U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICK L. GOODWIN and DEPARTMENT OF DEFENSE, DEFENSE LOGISTICS AGENCY, Tracy, CA

Docket No. 98-1090; Submitted on the Record;
Issued November 16, 1999

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant has established that he sustained a recurrence of disability causally related to his March 13, 1995 employment injury.

On August 2, 1996 appellant, then a 26-year-old electrician, filed a claim for compensation alleging that on March 13, 1995 he injured his knee while in the performance of duty.[1]

In an undated narrative received by the Office of Workers' Compensation Programs on August 26, 1996 appellant stated that after he returned from temporary duty in Point Hueneme, California, he sustained an off-duty recurrence of disability based on his March 1995 injury.

By letter dated September 10, 1996, the Office advised appellant that he needed to submit additional information regarding his claims for compensation, including a description of his duties upon returning to work after the original injury, all medical care received after his original injury, and his doctor's reasons, if appropriate, for why he or she believed that appellant's current medical condition was causally related to his original injury.

In an attending physician's report dated September 11, 1996, Roland H. Winter, appellant's treating physician and Board-certified in orthopedic surgery, stated that appellant originally injured his left knee on March 13, 1995, that he had a deficient anterior cruciate ligament (ACL) and osteochondral defect. He noted that appellant's preexisting condition was aggravated by stenosis, that he had performed an arthroscopic procedure, and that appellant was totally disabled from July 25 to September 11, 1996. In a medical report dated the same day, Dr. Winter stated that appellant would return to light duty on September 12, 1996, and would be expected to return to full duty on October 1, 1996. In a medical report dated July 25, 1996,

[1] Appellant was in a training program at Port Hueneme, California, when he injured his knee while playing basketball.

Dr. Winter stated that appellant had a deficient ACL left knee and that, on that date, he had performed an arthroscopy, debridement of the remnant of the ACL and chondroplasty of the medial femoral condyle.

On August 15, 1996 appellant filed a claim for recurrence of disability alleging that his knee remained swollen for about four months after the original injury, and that on January 22, 1996 he was playing basketball and his knee "gave out" as he landed after jumping for the ball. In the section of the form reserved for supervisor's comments, the employing establishment noted that it was not aware of an original injury until the time of the alleged recurrence of disability.

In a medical report dated October 4, 1996, Dr. Winter noted a familiarity with appellant's history of injury stating that appellant had originally injured his knee in March 1995, noting that it was doubtful that the injury resulted in a dislocation but rather a tear in the ACL which led to an "instability" episode in January 1996, resulting in a finding of a "cartilage defect (osteo-chondral defect) on the weight bearing part of his femoral condyle." He noted that appellant's original ACL tear "causes instability and predisposed the knee to the second twisting episode which caused the second injury (osteochondral defect)."

On December 23, 1996 the Office advised appellant that he was required to explain what happened on January 22, 1996 when he reinjured his knee and was required to submit treatment notes covering that incident.

On January 23, 1997 the Office notified appellant that it accepted his March 13, 1995 left dislocated patella injury as work related, but that he was required to submit medical reports covering March 13, 1995 to January 22, 1996; a detailed description of the January 22, 1996 incident; a medical report covering the January 22, 1996 incident; and a medical opinion on the relationship between the March 13, 1995 work-related injury and the January 22, 1996 incident.

In a medical report dated January 23, 1996 and received by the Office on February 20, 1997, Dr. Kirk Casey, Board-certified in family practice, stated that appellant had injured his knee on January 22, 1996 in a basketball game. He stated that appellant had an ACL insufficiency. In a medical report dated October 10, 1996 and received by the Office on February 20, 1997, Dr. Winter stated that he had returned appellant to full duty without restrictions that day and noted that he will see appellant "on an as-needed basis."

In an undated narrative received by the Office on February 27, 1997, appellant stated that he received no formal medical treatment from March 13, 1995 to January 22, 1996, and that he injured his knee on January 22, 1996 while playing basketball.

On April 14, 1997 the Office advised the employing establishment that it had received appellant's claim for recurrence of disability and determined that the January 22, 1996 incident constituted a new injury.

On May 8, 1997 the employing establishment notified the Office that appellant was not required to participate in the January 22, 1996 basketball game, that the employing establishment

derived no benefits from appellant's activity in the January 22, 1996 game, and that the injury occurred off premises during nonduty hours.

On June 12, 1997 Dr. Ellen Pichey, the district medical consultant, stated that "[T]he scenario of the course of injury presented by Dr. Winter is plausible, and that the original injury led to the instability of the knee, resulting in the need for surgery."[2]

On June 13, 1997 the Office referred a statement of accepted facts and appellant's medical record to Dr. Arthur S. Harris, an Office consultant and Board-certified in orthopedic surgery. The Office asked Dr. Harris to answer several questions:

> "1. Is the intervening injury of January 22, 1996 to his left knee solely responsible for the claimant's need for arthroscopic surgery and the resultant disability? Please provide your rationalized medical opinion.
>
> "2. Describe any nonindustrial or preexisting disability.
>
> "3. Is the diagnosed condition medically connected to the factors federal employment as described in the statement of accepted facts either employment related by direct cause, aggravation, precipitation, or acceleration?"

