U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THEODORE LOTT and DEPARTMENT OF VETERANS AFFAIRS, RIVERSIDE NATIONAL CEMETERY, Riverside, CA

Docket No. 97-1970; Submitted on the Record;
Issued November 5, 1999

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM, BRADLEY T. KNOTT

The issues are: (1) whether appellant has established that his low back condition is causally related to employment factors; and (2) whether the Office of Workers' Compensation Programs properly determined that appellant was not entitled to an attendant's allowance.

On November 18, 1982 appellant, then a 40-year-old janitor at the Veterans Medical Center in Loma Linda, California sustained an employment-related laceration of the radial nerve and artery of the right wrist for which he underwent authorized surgery and received appropriate continuation of pay and compensation.[1] This claim was adjudicated under Office file number A13-693816. At some point he moved to Cleveland, Ohio and worked at the Veterans Medical Center there. He returned to California in 1987 and began employment at the Riverside National Cemetery, initially as a housekeeping aid and later as an auto mechanic. On March 16, 1988 appellant filed an occupational disease claim, stating that his arm and back problems were causally related to the 1982 employment injury. This claim was adjudicated under Office file number A13-865552.[2] By decision dated December 15, 1988, the Office denied the claim. Following appellant's timely request for reconsideration, by decision dated March 7, 1989, the Office accepted that he sustained employment-related impingement syndrome of the right shoulder and temporary aggravation of degenerative joint disease of the cervical spine and appellant was placed on the periodic rolls. The cases were doubled on June 15, 1990. Appellant twice underwent vocational rehabilitation and in 1995 requested an attendant's allowance. By letter dated June 19, 1995, the Office informed appellant of the type of information needed to determine if he was entitled to an attendant's allowance.

[1] The record indicates that on August 3, 1983 the Office granted appellant a schedule award for 15 percent permanent loss of use of the right arm to run from April 25, 1983 to March 17, 1984 for a total of 46.80 weeks.

[2] Appellant also filed Forms CA-7, claims for compensation, for wage-loss compensation beginning July 1, 1987.

The Office developed the case and found that a conflict in the medical evidence existed between the opinions of appellant's treating physician, Dr. Thomas M. Mirich, III, a Board-certified orthopedic surgeon and Dr. Donald E. Julian, a Board-certified orthopedic surgeon who provided a second opinion for the Office.[3] By letter dated December 8, 1995, the Office referred appellant, along with a statement of accepted facts, a set of questions and the medical record, to Dr. Stephen P. Suzuki, a Board-certified orthopedic surgeon, for an impartial evaluation.

In a comprehensive report dated February 8, 1996, Dr. Suzuki advised that appellant's lumbosacral spine complaints were due to the natural process of aging. He noted that in 1987 and 1988, when appellant was treated for his shoulder and neck, there was no indication of any type of significant back complaint and concluded that there were no clear objective factors that could correlate appellant's work to his current low back complaints. Dr. Suzuki advised that appellant did not need the services of an attendant.

By decision dated March 18, 1996, crediting the opinion of Dr. Suzuki, the Office disallowed appellant's claim for a low back condition and attendant's allowance.[4] Appellant requested reconsideration on two occasions[5] and submitted additional medical evidence. By decisions dated January 24 and April 15, 1997, the Office denied modification of its prior decision. The instant appeal follows.

Initially, the Board finds that appellant did not meet his burden of proof to establish that his low back condition is causally related to employment factors.

An employee seeking benefits under the Federal Employees' Compensation Act[6] has the burden of establishing the essential elements of his or her claim[7] including the fact that the individual is an "employee of the United States" within the meaning of the Act,[8] that the claim was timely filed within the applicable time limitation period of the Act,[9] that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[10] These are

[3] The Office indicated that a conflict existed regarding whether appellant needed the services of an attendant, whether appellant needed surgery for his accepted cervical spine condition, whether the temporary aggravation of the degenerative joint disease of the cervical spine had resolved and what additional orthopedic difficulties, if any, were employment related.

[4] On March 14, 1996 the Office accepted that appellant sustained employment-related right carpal tunnel syndrome and authorized surgery.

