U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PHILLIP B. PROCTOR and DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, Bremerton, WA

Docket No. 02-2216; Submitted on the Record;
Issued May 19, 2003

DECISION and ORDER

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

The issue is whether appellant has established that he sustained a recurrence of disability commencing August 12, 1998, causally related to an accepted lumbar 1985 disc herniation.

The Office of Workers' Compensation Programs accepted that on July 16, 1985 appellant, then a 26-year-old animal caretaker, sustained a lumbar strain and herniated L4-5 disc superimposed on spinal stenosis, when he lifted a 40-pound bag of wood chips.[1] Appellant stopped work on July 16, 1985 returned to work on September 1, 1985 with intermittent absences. Appellant stopped work on March 1, 1986 and did not return.[2] He submitted periodic treatment notes through 1987.

From July 1988 to August 1992, appellant received vocational rehabilitation services, including testing, counseling and job placement assistance. In an October 26, 1990 report, an Office rehabilitation specialist identified the position of maintenance mechanical supervisor[3] as being within appellant's physical abilities[4] and vocational qualifications. The job was categorized as light work, with lifting up to 10 pounds and requiring stooping, kneeling, crouching, reaching, handling and fingering. Although the required vocational preparation was

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[1] Appellant also sustained a 1986 allergic reaction to a medication prescribed pursuant to the lumbar strain.

[2] Appellant submitted periodic affidavits of earnings and employment (Form EN-1032) dated from August 3, 1987 to November 4, 1996, stating that he had not worked during the 15 months prior to the date of the form.

[3] Department of Labor's *Dictionary of Occupational Titles*, Classification No. 638.131-026.

[4] In a September 11, 1990 report, Dr. Alvaro Sanchez, an attending Board-certified orthopedic surgeon, noted treating appellant for lumbar problems since 1986. He stated that appellant's "moderate symptoms related to a degenerated disc" did not contraindicate light-duty work. Dr. Sanchez limited lifting to 25 pounds, with no repeated twisting or forward bending.

listed as 4 to 10 years, the rehabilitation specialist noted that appellant had worked in the "field for over [4] years."

In September 1992, appellant relocated from Maryland to Macon, North Carolina. He received compensation for total disability through January 26, 1998.

In a January 13, 1993 report, Dr. Gary L. Kaplowitz, an attending Board-certified orthopedic surgeon, provided work restrictions based on a January 11, 1993 functional capacity evaluation. He released appellant to full-time light duty, with lifting limited to 20 pounds. Dr. Kaplowitz submitted October and November 1995 reports, reviewing a recent lumbar magnetic resonance imaging (MRI) scan showing "lateral recess stenosis with facet joint hypertrophy and obvious stenosis at both L4[-]5 and L5, S1."

By notice dated September 18, 1997 and finalized January 28, 1998,[5] the Office determined that the constructed position of maintenance mechanic supervisor was representative of appellant's wage-earning capacity and was within his medical limitations and vocational abilities.[6] Effective February 1, 1997, the Office reduced appellant's continuing compensation payments to reflect what he could earn in the selected position.

Appellant disagreed with this decision and in a January 30, 1998 letter, requested an oral hearing before a representative of the Office's Branch of Hearings and Review, held July 1, 1998. At the hearing, appellant testified that he had no experience in mechanics, except for a four- to six-week course in small engine repair after high school and five months work as a golf course maintenance mechanic in 1977. He also had no supervisory experience. Appellant testified that, since April 1998, he had worked in a tire shop "[b]alancing and mounting tires," causing constant back pain due to lifting tires.[7] He submitted additional medical evidence.

In an August 12, 1998 report, Dr. Divakar Krishnareddy, an attending Board-certified orthopedic surgeon, noted the accepted 1985 injury and related appellant's complaints of back pain with activity, "aggravated by long periods of sitting, standing and walking. Dr. Krishnareddy stated that appellant had stopped work at the tire shop due to back pain. He commented that appellant was able to work eight hours sedentary duty per day, with walking, sitting and standing limited to four hours each per day.

By decision dated and finalized October 5, 1998, the Office affirmed the January 26, 1998 decision.

[5] Appellant contested the proposed reduction in an October 6, 1997 letter, asserting that he had been rejected from many positions when employers learned of his medical history.

