U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN L. ACKERMAN and DEPARTMENT OF THE NAVY, INDIAN ISLAND NAVAL BASE, Bremerton, Wash.

Docket No. 95-2862; Submitted on the Record;
Issued May 13, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, BRADLEY T. KNOTT

The issue is whether appellant has established any disability after June 8, 1992 that is causally related to his accepted employment injury of back strain or the resulting surgeries.

On December 21, 1948 appellant, then a 19-year-old helper general, strained his back while lifting a plank off a hatch cover. Appellant was terminated due to a reduction-in-force on June 24, 1949. Appellant underwent several approved surgeries for his back condition, which the Office of Workers' Compensation Programs found to be a work-related injury. The Office found that appellant was temporarily totally disabled and paid appropriate compensation for the following periods: March 1, 1957 to July 1, 1958, July 6 to September 1959, January 1960 to August 1961, February 12, 1971 to January 10, 1972, November 15 to 27, 1974 and March 15, 1976 to October 25, 1976 when he was found able to return to work. On November 13, 1980 appellant notified the Office that his employment with Weyerhaeuser Company as a first bleacherman had ceased October 5, 1980 and alleged that he stopped work due to back pain related to his work-injury related surgeries.[1] In a decision dated August 10, 1981, the Office advised appellant that the medical evidence was insufficient to establish that his condition was causally related to his December 21, 1948 employment injury.[2] On July 11, 1983 and June 5, 1984 appellant filed a CA-8 claim for continuing compensation beginning October 5, 1980. On October 29, 1987 appellant was advised that his claim was disallowed and that he must file a claim for recurrence as there had been no record of medical treatment since 1985. On July 19, 1991 appellant underwent lumbar laminectomy decompression surgery performed by Dr. Robert C. Buza, a Board-certified orthopedic surgeon, due to lumbar stenosis at the L3-4. On September 13, 1991 appellant filed a claim for recurrence of disability beginning February 19, 1991 and indicated that he stopped work following the recurrence on October 5,

[1] Appellant began working with the Weyerhaeuser Company on April 18, 1950.

[2] By decision dated August 21, 1981, an administrative law judge found that appellant met the requirements for a medical disability retirement under the Social Security Act.

1980. In March 1992 appellant underwent additional surgery on his back. On February 12, 1993 appellant filed a CA-7 form claim of disability on account of traumatic injury or occupational disease for disability beginning October 5, 1980. In letter decisions dated April 27 and June 29, 1993, the Office approved compensation for total disability for the period of July 17 to August 5, 1991 and March 13 to June 8, 1992, for surgical recovery periods, during which appellant was totally disabled, but further found that the medical evidence did not establish any disability on or after June 9, 1993. On October 5, 1993 appellant filed a CA-8 claim for continuing compensation, claiming compensation as a result of pay loss beginning June 8, 1992. By decision dated February 16, 1994, the Office found that appellant did not have any residual disability due to his December 1948 employment injury or the subsequently approved surgeries, was not entitled to any compensation for disability after June 8, 1992 and found that termination was properly terminated on that date. On March 15, 1994 appellant requested an oral hearing his case before an Office hearing representative. By decision dated June 5, 1995, an Office hearing representative affirmed the Office's February 16, 1994 decision.

The Board finds that appellant has not met his burden of proof in establishing any disability after June 8, 1992 causally related to his 1948 employment injury.[3]

An employee seeking benefits under the Federal Employees' Compensation Act has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed is causally related to the employment injury.[4] These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[5]

In the present case, appellant has not established that he had any disability after June 8, 1992 causally related to his 1948 employment injury or the subsequent approved surgeries for his condition. Relevant to this issue, appellant was referred for a second opinion examination on May 15, 1992 by Dr. Don E. Poulson, a Board-certified orthopedic surgeon. In a report dated June 8, 1992, Dr. Poulson noted the history of injury, which included five subsequent operations on appellant's back and appellant's medical history, which included double hernia repair in 1987, removal of a tumor from appellant's face in 1971, hypertensive arthritis of the hand and

[3] 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. As appellant filed his appeal with the Board on August 19, 1995, the only decision before the Board is the Office's June 5, 1995 decision. *See* 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[4] The Board notes that although the Office utilized terminology to the effect that it terminated appellant benefits effective June 9, 1992, a review of the record in this case reveals that it actually determined that appellant was only entitled to compensation for specific periods of temporary total disability in relation to his work injury related surgeries for which he had filed claims for continuing compensation. Thus, when appellant filed an additional claim for continuing compensation for the period of time beginning June 8, 1992, he had the burden of proof to establish disability for that time period as opposed to the Office having the burden of proof to justify termination of compensation; *see Donald Leroy Ballard*, 43 ECAB 876 (1992).