[5] The record indicates that on March 23, 1996 appellant requested a hearing but withdrew the request on October 22, 1996.

[6] 5 U.S.C. §§ 8101-8193.

[7] *See Daniel R. Hickman*, 34 ECAB 1220 (1983); *see also* 20 C.F.R. § 10.110.

[8] *See James A. Lynch*, 32 ECAB 216 (1980); *see also* 5 U.S.C. § 8101(1).

[9] 5 U.S.C. § 8122.

[10] *See Melinda C. Epperly*, 45 ECAB 196 (1993).

essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[11] However, an employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong and persuasive evidence.[12]

Causal relationship is a medical issue[13] and the medical evidence required to establish a causal relationship is rationalized medical evidence. Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[14] Moreover, neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[15]

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.[16] Here, finding that a conflict of medical opinion existed, the Office referred appellant to Dr. Stephen P. Suzuki to provide an impartial evaluation. In a comprehensive report dated February 8, 1996, he advised that appellant's low back condition was not employment related. While appellant submitted additional reports from Dr. Mirich, he merely reiterated his opinion that employment factors caused appellant's low back condition. As Dr. Mirich had been on one side of the conflict in the medical opinion that Dr. Suzuki resolved, Dr. Mirich's reports are insufficient to overcome the special weight accorded Dr. Suzuki.[17] The Board, therefore, finds that appellant failed to establish that his low back condition was employment related.

The Board further finds that the Office properly determined that appellant was not entitled to an attendant's allowance.

The Act provides for an attendant's allowance under section 8111(a), which states that the Office may pay an employee who has been awarded compensation an additional sum of not

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[11] *See Delores C. Ellyett*, 41 ECAB 992 (1990); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[12] *See Robert A. Gregory*, 40 ECAB 478 (1989).

[13] *Mary J. Briggs*, 37 ECAB 578 (1986).

[14] *Gary L. Fowler*, 45 ECAB 365 (1994); *Victor J. Woodhams, supra* note 11.

[15] *Minnie L. Bryson*, 44 ECAB 713 (1993); *Froilan Negron Marrero*, 33 ECAB 796 (1982).

[16] *See Kathryn Haggerty*, 45 ECAB 383 (1994); *Edward E. Wright*, 43 ECAB 702 (1992).

[17] *See Harrison Combs, Jr.*, 45 ECAB 716 (1994).

more than $1,500.00 a month when the Office finds "that the service of an attendant is necessary constantly because the employee is totally blind, or has lost the use of both hands or both feet, or is paralyzed and unable to walk, or because of other disability resulting from injury making him so helpless as to require constant attendance."[18] The attendant's allowance is intended to pay an attendant for assistance in personal needs such as dressing, bathing or using the toilet; it is not intended to pay an attendant for performance of domestic and housekeeping chores.[19]

In the present case, the weight of the medical evidence establishes that appellant did not have a continuing disability that required constant attendance. In an August 17, 1994 report, Dr. Julian advised that appellant did not require assistance during the physical examination and saw no need for an attendant. Likewise, in his February 8, 1996 report, Dr. Suzuki opined that appellant did not need an attendant. In his numerous reports, Dr. Mirich did not indicate that appellant needed an attendant.[20] Accordingly, the Board finds that the Office properly determined that appellant was not entitled to an attendant's allowance.

[18] 5 U.S.C. § 8111(a).

[19] *See Grant S. Pfeiffer*, 42 ECAB 647 (1991).

[20] In an August 29, 1995 report, Dr. Mirich stated: "It is noted that an attendant allowance may be awarded to a claimant if the services of an attendant are required constantly because the claimant is totally blind and unable to walk or has other disabilities resulting from the injury which makes the claimant so helpless as to require constant attendance for personal needs such as feeding, dressing or bathing." Dr. Mirich, however, voiced no opinion regarding appellant's need for an attendant's services.

The decisions of the Office of Workers' Compensation Programs dated April 15 and January 24, 1997 are hereby affirmed.

Dated, Washington, D.C.
November 5, 1999

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member