In a medical report dated June 27, 1997, Dr. Harris stated:

> "From review of the medical records, I would agree with Dr. Roland Winter. It appears that the injury of March 1995, in all likelihood, resulted in an anterior cruciate ligament injury. Although the Office of Workers' Compensation Programs has accepted a disclosed left patella as being the result of this injury, the medical documentation at this time does not support this diagnosis. The only information contained in the medical records are some handwritten hospital emergency room notes, making a diagnosis of spontaneous reduction of patella dislocation, indicating that there is no obvious evidence of patella dislocation. The patient does relatively well subsequent to this, until he sustain[ed] another injury on January 22, 1996 while playing basketball. He is seen for orthopedic evaluation the day following his injury by an orthopedic surgeon, Dr. Kirk Casey, who felt that the patient's injury represented an episode of giving way as a result of this chronic anterior cruciate ligament insufficiency. The patient subsequently goes on to have an MRI [magnetic resonance imaging] study and arthroscopic surgery confirming this anterior cruciate ligament in March 1995, went on to have subsequent instability and had an episode of instability/giving way on January 22, 1996, resulting in a fall while playing basketball. The information contained in the medical records, and in particular, the reports of Dr. Winter and Dr. Casey, who examined the patient the day following his injury support this.

[2] The Office stated that appellant did not seek medical treatment on March 13, 1995. However, the statement of accepted facts indicates that appellant did seek medical care on that day.

"In response to questions posed in the memorandum dated June 13, 1997, … Paul Cardenas [stated]:

"(1) I believe that the intervening injury of January 22, 1996 is solely responsible for the claimant's need for arthroscopic surgery and the resulting disability. Although he did sustain an anterior cruciate ligament injury in March 1995 with some residual instability, he had been doing well until his injury of January 22, 1996. As such, his need for medical care and associated disability are the direct result of the injury of January 22, 1996.

"(2) Preexisting disability would be residual anterior cruciate insufficiency, resulting from his anterior cruciate ligament tear of March 13, 1995.

"(3) The diagnosed condition is the direct result of injuries sustained during the course of his employment."

In a decision dated August 8, 1997, the Office denied appellant's claim for compensation. In an attached memorandum, the Office noted that Dr. Harris found that appellant's intervening nonduty January 22, 1996 incident was solely responsible for appellant's need for surgery and resultant total disability.

On October 28, 1997 appellant requested reconsideration on the basis that no independent medical evaluation to resolve the conflict in medical evidence had been made. In a merit decision dated November 20, 1997, the Office denied appellant's request for reconsideration on the grounds that the record did not contain a conflict in medical evidence.

The Board finds that the case is not in posture for decision.

Appellant has the burden of proving by the weight of the reliable, probative and substantial evidence that the employee's death was causally related to his employment.[3] This burden includes the necessity of furnishing rationalized medical opinion evidence, based on a complete factual and medical background, showing causal relationship.[4]

In this case, the question arises as to whether the intervening incident, playing basketball on January 22, 1996, broke the causation link between appellant's initial injury in March 1995 and his current medical condition. Although the reconsideration examiner states that "Athletic endeavors, such as playing basketball, carry an inherent risk of injury and cannot be considered a normal activity of daily living" in support of her decision to affirm the Office's denial of compensation benefits, this absolute interpretation of the rule regarding independent intervening cause is incorrect.[5] It is an accepted principle of workers' compensation law that when the primary injury is shown to have arisen out of and in the course of employment, every natural

[3] *Carolyn P. Spiewak (Paul Spiewak)*, 40 ECAB 552, 560 (1989).

[4] *Martha A. Whitson (Joe E. Whitson)*, 43 ECAB 1176, 1180 (1992).

[5] *Bobby W. Hornbuckle*, 38 ECAB 626 (1987).

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 Larson in his treatise on workers' compensation, once the work-connected character of any 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 and so 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 light of the claimant's knowledge of his condition.[6]

Dr. Winter stated that appellant's accepted injury led to the "instability" episode in January 1996 and thus appears to maintain an unbroken link in the chain of causation between the March 1995 injury and appellant's current condition. Although Dr. Harris stated that he believed that appellant's January 22, 1996 injury was solely responsible for the need for surgery, it is unclear if the doctor also means that the January 22, 1996 injury was an independent injury, unconnected to the March 1995 injury, and thus would constitute a break in the chain of causation. The Board notes that the claims examiner's questions are ambiguous in they fail to distinguish the issue of whether the January 22, 1996 injury was, in the opinion of the doctor, related to the March 1995 injury. It could be argued that question one implies that Dr. Harris' response reflected his opinion that the January 22, 1996 injury was not part of a causal chain with the March 1995 injury. Although the doctor stated that the January 22, 1996 injury was the reason why surgery was necessary, it does not necessarily imply that the January 22, 1996 was independent from the March 1995 injury. Inasmuch as Dr. Harris' report is both ambiguous (due to the inherent ambiguity of the question) and arguably in conflict with Dr. Winter, the Board holds that the case must be remanded due to a conflict in the medical evidence.

Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part: "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."[7] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.[8]

Consequently, the case will be referred to an impartial medical specialist to resolve the conflict in the medical opinion evidence between Drs. Winter and Harris on whether the employee's January 22, 1996 injury was causally related to the accepted employment injury. On remand, the Office should refer the case, including the case file and the statement of accepted facts, to an appropriate specialist for a specific finding regarding whether the second injury

[6] A. Larson, *The Law of Workmers' Compensation* § 13.11(a) (1997).

[7] 5 U.S.C. § 8123(a).

[8] *William C. Bush*, 40 ECAB 1064, 1075 (1989).

involved conduct that was negligent or rash.[9] After such further development as the Office deems necessary, the Office should issue an appropriate decision regarding appellant's claim.

The decisions of the Office of Workers' Compensation Programs dated November 20 and August 8, 1997 are hereby set aside and remanded for further development consistent with this decision of the Board.

Dated, Washington, D.C.
November 16, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[9] The Office impairment is required to rephrase question 1 because as written it finds that the March 1995 injury was not causally related to the January 22, 1996 injury. It is indeed this issue of causation which the Office is required to further develop on remand by reference to an impartial medical examiner.