U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MIGUEL A. MUNIZ and U.S. POSTAL SERVICE,
POST OFFICE, Camden, NJ

Docket No. 99-663; Submitted on the Record;
Issued November 24, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits as of February 27, 1997; (2) whether appellant has sustained any permanent impairment to a schedule member of his body causally related to his accepted left knee condition, thereby entitling him to a schedule award under 5 U.S.C. § 8107.

On October 21, 1991 appellant, a 30-year-old letter carrier, injured his left knee when a customer's dog jumped onto a fence and startled appellant causing him to fall. Appellant filed a Form CA-1 claim for benefits on the date of injury, which the Office accepted for contusion and sprain of the left knee. The Office paid appropriate compensation benefits.[1]

In a report dated August 25, 1994, Dr. Mark L. Khan, appellant's treating physician and a Board-certified orthopedic surgeon, diagnosed a probable internal derangement of the left knee and stated that appellant had experienced continued pain in his left knee since his 1991 employment injury. Dr. Kahn indicated that appellant had attempted to ameliorate his condition through physical therapy, but that this had not proven beneficial. He, therefore, recommended that appellant undergo arthroscopic surgery on his left knee. Dr. Kahn performed the surgery on January 17, 1995, at which time he diagnosed a medial meniscus and tear in the left knee, in addition to impinging medial and lateral joint space.

On January 17, 1995 appellant filed a Form CA-2 claim for recurrence of disability due to his accepted left knee condition, which the Office accepted by letter dated December 28, 1995.

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[1] In a letter to the Office dated December 27, 1995, the employing establishment stated that appellant was a temporary employee at the time of his work injury and that his temporary employment status concluded in mid December 1991.

By decision dated March 22, 1996, the Office rescinded its acceptance of appellant's recurrence claim, finding that its earlier acceptance of the claim was erroneous. The Office stated that the employing establishment had submitted new and material evidence indicating appellant had been employed as a laborer with a construction firm beginning June 16, 1992, a job involving strenuous activities. Based on this new evidence, the Office found that any recurrent disability was not the result of the natural consequence or progression of the employment injury, but was due to an independent intervening cause attributable to appellant's intentional and unreasonable conduct; *i.e.*, his acceptance of a job with the construction firm.

By letter dated March 28, 1996, appellant, through his attorney, requested an oral hearing.

By decision dated July 5, 1996, an Office hearing representative reversed the March 22, 1996 decision, finding that the Office had not submitted any medical evidence indicating that appellant's recurrent knee condition was unrelated to his federal employment. The hearing representative, therefore, found that the Office failed to meet its burden of proof to establish that his recurrent knee condition was aggravated by his subsequent employment with the construction firm and was therefore totally unrelated to the employment injury. The hearing representative ordered the district office to reinstate compensation benefits and compose a new statement of facts which correctly described appellant's activities subsequent to his federal employment, the duties of his federal position and the date he ceased those duties. The hearing representative instructed the district office to refer appellant to a second opinion physician to determine whether, given his activities subsequent to June 16, 1992, the date he commenced employment with the construction firm, he had any condition or disability causally related to the October 21, 1991 employment injury.

The Office referred appellant to Dr. Alexander A. Sapega, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated November 13, 1996, Dr. Sapega reviewed appellant's medical history and the statement of accepted facts, took x-rays and stated findings on examination. He stated that x-rays showed normal osseous and soft tissue structures and that physical examination showed normal knee alignment, subjective discomfort on squatting without crepitation, equal muscle tone, an exaggerated response to light touch and normal patellar mobility and stability. Dr. Sapega concluded that appellant, by history, appeared to have sustained a direct contact injury to the anterior aspect of his left knee, which did not result in any specific internal derangement injury such as patellar chondromalacia or cartilage tear. He stated that, "[a]t the present time, I find absolutely no objective evidence of ongoing injury in his left knee or leg, nor would I expect to have found any, based upon the final diagnosis and the treatment rendered by Dr. Kahn.... [I]t is also unfortunately apparent that appellant is voluntarily exaggerating his left knee pain and disability. In essence, whatever the exact nature of his left knee injury was, based upon my findings today, I would consider that injury to be completely resolved and, with no residuals that would create any significant degree of permanent impairment or disability….

On December 10, 1996 the Office issued a proposed notice of termination based on Dr. Sapega's opinion, that appellant had no residuals or continuing disability causally related to the October 21, 1991 employment injury, finding that it represented the weight of the medical

evidence. The Office informed appellant that he had 30 days in which to submit additional argument evidence in opposition to the proposed termination. Appellant did not respond to this notice within 30 days.

By decision dated February 27, 1997, the Office terminated appellant's compensation.

By letter dated March 3, 1997, appellant, through his attorney, requested an oral hearing, which the Office scheduled for August 9, 1997. In support of his request, appellant submitted a January 20, 1997 medical report from Dr. Paul Frumento, a podiatrist, who stated that "due to the nature of his condition, his problems are at this point purely subjective. It is highly probable that the injury and subsequent healing has left him with a functional, if not structural, leg length discrepancy and therefore has caused significant pedal, biomechanical imbalance."

In a decision dated February 19, 1998, an Office hearing representative found that the evidence appellant submitted was not sufficient to warrant modification of the February 27, 1997 termination decision.