[6] In a May 13, 1997 report, an Office rehabilitation specialist stated that an April 17, 1997 labor market survey showed that maintenance mechanical supervisor positions were available in towns from 26 to 35 miles from appellant's home.

[7] In a November 2, 1998 affidavit of earnings and employment (Form EN-1032), appellant noted working from April 28 to September 22, 1998, at Tar Heel Tire Sales and Service as a tire changer, earning $6.50 per hour. Appellant reiterated this information in a November 9, 1999 Form EN-1032.

In a December 21, 1998 report, Dr. Krishnareddy noted that an October 5, 1998 lumbar MRI scan showed "degenerative changes of the diffuse disc bulging at the L4-5 level."[8] He found that appellant's condition was permanent and stationary and that he was "unable to return to a manual labor type of work because of the pain." He recommended sedentary work.

On March 10, 1999 appellant claimed an August 12, 1998 recurrence of total disability. He explained that he stopped work on August 12, 1998 due to increased back pain from standing "all day in the tire store and lifting heavy tires and using hand tools like tire wrenches." Appellant noted that he worked for 55 hours per week, earning $6.50 an hour or approximately $366.00 per week.

In an August 6, 1999 letter, the Office advised appellant of the type of additional medical evidence needed to establish his claim for recurrence of disability. The Office noted that Dr. Krishnareddy's August 12, 1998 report found that appellant was able to work eight hours per day light duty and that subsequent reports did not substantiate a change in his condition.

In an August 26, 1999 report, Dr. Krishnareddy diagnosed an L4-5 disc bulge with "possible chronic lumbosacral degenerative disc disease with elements of spinal stenosis." He stated that appellant "had an increase or aggravation of his condition and symptoms since September 1998. He had been doing better before that but his condition was aggravated during the five months he worked at a tire store and his pain became so severe that he was unable to continue working. From a medical standpoint, … the work at the tire store did cause an increase in his symptoms."

By decision dated September 7, 2000, the Office denied appellant's claim for a recurrence of disability on the grounds that he submitted insufficient medical evidence substantiating a total disability for work. The Office also found that Dr. Krishnareddy's August 26, 1999 report delineated a new, intervening lumbar injury from working at the tire shop.

Appellant disagreed with this decision and in a September 28, 2000 letter requested an oral hearing before a representative of the Office's Branch of Hearings and Review, held March 5, 2001.

Prior to the hearing, appellant submitted an October 31, 2000 report from Dr. Krishnareddy. He noted that appellant was disabled for work due to "fairly exhaustive physical work, changing tires " at the tire shop, with lumbar pain and radiculopathy "consistent since that time." Dr. Krishnareddy diagnosed "degenerative disc disease with degenerative disc bulge at L4-5 and possible lumbar spinal stenosis at that level."

At the hearing, appellant noted working at the tire shop from April 28 to August 27, 1998. He explained that he was fired from his position as a "tire changer/mechanic" after his supervisor observed his body mechanics and surmised that appellant had a prior back

[8] An October 5, 1998 lumbar MRI scan showed "[m]ild degenerative changes with a diffuse disc bulge … at the L4-5 level," without evidence of disc herniation.

injury. He was required to lift the tires down off the car by himself. Appellant stated that he experienced pain from his first day on the job, which eventually became excruciating.[9]

By decision dated and finalized May 30, 2001, the Office affirmed the September 7, 2000 decision, finding that appellant had not submitted medical evidence demonstrating a change in the nature and extent of his accepted lumbar condition such that he was physically incapable of performing the maintenance mechanical supervisor position.

Appellant disagreed with this decision and in an October 4, 2001 letter, requested reconsideration through his attorney. Appellant asserted that, while working at the tire shop, his pain "increase[d] diametrically" until he became totally disabled. Appellant also contended that he was no longer able to lift up to 20 pounds and thus could not earn wages as a mechanical maintenance supervisor. He submitted additional medical evidence.

