U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LEE M. WATTS and DEPARTMENT OF THE AIR FORCE, LOWRY AIR FORCE BASE, Denver, CO

Docket No. 97-2448; Submitted on the Record;
Issued January 4, 2000

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT, A. PETER KANJORSKI

The issue is whether appellant has met his burden of proof in establishing that he sustained a recurrence of disability on or after April 1992 causally related to his October 1, 1990 employment injury.

On October 1, 1990 appellant, then a 50-year-old laborer, filed a Form CA-1, notice of traumatic injury, stating that he fell that day injuring his neck, back, foot and arm. The Office of Workers' Compensation Programs accepted appellant's claim for cervical and lumbar strains and a right shoulder strain. Appellant returned to work in a light-duty position as a clerk/typist in October 1991.

On November 23, 1993 appellant filed a Form CA-2a, notice of recurrence of disability, stating that he was still suffering the same back, neck and shoulder problems and that they have been getting progressively worse.

By decision dated March 23, 1994, the Office denied appellant's recurrence claim for the reason that the evidence of file failed to demonstrate that the claimed recurrence of disability on or after April 1992 was causally related to the accepted injury. By decision dated January 20, 1995, an Office hearing representative affirmed the March 23, 1994 decision on the grounds that the recent medical evidence failed to support the presence of injury-related residuals to support continuing injury-related disability.

Appellant, through his representative, disagreed with the decision and requested another hearing. An amended report dated March 1, 1995 from Dr. Don R. Molden, an internist and appellant's treating physician, was submitted. Dr. Molden stated that it was appellant's medical opinion that all of appellant's injuries noted on his December 2, 1994 letter were related to appellant's fall on October 1, 1990.

In a December 1, 1995 report prepared for appellant's application for disability retirement, Dr. Molden noted appellant's work injury of October 1, 1990 and the course of treatment appellant had undergone since then. He diagnosed a chronic cervical and lumbar strain associated with frequent muscle spasms of the neck and back respectively. Dr. Molden stated that, due to the lumbar strain, appellant had chronic sciatica of the right lower extremity and due to the above diagnoses, appellant had a chronic pain syndrome that was poorly responsive even to the most potent narcotic analgesic agents. He stated that he did not expect appellant to recover either partially or fully from his condition and that, as a result, appellant could not be gainfully employed even in the most sedentary occupation.

By decision dated May 3, 1996, an Office hearing representative found that the medical evidence of record raised an uncontroverted inference of continuing disability and remanded the case for further development of the case record by the Office.

The Office referred appellant to Dr. Herbert H. Maruyama, a Board-certified orthopedic surgeon, for a second opinion evaluation, who evaluated appellant on October 28, 1996, noted appellant's accounts of the October 1, 1990 and the October 23, 1995 work incidents, took a medical and family history, reviewed the medical record, performed a physical examination and took x-rays of appellant's cervical and lumbosacral spine and right shoulder. He stated that, historically, all of appellant's symptoms worsened in the neck, right shoulder and low back regions from the October 23, 1995 accident in addition to a left elbow injury. Dr. Maruyama noted that the June 19, 1996 statement of accepted facts failed to mention the October 23, 1995 slip and fall which appellant claims has steadily worsened all of his symptomatology.

Dr. Maruyama opined that appellant's disability was more related to the October 23, 1995 incident than to the October 1, 1990 injury as there appeared to be considerable residuals from the October 23, 1995 episode. He further stated that appellant's "subjective complaints when noted with the considerable restriction of motion found especially in the low back examination and to some extent, in the neck and right shoulder regions, do not seem compatible with an ability to return to gainful work." Dr. Maruyama recommended that appellant be placed on an exercise regimen to gain the strength and endurance to recondition his body to meet the work requirements as set forth in the statement of accepted facts.

Appellant, through his attorney, submitted additional medical evidence.

On June 17, 1996 Dr. Floyd Bralliar, a Board-certified physiatrist, examined appellant at the request of appellant's attorney. In a report of the same date, Dr. Bralliar noted the history of the October 1, 1990 and October 23, 1995 injuries as appellant related them, took a medical and family history, noted that he performed examinations on June 17 and July 1, 1996 and provided his findings. He diagnosed herniated discs at C4-5 and C6 superimposed upon chronic cervical strain; stenosis at the C6-7 level; marked degenerative changes at L4-5 and generally in the lumbosacral region; acute lumbosacral strain; and impingement syndrome, right shoulder. Dr. Bralliar stated that, as of July 1, 1996, maximum medical improvement had not been reached as there was marked palpable spasticity of the musculature of the back from the midthoracic region downward as well as loss of the knee reflex on the right and the sensory loss on the lateral aspect of the right leg and foot. He opined that appellant was totally disabled. Dr. Bralliar noted that, after the first injury of October 1990, appellant had varying trouble with his back. He noted

that this was made worse by the slip and fall accident that occured in October 1995. Dr. Bralliar opined that this was an exacerbation of the original injury and not considered apportionable.

