U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES McBREARTY, JR. and DEPARTMENT OF THE TREASURY, CUSTOMS SERVICE, Jamaica, NY

Docket No. 99-605; Submitted on the Record;
Issued December 4, 2000

DECISION and ORDER

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

The issues are: (1) whether appellant sustained recurrences of disability on March 24, 1997, April 1 and May 24, 1998 causally related to his August 14, 1995 employment injury; and (2) whether the Office of Workers' Compensation Programs properly found that appellant had no loss of wage-earning capacity.

On August 14, 1995 appellant, then a 46-year-old accountant/auditor, filed a claim for a traumatic injury which occurred on that date from a fall sustained in the performance of duty. The Office accepted the claim for lumbosacral and right knee sprains.[1]

Dr. Raphael Cilento, an orthopedic surgeon, submitted numerous attending physician reports (Forms 20-a), which he indicated that appellant was suffering from an employment-related lumbosacral intervertebral disc lesion, an injury to his right knee and a cervical intervertebral disc lesion. Commencing with his attending physician's report dated December 31, 1995, Dr. Cilento opined that appellant was totally and permanently disabled.

On May 8, 1996 the Office requested a second opinion from Dr. Martin A. Lehman, a Board-certified orthopedic surgeon who, in a medical report dated June 12, 1996, concluded:

> "At the present time based upon the examination and review of records, it is my opinion the patient is able to perform work as an [a]ccountant/[a]uditor performing his normal sitting. I would restrict the walking, lifting, bending, squatting, climbing, kneeling, twisting and standing as indicated on the enclosed

[1] The Board notes that appellant had a preexisting condition due to injuries he sustained while in the military, specifically, appellant lost his left leg and wears a prosthesis and he has numerous bullet wounds, including some in his right leg.

> form OWCP-5….[2] In summary then, it is my opinion the patient is able to perform his duties as an [a]ccountant/[a]uditor with restriction noted on heavy physical work."

On July 24, 1996 the Office issued a notice of proposed termination of compensation, wherein it noted that, after considering the reports of Drs. Cilento and Lehman and the sedentary nature of appellant's position, appellant was capable of performing his normal job duties.

In response, appellant submitted further attending physician's reports by Dr. Cilento, including those dated July 2, September 5 and October 22, 1996 wherein he again noted his opinion that appellant was totally and permanently disabled. However, in a September 5, 1996 medical report, wherein Dr. Cilento critiqued Dr. Lehman's opinion, he recommended that appellant return to part-time duty, which was restricted and had no driving during work hours and did not expose appellant to any working machinery outside of his restrictions. Dr. Cilento concluded, "It is my forensic conclusion that this patient suffers serious work-related injuries recently and that these injuries are permanent and will not be cured and he is not capable of anything but restricted duty."

In a letter dated October 31, 1996, the employing establishment informed appellant that as the medical evidence indicated, he was able to return to work as an auditor, he was to report on November 25, 1996. The employing establishment explained:

> "The work of the position is primarily sedentary and there is no excessive bending, twisting, kneeling or lifting of objects required. If necessary, assistance will be provided if lifting of such objects as files, ledgers, computer lap tops, weighing 20 pounds or more is required"

In a letter to the employing establishment dated November 14, 1996, appellant, through his attorney, indicated that he accepted the position under duress and protest, arguing that the offered position is contrary to the restrictions set by Dr. Cilento in his September 5, 1996 report.

In attending physician's reports dated December 5, 1996 and January 9, 1997, Dr. Cilento noted that appellant was totally disabled from his regular work and otherwise temporarily totally disabled due to his work injury, that he was in need of rehabilitation that the prognosis for his knee and back was poor.

In a letter dated February 14, 1997, appellant received an offer for work.

On March 11, 1997 the employing establishment filed a report of termination of disability and/or payment, wherein it noted that appellant returned to work on March 10, 1997.

[2] Dr. Lehman found that appellant could sit continuously, but that walking and lifting were limited to four hours a day intermittently, lifting, bending, squatting, climbing, kneeling and twisting, were limited to three hours a day intermittently and standing was limited to six hours a day intermittently. Appellant was restricted to lifting no more than 20 pounds. Dr. Lehman indicated that appellant could work eight hours a day.

In a decision dated September 13, 1997, the Office determined that appellant had satisfactorily performed his duties as compliance assessment team leader, full time light duty and was capable of earning the same wages, so no loss of wage-earning capacity existed.

On October 29, 1997 appellant filed a notice of recurrence of disability and claim for continuation of pay/compensation (Form CA 2a), alleging that he was temporarily totally disabled from work due to his work injury on certain dates from March 24 through September 22, 1997.

