U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH HOLDER and U.S. POSTAL SERVICE, BAY AREA COOPER STATION POST OFFICE, New York, N.Y.

Docket No. 97-174; Submitted on the Record;
Issued November 12, 1998

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether appellant has met his burden of proof to establish that he sustained a recurrence of disability beginning December 20, 1995 that was causally related to his September 3, 1974 employment injury.

The Board has duly reviewed the case record in this appeal and finds that the case is not in posture for decision.

On September 3, 1974 appellant, then a regular carrier, filed a claim (Form CA-1&2)[1] alleging that on that date he sustained a contusion of the left leg. The Office of Workers' Compensation Programs accepted appellant's claim for chondromalacia of the left knee and lumbosacral strain.

Appellant had intermittent absences from work and returned to work as a modified letter carrier effective September 16, 1995. This position involved duties that were in accordance with appellant's physical restrictions of limited kneeling and squatting, and no prolonged standing.[2]

On February 1, 1996 appellant filed a claim (Form CA-2a) alleging that he sustained a recurrence of disability on December 28, 1995. Appellant stopped work on December 28, 1995. On March 3, 1996 appellant filed another Form CA-2a alleging that he sustained a recurrence of disability on December 20, 1995.

By decision dated March 27, 1996, the Office found the evidence of record insufficient to establish that appellant sustained a recurrence of disability beginning December 20, 1995 that

[1] The form is titled "Federal Employee's Notice of Injury or Occupational Disease."

[2] The record revealed that appellant was not actually expected to return to work until September 18, 1995 because September 16, 1995 was his rest day.

was causally related to the September 3, 1974 employment injury. The Office also found that appellant's lumbar radiculopathy was not caused by the September 3, 1974 employment injury. In a May 27, 1996 letter, appellant requested reconsideration of the Office's decision accompanied by medical evidence.

By letter dated June 19, 1996, the Office found a conflict in the medical opinion evidence between Dr. Ludwig Licciardi, a Board-certified orthopedic surgeon and appellant's treating physician, and Dr. Jack Levine, a Board-certified orthopedic surgeon and second opinion physician, on the issue of continuing disability. The Office referred appellant along with a statement of accepted facts, a list of specific questions and medical records to Dr. Milton M. Smith, an orthopedic surgeon, for an impartial medical examination.

Dr. Smith submitted a July 22, 1996 medical report revealing that appellant's lumbosacral sprain had resolved, but that there was a causal relationship between the employment injury and appellant's chondromalacia of the left knee. By letter dated August 19, 1996, the Office advised Dr. Smith to provide whether appellant's condition worsened to the extent that he was unable to perform the modified letter carrier position on December 20, 1995.

In an August 23, 1996 response letter, Dr. Smith opined that appellant could return to work and perform the duties of the job of modified letter carrier position with physical restrictions. In a report of telephone call or office call, the Office spoke to Dr. Smith's office manager on August 27, 1996 and advised her that Dr. Smith's August 23, 1996 letter did not respond to its August 19, 1996 letter requesting clarification. The Office requested that Dr. Smith provide whether appellant's condition prevented him from performing the modified position on December 20, 1995. In response, Dr. Smith resubmitted his August 23, 1996 letter.

By decision dated August 28, 1996, the Office denied appellant's request for modification based on a merit review of the claim. In an accompanying memorandum, the Office found that Dr. Smith's opinion constituted the weight of the medical opinion evidence.

Section 8123(a) of the Federal Employees' Compensation Act provides that "[i]f there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[3] 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.[4]

In this case, the Office found a conflict in the medical opinion evidence between Dr. Licciardi, appellant's treating physician, and Dr. Levine, a second opinion physician, and referred appellant to Dr. Smith for an impartial medical examination. Dr. Licciardi opined that appellant's current back and left knee conditions were caused by the September 3, 1974 employment injury. Dr. Levine opined that although appellant's lumbosacral sprain was due to

[3] 5 U.S.C. § 8123(a).

