U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANTHONY G. ALPHONSO and U.S. POSTAL SERVICE, POST OFFICE, Albany, NY

Docket No. 97-2351; Submitted on the Record;
Issued September 3, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS, DAVID S. GERSON

The issue is whether appellant sustained a recurrence of disability after September 14, 1993 that was causally related to his employment injury of April 7, 1986.

On April 7, 1986 appellant, a city letter carrier, sustained an injury while in the performance of duty when he picked up a bag of mail.[1] The Office of Workers' Compensation Programs accepted his claim for the condition of thoracic and paravertebral muscle strain and paid benefits. He accepted a permanent limited-duty assignment on January 3, 1990 but stopped worked on September 14, 1993 claiming a recurrence of disability. Appellant explained that his condition was basically the same, that he always had the back pain he had from the original injury. Describing the circumstances of the recurrence, appellant stated: "I have the same back, hip and leg pain as I experienced after my injury."

The postmaster explained that on September 14, 1993 appellant was instructed that, whenever he needed to sit because his back bothered him and he could not case mail, he was to answer telephones rather than sit downstairs reading books, newspapers or sports magazines. The conversation ended, the postmaster explained, when appellant stated that he would not answer the telephone. The postmaster noted that appellant never reported a recurrence. On the following day the office of appellant's physician called to request forms and to advise that appellant needed time off because of stress and back pain.

In a report dated October 13, 1993, Dr. George S. Cook, appellant's family physician, stated that appellant had become disabled by a combination of his back pain and new stresses at work. Dr. Cook stated that appellant was tolerating work when allowed to take structured breaks in order to rest his back but that appellant felt that he was unable to continue working when a modification in his current working program was recommended. He noted that appellant

[1] On July 7, 1987 appellant filed a Form CA-2, notice of occupational disease and claim for compensation, but implicated only the lifting incident of April 7, 1986.

definitely had comparable muscle spasms in his mid-thoracic spine when examined after this. Dr. Cook related appellant's disability to the original injury of April 7, 1986. He stated that appellant had continued to experience off-and-on back pain between the scapulas and in the low back. On October 15, 1993 Dr. Rowland G. Hazard, a consultant to Dr. Cook, reported that appellant recently had to stop work as a mail carrier on September 15, 1993 because of his thoracic back pain. Dr. Hazard reported that appellant had noted that over the past year "he had his ability to take breaks during the day curtailed and feels that this has made a significant difference in his ability to tolerate his work duties."

On October 29, 1993 the postmaster further explained that there was no modification of appellant's work program. Appellant's structured breaks had not changed. It was suggested that if appellant was able to sit and read he could sit and answer the telephone. "When this was proposed to [appellant]," the postmaster stated, "he became outraged and refused stating that 'you can do whatever you want, but I will not answer the telephone.'"

On February 1, 1994 appellant replied that his back pain became so bad on September 14, 1993 while pulling down mail for his route that he thought he was going to faint. He decided to remain at work until his shift was over as the following day was his scheduled day off and he could see his physician. Appellant explained that he met with the postmaster later that day, who advised that appellant would start routing mail on city 5 and city 13 before starting his own route, that he was not allowed to take his break in the break room any more, that the postmaster was going to set up a table and chair in the middle of the floor where appellant would sit and answer the telephone, that appellant advised he would not answer the telephone during his break time and that the postmaster advised that his work shift would now start and end a half an hour later.

In a report dated February 28, 1994, Dr. Cook noted that appellant had a recurrence of back pain on September 14, 1993 "in association with some demands that he would be available to answer the phone when taking breaks from his modified back pain." In a report dated July 1, 1994, Dr. Hazard stated that appellant recalled having some sort of lifting injury in September 1993 for which he saw Dr. Cook and that it was appellant's feeling that this was an exacerbation of his long-standing thoracic back pain dating back to 1986. Dr. Hazard noted: "This specific injury of September 1993 which he relates now was not part of his history on evaluation here [October 15, 1993]." Instead, Dr. Hazard reported, appellant related on October 14, 1993 that the only change he recognized since January 1993 had been some "very gradual and slight" worsening of his mid-thoracic back pain.

In a decision dated April 7, 1994, the Office denied appellant's claim of recurrence. In a decision dated December 9, 1994, the Office affirmed the denial. Appellant requested reconsideration. In decisions dated June 2, 1995 and September 18, 1996, the Office denied modification of its prior decision.

The Board finds that the evidence of record is insufficient to establish that appellant sustained a recurrence of disability after September 14, 1993 that was causally related to his employment injury of April 7, 1986.

