and status post medial meniscectomy left knee with early degeneration. He noted appellant's impending return to work. In a November 26, 1993 report, Dr. Patel noted work restrictions of no lifting, bending, squatting, climbing, kneeling or twisting. He limited appellant to working four hours a day, noting that he had reached maximum medical improvement. Dr. Patel also limited standing to one hour, walking to two hours and sitting to four hours a day.

[2] Docket No. 00-1440 (issued February 25, 2002).

[3] In a November 7, 1983 report, Dr. Rudolph F. Tadonio, an attending orthopedist, diagnosed an L1 compression fracture with involvement L4-S1. He underwent a left knee arthroscopy in 1983. On August 31, 1984 Dr. Alan Moskowitz, an attending orthopedist, noted instability at L1 with back pain. Dr. Edwin E. Mohler, a Board-certified orthopedic surgeon, on February 27, 1990 and second opinion physician, diagnosed status post 1979 L1 compression fracture, 1979 left knee meniscus and anterior cruciate repair, 1980 left fifth metatarsal fracture, 1983 arthroscopy and chronic low back pain syndrome with left-sided paresthesias since at least 1982. Appellant was treated for left knee pain on December 16, 1991 by Dr. Mary Greulick, an attending Board-certified internist.

By decision dated January 25, 1994, the Office advised appellant that it was reducing his wage-loss compensation benefits to reflect his actual earnings as an identification clerk.

Appellant again stopped work on August 11, 1994. On October 20, 1994 appellant filed a claim for a recurrence of disability commencing on "approximately June 20, 1994." He filed claims for wage-loss compensation.

Appellant submitted medical evidence in support of his claim for recurrence of disability. In an August 12, 1994 report, Dr. David Herman, an attending Board-certified internist, diagnosed a flare-up of chronic low back pain. In a September 21, 1994 form report, Dr. Herman found appellant totally disabled from October 3, 1994 onward due to chronic low back pain with possible nerve root irritation. He checked a box "yes" indicating his support for a causal relationship between the claimed period of disability and the accepted lumbar fracture. In December 21, 1994 and March 6, 1995 form reports, Dr. Patel provided work restrictions limiting standing to one hour, walking to two hours and sitting to four hours, with all other activities prohibited. Dr. Patel noted that appellant should avoid damp or humid areas.[4]

By decision dated January 13, 1995, the Office found that appellant had been reemployed part time as an identification clerk, earning $210.40 a week. The Office found that the part-time identification clerk position was representative of his wage-earning capacity and adjusted his continuing compensation payments accordingly.[5]

Appellant returned to work on February 21, 1995 in the identification clerk position for four hours a day.

Appellant again stopped work on June 30, 1995. On October 31, 1995 the employing establishment terminated appellant due to a reduction-in-force (RIF). The employing establishment stated that appellant's position of identification clerk was being abolished as part of a RIF affecting all arsenal divisions. On January 30, 1996 appellant filed a claim for total disability compensation from October 31, 1995 onward. On December 5, 1995 appellant filed a claim for compensation for total disability from June 30 to October 8, 1995.

By decision dated May 22, 1998, the Office modified its January 13, 1995 wage-earning capacity determination to reflect that as of June 12, 1994, appellant was earning $189.36 a week on a compressed work schedule of 36 hours every two weeks instead of 40 hours. The Office noted that it was in the process of determining the amount of retroactive compensation owed to him for the period June 12, 1994 to May 23, 1998.

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[4] Subsequent medical reports of record do not address the period of the claimed recurrence of disability from August 12, 1994 to February 21, 1995.

[5] Appellant requested reconsideration. By letter decision dated May 18, 1995, the Office denied modification. Appellant then appealed to the Board, resulting in the issuance of the January 13, 1998 decision setting aside the January 13, 1995 decision and remanding the case to the Office to evaluate whether the January 13, 1995 wage-earning capacity determination was based on the correct work schedule. Following remand of the case, the Office conducted further development that revealed that as of June 12, 1994, the employing establishment adopted a compressed work schedule such that appellant worked only 18 hours a week, not 20 as the Office had found in its January 13, 1995 decision.