[5] *Ruthie M. Evans*, 41 ECAB 416 (1990); *Joe D. Cameron*, 41 ECAB 153 (1989).

asthma. Dr. Poulson diagnosed chronic lumbar pain with multiple levels of degeneration and status post five surgeries. He indicated that appellant's need for surgery was not related to the 1948 incident nor was this incident the cause for the five surgeries, although the surgeries were necessary for the condition. Dr. Poulson concluded that appellant could do the job of bleacherman if properly motivated as it did not require a great deal of bending or lifting, as described in the accompanying position description. In response to the Office letter dated July 20, 1993, which requested clarification, in a report dated July 29, 1992, Dr. Poulson reiterated that appellant could probably do the bleacherman's job from a physical standpoint and indicated that the surgeries were not responsible for any disability, but that the disability was related to appellant's conditions. By letter dated December 22, 1993, the Office requested that Dr. Buza review the reports by Dr. Poulson and respond to his assessment that appellant was no longer totally disabled as of June 8, 1992. In an undated letter received February 1, 1994, Dr. Buza responded that he concurred with Dr. Poulson's findings and agreed that appellant could perform the job of a bleacherman on June 8, 1992. Thus, Drs. Poulson and Buza, the second opinion physician and appellant's treating physician, agreed that appellant was no longer totally disabled from his regular job as of June 8, 1992.

On appeal, appellant contends that Dr. Poulson's report lacks probative value because he did not have a statement of accepted facts and that the Office did not provide him with the physical requirements of appellant's bleacherman job. However, in the Office's letter referring appellant to Dr. Poulson for second opinion examination and report, it advises him that a January 5, 1992 copy of a statement of accepted facts is attached. In addition, in his report, Dr. Poulson provided a history, in which he included that appellant had undergone five surgeries on his back and that he had a recurrent history of back pain, the very points of which appellant's counsel believed Dr. Poulson was unaware. Dr. Poulson also stated, "By the accepted facts, [appellant] did return to work soon after to his regular work." This statement and the physician's, referral to "accepted facts" is further indicia that Dr. Poulson was provided with a statement of accepted facts and did base his opinion on a complete relevant medical and social history of appellant. Similarly, in concluding that appellant could do the work of a bleacherman, Dr. Poulson stated, "By what I read, it did not require a great deal of bending or lifting." Thus, it appears that he is referring to a position description for the job of bleacherman in indicating that appellant was capable of performing this job as it did not require him to engage in restricted activities.[6]

Although appellant later submitted a form report dated March 3, 1994 by Dr. T. Moss, who diagnosed chronic back pain, Dr. Moss did not indicate the cause of appellant's condition or his disability. Appellant also submitted an outpatient neurosurgery consultation report dated February 22, 1994 by Dr. Mitchell Weinstein, a Board-certified neurosurgeon, who diagnosed failed back syndrome. However, while Dr. Weinstein provided an abbreviated history of injury including a description of the 1948 incident and the multiple surgeries, he also indicated that he

[6] A review of the record indicates that while the statement of accepted facts is not actually attached to the Office's May 15, 1992 referral letter, that letter and other evidence in the file, including two copies of Dr. Poulson's report, is not in any exact chronological order. The Board also notes that while the lengthy bleacherman job description is not attached to the Office referral letter, it was attached to the Office's later letter requested commentary from Dr. Buza on Dr. Poulson's report.

did not perform a complete physical examination and did not provide a conclusion regarding the source of the diagnosed condition of failed back syndrome. Consequently, the well-reasoned and rationalized report by Dr. Poulson, with which Dr. Buza concurred, constitutes the weight of the medical evidence relative to the issue of whether appellant had any disability after June 8, 1992 as the other medical reports, of record do not address the central issue in this case. Appellant has not met his burden of proof in establishing disability after June 8, 1992.[7]

The decision of the Office of Workers' Compensation Programs dated June 5, 1995 is hereby affirmed.

Dated, Washington, D.C.
May 13, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member

[7] Appellant also contends on appeal that the Office erred in not applying 5 U.S.C. § 8115 of the Act to appellant's bleacherman job. As this appeal does not involve a loss of wage-earning capacity decision, this argument is misplaced.