In a September 19, 2001 report, Dr. Krishnareddy stated that, from "the medical records, including the 1995 and 1998 MRI [scan] reports," and from clinical examinations, he was "relatively certain" that, "in the five months of April to August 1998, [appellant] experienced a fairly rapid degeneration of his lumbar spine that results in a marked decrease in [appellant]'s ability to perform" all but purely sedentary activity. Dr. Krishnareddy noted that appellant "experienced degenerative changes" of the 1985 herniated L4-5 disc, "not the least severe, of which were when he worked or attempted to work changing tires." Dr. Krishnareddy also opined that appellant's current condition was also "unquestionably causally related" to the 1985 injury.[10]

By decision dated February 19, 2002, the Office denied modification on the grounds that the evidence submitted was insufficient to warrant such modification. The Office found that Dr. Krishnareddy's September 19, 2001 report, clearly established that appellant's employment at the tire shop caused an objective worsening of the accepted lumbar condition, representing "a new intervening work factor … and not a recurrence occurring as a direct natural result of [his] compensable primary injury." The Office also found that Dr. Krishnareddy's sedentary duty restrictions were due to the intervening effects of the tire shop job.

Appellant disagreed with this decision and in a March 18, 2002 letter, requested reconsideration through his attorney representative. Appellant asserted that he did not sustain a new injury at the tire shop, but that his lumbar condition degenerated spontaneously. Alternatively, appellant suggested that his work stoppage was due to an "increase in disability occurring from the weakness or impairment of a work[-]related injury." He submitted additional medical evidence.

[9] The hearing representative described the type of additional medical evidence needed to establish his claim, in particular, explaining why he could no longer lift up to 20 pounds due to a change in the nature and extent of his work-related condition. The hearing representative held the record open for 30 days to allow appellant to submit such evidence. Appellant did not submit additional evidence prior to issuance of the May 30, 2001 decision.

[10] Dr. Krishnareddy submitted periodic chart notes from September 27, 2000 to June 6, 2001, finding appellant's lumbar condition unimproved.

In a March 13, 2002 report, Dr. Krishnareddy opined that the 1998 "tire-changing job might have aggravated his existing condition but certainly not the whole cause for his contentious problems at this time." He stated that, as the 1998 MRI scan showed a diffuse degenerative disc bulge, there was "some deterioration in his condition, therefore, he was actually advised not to continue with the tire-changing work because of the aggravation it is causing him. It certainly did not help him … but there is no evidence in his medical history to suggest that he reinjured (sic) at that job." Dr. Krishnareddy stated that appellant was totally disabled for work due to "severe pain and he has degenerative disc disease at L4-5. This was all a progression of the injury that he sustained in 1985."

By decision dated June 7, 2002, the Office denied modification on the grounds that the evidence submitted was insufficient to warrant modification of the prior decision. The Office found that Dr. Krishnareddy's March 13, 2002 report again showed that appellant's 1998 employment was an intervening cause, breaking the chain of causation from the 1985 injury. The Office explained that appellant did not show a worsening of his condition "as a natural consequence arising from factors of [his] former federal employment."[11]

Appellant filed his appeal with the Board on September 5, 2002.[12]

The Board finds that appellant has not established that he sustained a recurrence of disability commencing August 12, 1998, causally related to the 1985 herniated lumbar disc.[13]

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 submission of rationalized medical evidence, based on a complete, accurate factual and medical history, explaining that the disabling condition continues to be causally related to employment factors.[14] Once the work-connected

[11] Following issuance of the June 7, 2002 decision, appellant submitted additional factual evidence. The Board may not consider this evidence for the first time on appeal as it was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c).

[12] In an August 29, 2002 letter, appellant, through his attorney representative stated that he was simultaneously requesting reconsideration from the Office and filing an appeal. The Board notes that the Board and the Office may not simultaneously have jurisdiction over the same issue in the same case. Although there is no evidence of record that the Office issued a decision regarding appellant's August 29, 2002 request for reconsideration, any such decision would be null and void as the case was pending before the Board on the same issue. *Russell E. Lerman*, 43 ECAB 770 (1992); *Douglas E. Billings*, 41 ECAB 880 (1990).

[13] The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one-year prior to the filing of the appeal. 20 C.F.R. §§ 501.2(c), 501.3(d)(2). As appellant filed his appeal with the Board on September 5, 2002 the only decisions properly before the Board are the February 19 and June 7, 2002 decisions regarding the claimed August 12, 1998 recurrence of disability. The January 28, 1998 decision, regarding loss of wage-earning capacity, the October 5, 1998 affirming it, are not before the Board on the present appeal. Although the issue on appeal is the alleged recurrence of disability, the September 7, 2000 decision denying this claim and the May 30, 2001 affirmance, are not before the Board due to the one-year time limitation.