Following payment of compensation based on the May 22, 1998 wage-earning capacity determination for the period June 12, 1994 and continuing, the Office determined by decision dated December 28, 1999 that two overpayments of compensation had occurred in his case, totaling $2,485.60.[6]

On September 23, 2003 appellant filed a claim for a recurrence of disability for the periods September 1, 1994 to January 23, 1995, June 30 to October 6, 1995 and from October 19, 1995 onward. In a November 14, 2003 letter, the Office advised appellant of the type of evidence needed to establish his claim.

By decision dated January 20, 2004, the Office denied appellant's claim for a recurrence of disability commencing August 12, 1994 on the grounds that he submitted insufficient rationalized medical evidence to establish causal relationship. The Office found that appellant's September 23, 2003 claim form constituted a refiling of the October 20, 1994 claim.

In a February 11, 2004 letter, appellant requested a review of the written record by a representative of the Office's Branch of Hearings and Review. He asserted that the identification clerk position was not suitable work as the job had begun to require lifting equipment, standing, kneeling, squatting and twisting, in violation of his work restrictions. He submitted additional evidence.[7]

In an August 12, 1994 report, Daniel Wiest, a physician's assistant, noted appellant's complaints of back pain and held him off work. Gary Schulte, a physician's assistant, provided September 1 and 29, 1994 reports addressing appellant's complaints of back pain and held him off work from September 29 to November 28, 1994.

In a November 23, 1994 report, Dr. Joseph F. Emrich, an attending Board-certified orthopedic surgeon of professorial rank, provided a history of injury and treatment and diagnosed a lumbar strain and facet pain. He prescribed a two-month course of physical therapy and held appellant off work for that period.

By decision dated and finalized July 1, 2004, an Office hearing representative affirmed the Office's January 20, 2004 decision, finding that appellant failed to establish a recurrence of disability for the period August 12, 1994 to February 21, 1995, as he submitted insufficient evidence to establish either a change in the nature and extent of his accepted conditions or in his light-duty job requirements. The hearing representative found that there was no contemporaneous factual or medical evidence that the identification clerk position exceeded appellant's work restrictions. The hearing representative further found that the reports of Mr. Wiest and Mr. Schulte did not constitute probative medical evidence as physician assistants are not considered physicians under the Federal Employees' Compensation Act. The hearing representative also found that Dr. Emrich attributed appellant's disability to a lumbar strain not accepted by the Office and failed to provide sufficient rationale explaining why appellant was

[6] As noted, appellant appealed this decision to the Board.

[7] Appellant also submitted medical reports dated December 29, 1992 and from February 21, 2003 to January 8, 2004, which did not address the claimed period of recurrence of disability.

incapable of performing the part-time identification clerk position.[8] The Office also noted that its decision pertained only to the claimed recurrence of disability from August 12, 1994 to February 21, 1995. The Office explained that the issue of compensation for the periods June 30 to October 6, 1995 and from October 31, 1995 onward, when appellant was terminated from his position due to a RIF, was separate matters requiring further review and an additional decision.

LEGAL PRECEDENT

The Office's implementing regulations define a recurrence of disability as "an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness."[9]

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 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.[10] This 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]

ANALYSIS

The Office accepted that on June 26, 1979, appellant sustained a left knee sprain and torn anterior cruciate ligament, with consequential left foot and L1 fractures on June 23, 1980. Following these injuries, appellant returned to work on October 18, 1993 in a part-time, light-duty position as an identification clerk at the employing establishment. He performed light duty with intermittent absences through October 31, 1995, when his position was abolished due

[8] The hearing representative noted that his decision pertained only to the claimed recurrence of disability from August 12, 1994 to February 21, 1995, as the Office had not yet issued a final decision regarding the claimed period of total disability from June 30 to October 6, 1995 or from October 31, 1995 and continuing. He directed that "on return of the case record, the Office should issue final decisions on the claims for total disability compensation beginning June 30, 1995 and October 31, 1995."

[9] 20 C.F.R. § 10.5(x); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3.b(a)(1) (May 1997). *See also Philip L. Barnes*, 55 ECAB ___ (Docket No. 02-1441, issued March 31, 2004).

