U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ERIC V. LICK and DEPARTMENT OF THE TREASURY, U.S. CUSTOMS SERVICE, Tacoma, WA

Docket No. 98-878; Submitted on the Record;
Issued November 2, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS, WILLIE T.C. THOMAS

The issue is whether appellant has met his burden of proof in establishing that he sustained injuries to his back that were causally related to factors of his federal employment.

On April 26, 1993 appellant, then a 46-year-old senior customs inspector, filed a notice of traumatic injury and claim, alleging that he bruised his right toe and had a sore knee after falling on a recently cleaned floor.[1] On May 12,1993 appellant amended his traumatic injury claim to add extreme pain in both feet and difficulty walking. He amended his claim a second time to add injury to the lower back and problems with walking and sitting. The Office of Workers' Compensation Programs accepted appellant's claim for hyperextension of the left big toe but did not accept any injuries to the right knee or lower back. On July 5, 1995 appellant filed a claim for recurrence of disability in his right knee and back beginning June 30, 1993. By decision dated September 12, 1995, the Office denied appellant's claim for recurrence of disability on the grounds that the medical evidence did not establish a connection between the back and knee conditions and the accepted employment injury. On January 27, 1995 appellant filed an occupational disease claim for mild degenerative arthritis of the lower back that he first became aware of on January 3, 1995. In a decision dated October 13, 1995, the Office denied appellant's occupational disease claim on the grounds that the evidence of record did not establish that it occurred as alleged. In a decision dated April 4, 1996, an Office hearing representative set aside the October 1995 decision of the Office and remanded the case for further development of the evidence relevant to causal relationship. By decision dated July 31, 1996, the Office again denied appellant's claim on the grounds that the evidence did not establish causal relationship between the claimed condition and factors of his federal employment. In a decision dated October 24, 1997, an Office hearing representative affirmed the July 31, 1996 decision of the Office.

[1] Appellant had an earlier unrelated worker's compensation claim dated March 6, 1992, which he filed for early carpal tunnel syndrome and possible tendinitis. By decision dated August 18, 1992, the Office accepted appellant's claim for bilateral tendinitis related to occupational activities.

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

An award of compensation may not be based on surmise, conjecture, speculation, or appellant's belief of causal relationship.[2] The Board has held that the mere fact that a disease or condition manifests itself during a period of employment does not raise an inference of causal relationship between the condition and the employment.[3] Neither the fact that the condition became apparent during a period of employment nor appellant's belief that employment caused or aggravated his condition is sufficient to establish causal relationship.[4] While the medical opinion of a physician supporting causal relationship does not have to reduce the cause or etiology of a disease or condition to an absolute certainty,[5] neither can such opinion be speculative or equivocal. The opinion of a physician supporting causal relationship must be one of reasonable medical certainty that the condition for which compensation is claimed is causally related to federal employment and such relationship must be supported with affirmative evidence, explained by medical rationale and be based upon a complete and accurate medical and factual background of the claimant.[6]

In the present case, the Office accorded determinative weight to the second opinion examination and report by Dr. Loy E. Cramer, a Board-certified orthopedic surgeon, who, in a report dated May 31, 1996, diagnosed degenerative disc disease of the lumbar spine and indicated that he did not believe there was a medical connection between appellant's back problems and factors of his employment. Dr. Cramer based this determination on appellant having had low back problems that preceded 1993 and his not having complaints related to his low back until several months later. In a subsequent report dated July 26, 1996, he indicated that appellant did not have any underlying condition that had any relationship to his work activities. Dr. Cramer found that appellant's degenerative disc disease was entirely compatible with chronological age. Neither report by Dr. Cramer is entitled to determinative weight as his May 1996 report is internally inconsistent since the doctor initially rules out a causal relationship between appellant's back condition and factors of his federal employment based on his belief that appellant had a back condition that preceded 1993 without support of this conclusion in the record and then states that appellant delayed in reporting his complaints after the 1993 injury. Dr. Cramer's second report does not provide an adequate rationale for his conclusion in light of the problems with the accuracy of the medical history upon which he relied. The record also contains a medical report by Dr. W. Daniel Fife, a Board-certified orthopedic surgeon, who reported that appellant was incapacitated due to unresolved symptoms related to his fall in April 1993. He indicated that a slip from a standing position to the floor had enough potential energy stored to produce symptoms of this nature and that the x-ray findings were irrelevant

[2] *Williams Nimitz, Jr.*, 30 ECAB 567, 570 (1979); *Miriam L. Jackson Gholikely*, 5 ECAB 537-39 (1953).

[3] *Edward E. Olson*, 35 ECAB 1099, 1103 (1984).

[4] *Joseph T. Gulla*, 36 ECAB 516, 519 (1985).

[5] *See Kenneth J. Deerman*, 34 ECAB 641 (1983).

[6] *See Margaret A. Donnelly*, 15 ECAB 40 (1963); *Morris Scanlon*, 11 ECAB 384 (1960).

given the history of injury on the job. In a report dated February 7, 1995, appellant's treating physician, Dr. J. Richard Herd, noted that he was seeing appellant for pain in the lumbosacral area and that x-rays revealed spondylosis at the L5 to S1 level and mild degenerative disc disease at the L3 to S1 levels. Dr. Herd diagnosed osteoarthritis and degenerative joint disease that he suggested was exacerbated by work, including long period of walking, standing on hard surfaces and a lot of lifting, bending and stooping. While the reports by Drs. Fife and Herd are not sufficiently rationalized so as to constitute the weight of the medical evidence, they are opposing medical reports that are entitled to virtually equal weight and containing equal rationale as the second opinion medical report by Dr. Cramer. Section 8123(a) of the Federal Employees' Compensation Act[7] states that if there is 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. Thus, as there is an unresolved conflict in the medical evidence concerning the cause of appellant's back condition and its relationship, if any, to factors of his federal employment, the case must be remanded for referral of appellant together with a statement of accepted facts and the medical record to an appropriate specialist for resolution of the conflict. After such further development as the Office deems necessary a *de novo* decision on the merits of this case shall be issued.

The decision of the Office of Workers' Compensation Programs dated October 24, 1997 is hereby set aside and this case is remanded for further proceedings consistent with this decision.

Dated, Washington, D.C.
November 2, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

[7] 5 U.S.C. § 8123(a).