By letter dated July 23, 1998, appellant, through his attorney, requested reconsideration and a schedule award based on the employment injury. Accompanying the letter was a May 27, 1998 medical report from Dr. David Weiss, an osteopath. Dr. Weiss stated that appellant was currently unable to perform his previous job as a letter carrier. He also found that appellant had sustained a permanent impairment of the left knee, causally related to the 1991 employment injury, pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fourth edition) for an award under the schedule. Dr. Weiss found that appellant had a 12 percent impairment based on left quad muscle strength weakness, pursuant to Table 39, page 77 of A.M.A. *Guides*, a 17 percent impairment based on left gastrocnemius weakness, pursuant to Table 39, page 77 of A.M.A., *Guides* for a total combined left lower extremity impairment of 27 percent.

By decision dated October 23, 1998, the Office affirmed the previous decision, finding that appellant failed to submit medical evidence sufficient to warrant modification of the previous decision.

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits as of February 27, 1997.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened to order to justify termination or modification of compensation benefits.[2] After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[3]

[2] *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

[3] *Id.*

In the present case, the Office based its February 27, 1997 decision to terminate appellant's compensation on the November 13, 1996 medical report of Dr. Sapega, the second opinion physician, who found that appellant no longer suffered residual disability resulting from his accepted left knee condition and that the 1991 work injury did not result in any specific internal derangement injury such as patellar chondromalacia or cartilage tear. The Office found that the weight of the medical evidence rested with Dr. Sapega's November 13, 1996 medical report, which indicated that appellant was capable of returning to work without restrictions and that his left knee injury had resolved. This decision was proper, as Dr. Sapega's referral opinion represented the weight of medical opinion at the time of the Office's termination decision.

Subsequent to the Office's February 27, 1997 termination decision, however, the burden of proof in this case shifted to appellant, who thereafter submitted Dr. Frumento's January 20, 1997 medical report. This report, however, did not contain countervailing, probative medical evidence that appellant continued to have residual disability from his accepted October 21, 1991 injury. Dr. Frumento merely stated in summary fashion that appellant had purely subjective problems and that his injury and subsequent healing left him with a functional leg length discrepancy, which caused significant pedal, biomechanical imbalance. He provided no opinion as to whether appellant had any employment-related residuals in his left knee. Thus, Dr. Frumento's report did not satisfy appellant's burden of proof to submit medical evidence sufficient to warrant modification of the Office's February 27, 1997 termination decision. Accordingly, the Board affirms the February 19, 1998 decision of the Office hearing representative, affirming the Office's February 27, 1997 termination decision.

Lastly, notwithstanding the Board's affirmance of the Office's February 19, 1998 decision, the Office did not consider whether appellant was entitled to an award under the schedule based on a permanent impairment of the left knee, despite the fact that Dr. Weiss had indicated in his May 27, 1998 medical report that appellant had a 27 percent left lower extremity impairment pursuant to A.M.A., *Guides*. This report, which is unrefuted by the record, was not considered by the Office in its October 23, 1998 decision. The Office merely stated that Dr. Weiss failed to make any reference to a nonwork-related back injury appellant sustained in 1996 and failed to take into account whether appellant's prior and intervening back injuries contributed to his knee condition. This finding was erroneous, as it was not relevant to the issue raised by appellant in his request for reconsideration; *i.e.*, a determination regarding whether appellant was entitled to a schedule award based on a permanent impairment causally related to his accepted left knee injury.[4] Appellant has submitted evidence which contained a history of the development of a permanent impairment of the left knee resulting from his accepted left knee condition and a medical opinion that the condition found was consistent with the history of development.

[4] The Board notes that the Office acted improperly in providing its own medical opinion on appellant's case, questioning whether a nonwork-related back injury had contributed to appellant's accepted left knee condition. There is no evidence of record that the Office claims examiner is a physician. The statement of a lay person regarding medical issues is not competent evidence on the issue of causal relationship; *see James A. Long*, 40 ECAB 538 (1989); *Susan M. Biles*, 40 ECAB 420 (1988).

Accordingly, given the absence of any opposing medical evidence, Dr. Weiss' May 27, 1998 report is sufficient to require further development of the record.[5] Although the medical evidence submitted by appellant is not sufficient to meet appellant's burden of proof, the medical evidence of record raises an uncontroverted inference that appellant has sustained a permanent impairment to a schedule member of his body causally related to his accepted left knee condition, entitling him to a schedule award under 5 U.S.C. § 8107 and is sufficient to require further development of the case record by the Office.

The schedule award provision of the Federal Employees' Compensation Act[6] and its implementing regulation[7] set forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.[8] However, neither the Act nor its regulations specify the manner in which the percentage of loss of use of a member is to be determined. For consistent results and to insure equal justice under the law to all claimants, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants seeking schedule awards. The A.M.A., *Guides*, have been adopted by the Office for evaluating schedule losses and the Board has concurred in such adoption.[9]

On remand, therefore, the Office should further develop the medical evidence by submitting Dr. Weiss' May 27, 1998 to an Office medical adviser and requesting him to submit his opinion as to whether appellant has sustained a permanent impairment to a schedule member of his body causally related to his accepted left knee condition, entitling him to a schedule award under 5 U.S.C. § 8107 and, if warranted, to provide a rating in accordance with the relevant standards of A.M.A., *Guides*. After such development of the case record as the Office deems necessary, a *de novo* decision shall be issued.

[5] *John J. Carlone*, 41 ECAB 354 (1989).

[6] 5 U.S.C. §§ 8101-8193*; see* 5 U.S.C. § 8107(c).

[7] 20 C.F.R. § 10.304.

[8] 5 U.S.C. § 8107(c)(19).

[9] *Thomas D. Gunthier*, 34 ECAB 1060 (1983).

Accordingly, the decision of the Office of Workers' Compensation Programs dated February 19, 1998 is affirmed. The October 23, 1998 decision is set aside and the case is remanded for further action in accordance with this decision.

Dated, Washington, D.C.
November 24, 1999

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member