When an employee is disabled from the job he held when injured on account of employment-related residuals and returns to a limited-duty position or the medical evidence of record establishes that he can perform the limited-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he cannot perform such limited-duty work. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the limited-duty job requirements.[2]

The evidence in this case fails to show that appellant could no longer perform his limited-duty assignment after September 14, 1993 as a result of a change in the nature and extent of the injury he sustained on April 7, 1986, which the Office accepted for thoracic and paravertebral muscle strain. There is the observation appellant provided on his claim form that his condition was basically the same and that he always had the back pain he had from the original injury. Asked to describe the circumstances of the recurrence, appellant stated: "I have the same back, hip and leg pain as I experienced after my injury." Even if one assumes that the intensity of appellant's back pain was not always constant but varied with activity, nonetheless appellant gave no indication on his claim form that the nature and extent of his injury-related condition had changed such that he could no longer perform the duties of his limited-duty assignment. There is also appellant's failure to mention any such change to his superiors at the employing establishment. More compelling is appellant's failure to report any such change contemporaneously to the physicians providing his medical care. Indeed, although Dr. Cook noted muscle spasms in the mid-thoracic spine, he did not report that the nature and extent of appellant's accepted muscle strain had changed. He reported instead that appellant had continued to experience off-and-on back pain between the scapulas and in the low back. Further, he reported that appellant was tolerating work when allowed to take structured breaks in order to rest his back but that appellant felt that he was unable to continue working when a modification in his current working program was recommended. This history is consistent with the postmaster's account of his meeting with appellant on September 14, 1993 on the issue of answering telephones during breaks for his back, which the postmaster contended was no modification of appellant's working program. On October 15, 1993 appellant related to Dr. Hazard that his ability to take breaks during the day had been curtailed over the past year and that this had made a significant difference in his ability to tolerate his work duties. The record fails to substantiate the fact or length of this reported curtailment, showing instead that the issue of appellant's availability to answer telephones during rest breaks arose on September 14, 1993 during the meeting with the postmaster.

It was on February 1, 1994 that appellant first raised the issue of reinjury. He stated that his back pain had become so bad on September 14, 1993 while pulling down mail for his route that he thought he was going to faint. Notwithstanding this late history, coming some four and a half months after the claimed recurrence, Dr. Cook reported on February 28, 1994 that appellant had a recurrence of back pain on September 14, 1993 "in association with some demands that he would be available to answer the phone when taking breaks from his modified back pain." In a report dated July 1, 1994, Dr. Hazard stated that appellant recalled having some sort of lifting injury in September 1993 for which he saw Dr. Cook and that it was appellant's feeling that this

[2] *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

was an exacerbation of his long-standing thoracic back pain dating back to 1986. Dr. Hazard observed, however, that this specific injury of September 1993 that appellant was now relating was not part of the history he provided during his evaluation on October 15, 1993.

The Board finds that the evidence of record fails to establish that appellant could no longer perform his limited-duty assignment after September 14, 1993 as a result of a change in the nature and extent of the injury he sustained on April 7, 1986. At best, the medical evidence tends to support a "very gradual and slight" worsening of appellant's mid-thoracic back pain since January 1993 but does not establish that appellant could no longer perform his limited-duty assignment after September 14, 1993 as a result.[3]

The weight of the evidence tends to show instead that appellant stopped work after September 14, 1993 because of his reaction to the postmaster's remarks that day. The Board notes that appellant made no attempt to perform his assignment under the conditions set forth by the postmaster. There is no evidence, for example, that appellant attempted to answer telephones while taking a break for his back or that he attempted to commute to work during a new work shift the following workday or that he attempted to perform any additional routing. Fear of future injury is not compensable, and fear of a recurrence of disability or disability if the employee returns to work is not a basis for compensation.[4] Regardless of whether the postmaster's instructions on September 14, 1993 can be characterized as a change in the nature and extent of appellant's limited-duty job requirements, the record contains no convincing medical evidence that any such change disabled appellant for work.

As appellant has not met his burden of establishing by the weight of the reliable, probative and substantial evidence a recurrence of disability after September 14, 1993 that was causally related to his employment injury of April 7, 1986, the Board will affirm the denial of his claim.

[3] The medical opinions of record that relate appellant's disability to the unsubstantiated reinjury of September 14, 1993 are of little probative value and are, strictly speaking, immaterial to whether appellant sustained a recurrence of disability causally related to the injury of April 7, 1986; *see James A. Wyrick*, 31 ECAB 1805 (1980) (physician's report was entitled to little probative value because the history was both inaccurate and incomplete).

[4] *Pat Lazzara*, 31 ECAB 1169 (1980).

The September 18, 1996 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
September 3, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member