On April 2, 1998 appellant filed another notice of recurrence of disability and claim for continuation of pay/compensation alleging a recurrence occurred on April 1, 1998. On May 27, 1998 he filed another claim of recurrence, alleging a recurrence commencing on May 26, 1998.

In a decision dated June 4, 1998, the Office requested further information with regard to the three recurrence claims.

In an attending physician's supplemental report dated June 18, 1998, Dr. Cilento opined that appellant suffered from herniated discs in the spine and torn ligaments in the right knee and that this was due to the work-related injury. He no longer believed that appellant was totally disabled from his usual work, but did believe that appellant should not kneel or use the stairs and should only engage in limited bending, standing, sitting, walking, lifting and driving. Dr. Cilento also submitted a medical report on the date, wherein he noted that appellant had "serious problems which have prevented him from attending work and he needs recompense for the times when his work caused injury thus prevent[ed] him from performing his regular duties."

By letter dated July 31, 1998, appellant requested reconsideration of the rejected claim.

On September 24, 1998 the Office issued two decisions regarding the claims. In the first decision, the Office denied the claimed recurrences of disability of March 24, 1997, April 1 and May 24, 1998 for the reason that the evidence of record failed to establish a worsening of appellant's condition causing disability. In a second decision of the same date, the Office denied modification of the September 13, 1997 decision, finding that the evidence and arguments submitted did not demonstrate that there was a change in the nature and extent of his injury-related condition, nor that the original determination was erroneous.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[3] As appellant filed his appeal with the Board on December 22, 1998, the only decisions properly before the Board are the two decisions issued by the Office on September 24, 1998.

The Board finds that appellant has not established that he sustained recurrences of disability on March 24, 1997, April 1 and May 24, 1998 causally related to his August 14, 1995 employment injury.

[3] *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

Where appellant claims a recurrence of disability due to an accepted employment-related injury, he has the burden of establishing by the weight of the substantial, reliable and probative evidence that the subsequent disability for which he claims compensation is causally related to the accepted injury.[4] This burden includes the necessity of furnishing evidence from a qualified physician who, on the basis of a complete and accurate factual and medical history, concludes that the condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.[5]

The Office accepted that appellant's August 14, 1995 employment injury caused lumbosacral and right knee sprains, and paid compensation, which ended when appellant returned to work.

Appellant then claimed several recurrences of disability due to the August 14, 1995 injury. Despite the Office's instructions on the evidence necessary to support this claim, appellant did not submit rationalized medical opinion evidence showing that the claimed recurrences were related to his employment injury. The only medical evidence appellant submitted in support of his alleged recurrences was the aforementioned June 18, 1998 report by Dr. Cilento. This report does not provide any rationale as to why Dr. Cilento believed that the alleged recurrences were caused by the employment injury nor does it provide a satisfactory explanation of the alleged recurrences. As appellant has not submitted any new persuasive evidence, the Office properly denied appellant's claims for recurrences on March 24, 1997, April 1 and May 24, 1998.

The Board further finds that the Office properly denied modification of appellant's loss of wage-earning capacity determination.

Once loss of wage-earning capacity is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous. The burden of proof is on the party attempting to show modification of the award.[6]

In this case, appellant did not submit sufficient evidence to show that the Office's determination in its September 13, 1997 decision that appellant had no loss of wage-earning capacity was erroneous. Appellant's argument that his current position was unsuitable was evidenced by his numerous recurrences has no merit as these recurrences were properly denied, as discussed *supra*. Furthermore, appellant's position is within the restrictions set by his treating physician, Dr. Cilento. Dr. Cilento's latest medical report dated June 18, 1998 does not provide any medical reason that appellant cannot work in this position, as long as the restrictions of no kneeling or stairs, and limited bending, standing, sitting, walking, lifting and driving are honored. There is no indication that the employing establishment is not honoring these

[4] *John E. Blount*, 30 ECAB 1374 (1979).

[5] *Jose Hernandez*, 47 ECAB 288 (1996).

[6] *See Don J. Mazurek*, 46 ECAB 447 (1995).

restrictions. Appellant's argument that his inability to travel resulted in a loss of wage-earning capacity in that he could not effectively compete for promotions is also without merit, as the Board has held that the probability that an employee, if not for his injury-related condition, might have had greater earnings is not proof of a loss of wage-earning capacity and does not afford a basis for payment of compensation under the Federal Employees' Compensation Act.[7] Accordingly, as appellant has not submitted any evidence that he cannot perform the duties of his current position, the Office properly determined that he had not established that modification of the September 13, 1997 decision was warranted.

The decisions of the Office of Workers' Compensation Programs dated September 24, 1998 are hereby affirmed.

Dated, Washington, DC
December 4, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

[7] *Rudolph J. Short*, 46 ECAB 437 (1995).