[10] *Albert C. Brown*, 52 ECAB 152 (2000); *see also Terry R. Hedman*, 38 ECAB 222 (1986).

[11] *Ronald A. Eldridge*, 53 ECAB 218 (2001); *see Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

[12] *Patricia J. Glenn*, 53 ECAB 159 (2001); *Ausberto Guzman*, 25 ECAB 362 (1974).

to a RIF. On October 20, 1994 and September 23, 2003, appellant filed a claim for a recurrence of total disability from August 12, 1994 to February 21, 1995. In order to prevail, appellant must demonstrate either a change in the nature and extent of his accepted left knee, left foot and lumbar injuries or in his light-duty job requirements.[13]

Appellant submitted medical reports addressing his condition from August 12, 1994 to February 21, 1995. In August 12 and September 21, 1994 reports, Dr. Herman, an attending Board-certified internist, diagnosed a flare-up of chronic low back pain with possible nerve root irritation and held appellant off work from October 3, 1994 onward. In the September 21, 1994 form report, Dr. Herman checked a box "yes" indicating his support for a causal relationship between the indefinite period of disability and the accepted lumbar fracture. However, the Board has held checking a box "yes" on a form report, without additional explanation or rationale, is not sufficient to establish causal relationship.[14] As Dr. Herman did not provide additional rationale explaining how and why appellant's accepted lumbar condition worsened as of August 12, 1994, his opinion is insufficient to meet appellant's burden of proof in this regard.[15]

In December 21, 1994 and March 6, 1995 form reports, Dr. Patel, an attending Board-certified orthopedic surgeon, provided work restrictions in December 21, 1994 and March 6, 1995 form reports. However, he did not opine that appellant's accepted conditions had worsened such that appellant was no longer able to perform the light-duty position or that the job exceeded his restrictions.

Appellant also submitted a November 23, 1994 report from Dr. Emrich, an attending Board-certified neurosurgeon of professorial rank. Dr. Emrich held appellant off work for two months due to a lumbar strain and facet pain. However, the Office did not accept either a lumbar strain or facet pain. As Dr. Emrich attributed his finding of disability to nonoccupational causes, his reports are irrelevant to establishing a worsening of the accepted conditions. Thus, appellant has not submitted sufficient medical evidence to establish a change in the nature and extent of his accepted conditions from August 12, 1994 to February 21, 1995.

Appellant's physicians did not provide medical rationale explaining how and why the accepted left knee, left foot and lumbar injuries would cause or contribute to the claimed recurrence of disability from August 12, 1994 to February 21, 1995.[16]

Appellant also submitted reports dated August 12 to September 29, 1994 by Mr. Schulte and Mr. Wiest, both physician's assistants. As a physician's assistant is not a physician within the meaning of the Act, these reports are of no probative medical value in this case.[17]

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[13] *Supra* note 10.

[14] *Donald W. Long*, 41 ECAB 142 (1989).

[15] *Albert C. Brown*, *supra* note 10.

[16] *Beverly A. Spencer*, 55 ECAB ___ (Docket No. 03-2033, issued May 3, 2004).

[17] *See* 5 U.S.C. § 8101(2); *Ricky S. Storms*, 52 ECAB 349, 353 (2001).

Alternatively, appellant alleged a change in the nature and extent of his light-duty position. In his February 11, 2004 request for a review of the written record, appellant asserted that his job duties required him to lift, stand, kneel, squat and twist in violation of his restrictions. However, appellant did not provide the date on which his assignment changed or any evidence quantifying these changes. Thus, appellant submitted insufficient evidence to establish a change in the nature and extent of his light-duty job assignment such that he could no longer perform it from August 12, 1994 to February 21, 1995.

Accordingly, the Board finds that the arguments and evidence submitted by appellant in support of his claim are insufficient to establish that he sustained a recurrence of total disability as alleged.

CONCLUSION

The Board finds that appellant has not established that he sustained a recurrence of disability from August 12, 1994 to February 21, 1995, causally related to the accepted June 26, 1979 and June 16, 1980 injuries, either due to a worsening of the accepted conditions or a change in his light-duty job requirements.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 1 and January 20, 2004 are affirmed.

Issued: August 19, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board