[4] *Nancy Lackner Elkins*, 44 ECAB 840, 847 (1993).

the September 3, 1974 employment injury, it had healed. Dr. Levine provided medical rationale in support of his opinion. Dr. Levine also opined that appellant's chondromalacia of the left patella was caused by the September 3, 1974 employment injury because there was no problem prior to the direct blow appellant sustained to the knee. Dr. Levine's opinion that appellant's left knee condition did not exist prior to the September 3, 1974 employment injury because he did not have any prior problems is insufficient, without supporting rationale, to establish causal relationship.[5] However, inasmuch as there was a conflict in the medical opinion evidence regarding appellant's back condition, the Office properly referred appellant to Dr. Smith for an impartial medical examination.

An employee returning to light duty, or whose medical evidence shows the ability to perform light duty, has the burden of proof to establish a recurrence of temporary total disability by the weight of substantial, reliable and probative evidence and to show that he or she cannot perform the light duty.[6] As part of his burden, the employee must show a change in the nature and extent of the injury-related conditions or a change in the nature and extent of the light-duty requirements.[7]

In the present case, the Office relied on the medical opinion of Dr. Smith in finding that appellant did not sustain a recurrence of disability beginning December 20, 1995 that was causally related to the September 3, 1974 employment injury. In a July 22, 1996 medical report, Dr. Smith noted a history of the 1974 employment injury and appellant's medical treatment, a review of medical records, and his findings on physical examination. Based on his review of appellant's history, a review of medical records and his findings on physical examination, Dr. Smith opined that appellant's lumbosacral sprain was due to the knee injury and that it had resolved. Dr. Smith further opined that appellant's status post arthroscopy of the left knee demonstrated evidence of chondromalacia. He then opined that there was a mild causally related disability of the left knee. Dr. Smith stated that appellant was able to return to work with restrictions such as, no prolonged standing, kneeling and squatting. He also stated that there was a direct relationship between appellant's complaints and the injury described if the history provided was correct.

In an August 23, 1996 response to the Office's August 19, 1996 letter requesting whether "the medical evidence support[s] that [appellant's] condition worsen[ed] to the extent that he was unable to preform [sic] this modified job on December 20, 1995," Dr. Smith opined that "[appellant] can return to work at the job of a modified letter carrier consisting of limitations to prolonged kneeling, standing and squatting." The Office again asked Dr. Smith whether "[appellant's] condition prevented him from preforming [sic] [the] modified job on December 20, 1995." In response, Dr. Smith resubmitted his August 23, 1996 letter.

Dr. Smith has failed to specifically address the Office's question whether appellant's condition prevented him from performing the duties of the modified letter carrier position on

[5] *Thomas D. Petrylak*, 39 ECAB 276 (1987).

[6] *Terry R. Hedman*, 38 ECA 222, 227 (1986).

[7] *Id.*

December 20, 1995, the beginning date of appellant's alleged recurrence of disability. Dr. Smith also failed to address whether the alleged recurrence was caused by the September 3, 1974 employment injury. Thus, it is unclear from Dr. Smith's opinion whether appellant was able to perform the light-duty work on the date of the alleged recurrence due to the 1974 employment injury which is the issue in this case. Further, it is unclear as to whether Dr. Smith's opinion should be construed as to establish that appellant was unable to perform the light-duty work on December 20, 1995, but that he could return to the light-duty position as of July 22, 1996, the date that Dr. Smith examined appellant.

When the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from such specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original report. However, when the impartial specialist's supplemental report is vague, speculative or lacks rationale, the Office must submit the case record, together with a detailed statement of accepted facts, to a second impartial specialist for a rationalized medical opinion on the issue in question.[8]

Accordingly, the Board finds that the case must be remanded to the Office for a referral of the medical evidence and a statement of accepted facts to a second impartial medical examiner in an appropriate field of medical specialty to provide a rationalized opinion on the issue whether appellant sustained a recurrence of disability beginning December 20, 1995 that was causally related to his September 3, 1974 employment injury. Following this and any other such development which the Office deems necessary, the Office shall issue a *de novo* decision on appellant's recurrence claim.

[8] *Thomas Graves*, 38 ECAB 409, 418 (1987); *Harold Travis*, 30 ECAB 1071 (1979).

The August 28 and March 27, 1996 decisions of the Office of Workers' Compensation Programs are hereby set aside and the case is remanded to the Office for further development in accordance with this decision of the Board.

Dated, Washington, D.C.
November 12, 1998

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member