On June 14, 1996 Dr. Kasiel Steinhardt, a Board-certified orthopedic surgeon and appellant's treating physician, noted appellant's work injuries of October 1, 1990 and October 23, 1995 and reviewed outside records prior to conducting his examination. Dr. Steinhardt diagnosed chronic sprain, lumbar spine region; chronic cervicodorsal myofascial strain with post-traumatic myofasciitis involving right shoulder girdle region; chronic pain syndrome; and emotional reaction secondary to injury and to chronic pain syndrome. He found no indication for surgery and recommended that he continue a conservative program of care. Dr. Steinhardt opined that appellant was totally disabled for any type of work and stated that, because of appellant's chronic pain and his need for medication and episodes of muscular spasm, it was probable that appellant could not maintain any type of regular job. No opinion on causal relationship was rendered.

By decision dated July 14, 1997, the Office denied appellant's recurrence claim based on the second opinion evaluation of Dr. Maruyama, a Board-certified orthopedic surgeon, that the residuals of the October 1990 work injury had resolved as appellant was able to return to full-time light-duty work after the injury as well as performing a second part-time job delivering pizza. The Office noted that Dr. Maruyama related appellant's current disability to an October 23, 1995 work incident, which, according to another second opinion Board-certified orthopedist in case number A12-0157572, had resolved in a June 5, 1997 report.

The Board finds that this case is not in posture for decision, because of a conflict in the medical opinion evidence and thus the case must be remanded for further evidentiary development.

The Board finds that there is a conflict in medical opinion with respect to the causal relationship of appellant's current conditions. While the Office relied on Dr. Maruyama's opinion that appellant's current disability was related to an October 23, 1995 work incident, the Board notes that evidence pertaining to appellant's October 23, 1995 work injury is not currently in the record before us.[1] He rationalized that the residuals from the October 1990 injury had resolved as "historically, all of appellant's symptoms worsened after the October 23, 1995 incident." Dr. Maruyama found appellant to be totally disabled as he stated that appellant's subjective complaints in conjunction with the considerable restriction of motion found in the low back examination and, to some extent, in the neck and right shoulder regions, did not seem compatible with an ability to return to work. Appellant's attending physicians, Dr. Molden, an internist, and Dr. Bralliar, a Board-certified physiatrist, indicated an awareness about appellant's October 23, 1995 work incident, but opined that appellant's conditions were related to the October 1990 injury. In an October 23, 1995 treatment note, Dr. Molden references the work injury of that date. In a December 1, 1995 report, Dr. Molden diagnosed a chronic cervical and lumbar strain associated with frequent muscle spasms of the neck and back, respectively, and

[1] Appellant's claim for his October 23, 1995 injury was adjudicated separately under case number A12-0157572. The Board notes that a second appeal was filed to the Board in case No. A12-0157572 and that a separate decison by the Board will be issued in that case.

stated that he did not expect appellant to recover either partially or fully from his condition. He opined that all of appellant's problems stem from the fall he suffered at his job on or about October 1, 1990. In a detailed discussion of appellant's medical history since the October 1, 1990 injury, Dr. Molden discussed the results of the multiple studies and scans appellant underwent. He further stated that appellant was going to be on conservative management, which includes medications and physical therapy, for the rest of his life. Dr. Bralliar noted that, as of July 1, 1996, maximum medical improvement had not been reached and that appellant was totally disabled. He stated that, after the October 1990 injury, appellant had had varying trouble with his back and this was made worse by the slip and fall accident of October 1995. Dr. Bralliar opined that appellant's current conditions stemmed from the October 1990 injury as the October 1995 injury was an exacerbation of the original injury.

The Board finds that in this case, the medical opinions are of relatively equal weight and rationale. Dr. Maruyama relates appellant's disability to the October 23, 1995 injury, which is not before us, while, Drs. Molden and Bralliar relate appellant's disability to the October 1, 1990 injury, which is before us. Accordingly, the Board finds a current conflict between the opinions of Drs. Molden and Bralliar, on one hand, and Dr. Maruyama, on the other hand, on whether appellant's current disability is related to the October 1, 1990 injury. This conflict in medical opinion requires a remand for resolution.[2]

Section 8123 of the Federal Employees' Compensation Act[3] provides that if there is disagreement between the physician making the examination, for the Office and the employee's physician, the Office shall appoint a third physician to resolve the conflict.[4] Based on the conflict in medical opinion, the Office shall refer appellant, together with an updated statement of accepted facts which includes a history of the October 23, 1995 injury along with the relevant medical evidence, to an impartial medical examiner to resolve the question of whether appellant's current conditions are causally related to the October 1, 1990 or the October 23, 1995 employment injury and to address the nature and extent of appellant's employment-related condition. After such development of the case record as the Office deems necessary, a *de novo* decision shall be issued.

[2] The Office noted that a second opinion physician in claim number A12-0157572 found that the October 23, 1995 injury had resolved. Inasmuch as the case record of the October 23, 1995 claim is not before us, the Board can not make a finding on whether the October 23, 1995 injury had resolved as it is outside our scope of review; *see* 20 C.F.R. § 501.2(c). As previously noted, a second appeal was filed to the Board in case No. A12-0157572 and a separate decison by the Board will be issued.

[3] 5 U.S.C. §§ 8101-8193; 5 U.S.C. § 8123(a); 20 C.F.R. § 10.408.

[4] *Shirley L. Steib*, 46 ECAB 309, 316 (1994).

The July 14, 1997 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion.

Dated, Washington, D.C.
January 4, 2000

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member