U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN P. THOMAS and DEPARTMENT OF THE NAVY, KANEOHE MARINE CORPS AIR STATION, Kaneohe Bay, Hawaii

Docket No. 98-2157; Submitted on the Record;
Issued May 10, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issue is whether appellant had an disability after October 31, 1991 due to his employment injuries.

The case has been on appeal previously.[1] Appellant had sustained injuries to his back on July 28, 1989, September 17 and October 25, 1991 and had filed claims for recurrences of disability for the periods March 19 through March 28, 1991, September 23 through September 27, 1991, October 28 through October 31, 1991, June 22 through August 9, 1992 and April 20 through April 26, 1994. Appellant noted that he had sneezed at home on May 20, 1992 and had severe back pain and numbness in his left foot. He underwent surgery on June 20, 1992 for removal of disc fragments from a herniated L4-L5 disc. The Office rescinded acceptance appellant's claims for recurrences of disability for the periods March 19 through March 28, 1991 and June 21 though August 9, 1992 and rejected his claim for a claim of a recurrence of disability after April 20, 1994 on the grounds that the recurrences did not arise in the performance of duty because the medical evidence of record showed appellant had recovered from his July 28, 1989 employment injury. The Office found that the March 1991 incident for which appellant filed a claim was a new injury that occurred at his home. The Office found that the September 17 and October 31, 1991 injuries were new injuries and not recurrences of disability. The Board found the case not in posture for decision. The Board noted that Dr. Maurice Nicholson, a neurologist, had not related appellant's back condition to the July 28, 1989 employment injury but had related appellant's disc rupture and his subsequent surgery to his October 25, 1991 employment injury because he had back pain after that incident that never resolved. The Board further noted that Dr. Harry J. Ashe, a Board-certified internist, related appellant's condition and subsequent back problems to the initial July 28, 1989 employment injury. The Board stated that these reports were sufficient to require further development of appellant's claim. The Board therefore remanded the case to the Office for referral of appellant

[1] Docket No. 95-1813 (issued July 11, 1997).

to another physician for an examination and an opinion on whether appellant's condition was causally related to his employment injuries.

The Office referred appellant, together with the statement of accepted facts and the case record, to Dr. Lee B. Silver, a Board-certified orthopedic surgeon, for an examination. In a January 7, 1998 report, Dr. Silver diagnosed status post L4-L5 discectomy which he stated was not employment related and a lumbosacral musculoligamentous strain/sprain which was employment related. He indicated that appellant sustained an apparent musculoligamentous strain or sprain while lifting a toolbox on July 28, 1989 and had increased symptoms when he tried to get up from a couch at home on March 14, 1991. He commented that, at that time Dr. Ashe documented that appellant did not have radiation of pain into his leg and had no weakness or dorsiflexion. He concluded that appellant therefore did not have a herniated disc at that time. He stated that appellant had additional episodes of increased lumbosacral pain after the incidents of September 17 and October 25, 1991 but denied that he had any numbness or tingling down his legs. He indicated that appellant's symptoms at that time were related to the lumbosacral sprain/strain arising from his July 28, 1989 employment injury. He concluded that appellant's herniated disc was caused by the sneezing incident at home on May 20, 1992 because appellant first had radicular symptoms at that time. He stated that appellant had no physical limitations arising from the effects of the July 28, 1989, September 17 and October 25, 1991 employment injuries. He proposed a lifting limitation of 80 pounds due to appellant's discectomy which he considered not to be related to the employment injuries. He reported that his current examination did not reveal evidence of a significant ongoing neurologic deficit or nerve root impingement.

In a January 20, 1998 decision the Office denied appellant's claim for compensation effective October 31, 1991 on the grounds that he had recovered from his employment injuries of July 28, 1989, September 17 and October 25, 1991 by that time.

The Board finds that the case is not in posture for decision due to a conflict in the medical evidence.

Dr. Silver stated that appellant's herniated disc was causally related to his sneezing incident at home on May 20, 1992 because appellant first had radicular symptoms at that time. Dr. Nicholson, however, found in his June 24, 1994 report that appellant's herniated disc and subsequent surgery was related to his October 25, 1991 employment injury when he lifted a manhole cover because appellant had intractable back pain which did not cease after that time. Each physician therefore attributed appellant's herniated L4-L5 disc to a different incident, one related to work and one not related to work, and gave a different rationale for his opinion on the issue of causal relationship. The case must therefore be remanded for resolution of this conflict.

The physicians of record also did not consider the issue of whether appellant's injuries on March 29, 1991, when he had back pain after rising from a couch, and on May 20, 1992, when he sneezed while getting out of bed, were consequential injuries. In the case of *John R. Knox*,[2] regarding consequential injury, the Board stated:

[2] 42 ECAB 193 (1990).

> "It is an accepted principal of workers' compensation law, and the Board has so recognized, that when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause which is attributable to the employee's own intentional conduct. As is noted by Professor Larson in his treatise: '[O]nce the work-connected character of any injury, such as a back injury, has been established, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause.... [S]o long as it is clear that the real operative factor is the progression of the compensable injury, associated with an exertion that in itself would not be unreasonable [under] the circumstances. A different question is presented, of course, when the triggering activity is itself rash in the light of [the] claimant's knowledge of his condition.'"[3] (Citations omitted.)

Both the March 14, 1991 incident and the May 20, 1992 incidents occurred after employment-related back injuries. The physicians of record did not address whether these prior back injuries caused or contributed to appellant's disability after these incidents. Such development must be undertaken for a full and complete review of appellant's claim.

On remand the Office should refer appellant, together with the statement of accepted facts and the case record, to an appropriate impartial medical specialist for an examination. After an examination of appellant, the specialist should be requested to give a diagnosis of appellant's condition and give his rationalized opinion on whether appellant's periods of disability after October 31, 1991, particularly arising from his herniated L4-L5 disc and subsequent surgery, were causally related to any or all of his employment injuries or were caused by any incident unrelated to his employment. He should also address whether the incidents of March 14, 1991 and May 20, 1992 were consequential injuries that were causally related to appellant's employment injuries. After further development as it may find necessary the Office should issue a *de novo* decision.

[3] *Id*. at 196.

The decision of the Office of Workers' Compensation Programs, dated January 20, 1998 , is hereby set aside and the case remanded for further action in accordance with this decision.

Dated, Washington, D.C.
May 10, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member