[14] *See Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

character of any condition is established, its progression remains compensable unless such worsening can be shown to have been produced by a nonindustrial cause unrelated to the accepted causative work factors.[15] An award of compensation may not be made on the basis of speculation, or on appellant's unsupported belief of causal relation.[16]

In this case, appellant sustained a bulging L4-5 disc on July 16, 1985 when he lifted a heavy sack of wood chips. Vocational development identified the light-duty position of maintenance mechanical supervisor as representative of his wage-earning capacity as of January 28, 1998, with lifting limited to 20 pounds.

Medical reports prior to 1998 indicated that appellant was able to perform sedentary duty. In reports from January 13, 1993 through November 1995, Dr. Gary L. Kaplowitz, an attending Board-certified orthopedic surgeon, permitted full-time "light work," with lifting up to 20 pounds occasionally and up to 10 pounds frequently.

However, from April 28 to August 12, 1998, appellant worked as a tire changer, performing heavy lifting and working 55 hours per week, outside of his medical restrictions. Appellant subsequently claimed a recurrence of disability commencing August 12, 1998, which he attributed both to the arduous work of changing tires and the 1985 lumbar injury.

In support of his claim, appellant submitted several reports from Dr. Krishnareddy, an attending Board-certified orthopedic surgeon. However, Dr. Krishnareddy's reports indicate that appellant's lumbar condition on and after August 12, 1998, was related to an aggravation of the herniated lumbar disc caused by working at the tire shop from April 28 to August 12, 1998.

In an August 12, 1998 report, Dr. Krishnareddy noted that appellant's back pain was "aggravated by long periods of sitting, standing and walking" at the tire shop. He expanded on this opinion in an August 26, 1999 report, stating that appellant "had an increase or aggravation of his condition and symptoms since September 1998. …[H]is condition was aggravated during the five months he worked at a tire store.... From a medical standpoint … the work at the tire store did cause an increase in his symptoms." In an October 31, 2000 report, Dr. Krishnareddy opined that the tire shop job caused appellant's disability for work by increasing his lumbar pain and radiculopathy through "fairly exhaustive physical work, changing tires."

Dr. Krishnareddy also provided a detailed explanation of the objective worsening of the accepted L4-5 bulging disc caused by appellant working as a tire changer. In a September 19, 2001 report, he opined that degenerative changes of the diffuse L4-5 disc bulge seen on an October 5, 1998 lumbar MRI scan and not present in a 1995 study, made him "relatively certain" that appellant "experienced degenerative changes" of the 1985 herniated L4-5 disc, "when he worked or attempted to work changing tires." Dr. Krishnareddy noted in his March 13, 2002 report, that he advised appellant not to continue working at the tire shop due to the "deterioration in his condition" seen in the October 1998 MRI scan.

[15] *Raymond A. Nester*, 50 ECAB 173 (1998).

[16] *Ausberto Guzman*, 25 ECAB 362 (1974).

Thus, Dr. Krishnareddy set forth his medical reasoning, referring to specific objective findings, explaining that appellant's private sector employment as a tire changer from April 28 to August 12, 1998, caused degeneration of the accepted L4-5 herniated disc, disabling him from all but sedentary duty. The Board finds that this degeneration constitutes an intervening cause, breaking the chain of causal relationship from the accepted July 1985 injury. Thus, appellant is not entitled to further compensation, as his disability for work on and after August 12, 1998 no longer stems from factors of his federal employment.

The Board notes that, in his September 19, 2001 report, Dr. Krishnareddy also opined that appellant's current condition was also "unquestionably causally related" to the 1985 injury. He reiterated this opinion in a March 13, 2002 report, commenting that this was "all a progression of the injury that he sustained in 1985." However, considering the detailed rationale presented in the majority of his reports explaining how and why the tire-changing job caused a degeneration of the L4-5 bulging disc, Dr. Krishnareddy's gloss on his prior opinions of causal relationship is of very little probative value.[17]

Consequently, appellant has not met his burden of proof in establishing that he sustained a recurrence of disability on and after August 12, 1998 causally related to the July 16, 1985 herniated L4-5 disc, as the medical evidence supports that he experienced an intervening, permanent aggravation of his accepted condition in private sector employment from April 28 to August 12, 1998.

The decisions of the Office of Workers' Compensation Programs dated June 7 and February 19, 2002 are hereby affirmed.

Dated, Washington, DC
May 19, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

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