U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT BLACKWELL and DEPARTMENT OF THE NAVY, U.S. CIVIL SERVICE, PUBLIC WORKS CENTER, North Island Nas, CA

Docket No. 98-198; Oral Argument Held November 17, 1999; Issued January 18, 2000

Appearances: *James J. Cunningham, Esq.*, for appellant; *Cornelius S. Donoghue, Jr.*, for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM, A. PETER KANJORSKI

The issue is whether appellant has met his burden of proof to establish that he sustained a recurrence of disability caused by his accepted temporary aggravation of his underlying right lower extremity condition.

The Board has duly reviewed the case record in this appeal and finds that this case is not in posture for decision.

On October 17, 1995 appellant, a 46-year-old motor vehicle operator, filed a claim (Form CA-2a) assigned number A13-1026028 alleging that he sustained a recurrence of disability on September 14, 1995. He stated that following his original injury, which occurred on April 22, 1993, he was placed on restricted duty and limited to sitting 1 hour with a 20-minute break.[1] Appellant further stated that he experienced pain in the his right thigh after any prolonged sitting. In describing his recurrence of disability, appellant stated that he was assigned to an aircraft towing tug by his supervisor, and that due to constant jarring movements of this vehicle

[1] The record reveals that the Office of Workers' Compensation Programs decided to handle appellant's Form CA-2a as a new claim for an occupational disease (Form CA-2) due to new exposure. Appellant's new claim was assigned number A13-1090048. Appellant's claim regarding his original April 22, 1993 injury was accepted by the Office for temporary aggravation of spontaneous right saphenous neuralgia. The Board, however, notes that the instant case record does not contain the records for this employment injury to support a finding that appellant's current condition was due to new exposure. Rather, the record reveals that appellant returned to light-duty work after his April 22, 1993 employment injury and that he has alleged a change in the nature and extent of his accepted condition.

and pressure on the back of his right thigh he experienced pain and burning within 10 minutes of sitting.[2] His claim was accompanied by factual and medical evidence.

By letter dated February 20, 1996, the Office advised appellant that the evidence submitted was insufficient to establish his claim. The Office then advised appellant to submit additional factual and medical evidence supportive of his claim. In response to the Office's letter, appellant submitted factual and medical evidence by letters dated March 29 and April 17, 1996.

In a June 21, 1996 decision, the Office found the evidence of record insufficient to establish that appellant's condition was caused by factors of his federal employment. In a July 23, 1996 letter, appellant requested an oral hearing before an Office representative.

By decision dated August 7, 1996, the Office denied appellant's request for a hearing as untimely filed pursuant to 5 U.S.C. § 8124. On June 20, 1997 appellant, through his representative, requested reconsideration of the Office's June 21, 1996 decision.

In a July 11, 1997 decision, the Office denied appellant's request for modification based on a merit review of the claim.

An employee returning to light duty or whose medical evidence shows the ability to perform light duty, has the burden of proof to establish a recurrence of temporary total disability by the weight of substantial, reliable and probative evidence and to show that he or she cannot perform the light duty.[3] As part of his burden, the employee must show a change in the nature and extent of the injury-related conditions or a change in the nature and extent of the light-duty requirements.[4]

In this case, appellant returned to light-duty work on an aircraft towing tug following his April 22, 1993 accepted temporary aggravation of an underlying right lower extremity condition. Appellant has alleged that there was a change in the nature and extent of his accepted condition due to the physical requirements of his light-duty assignment on the aircraft towing tug. In support of his allegation, appellant submitted a September 25, 1995 medical report of Dr. David Stein, a Board-certified neurologist and his treating physician, that appellant was under his care for nerve entrapment syndrome in his right lower extremity and that appellant contacted him on September 14, 1995 with complaints of worsening symptoms. Dr. Stein stated that appellant's symptoms were exacerbated by prolonged sitting or by jarring movements. He recommended that appellant be restricted from driving any vehicle which caused jarring movements such as, an aircraft towing tug. Dr. Stein noted that there were no changes in appellant's other work restrictions.

[2] By letter dated October 19, 1995, appellant was separated from the employing establishment effective October 30, 1995 due to the employing establishment's inability to provide appellant with a light-duty assignment within his physical restrictions.

[3] *Terry R. Hedman*, 38 ECA 222, 227 (1986).

[4] *Id.*

In a September 29, 1995 medical report, Dr. Stein reiterated appellant's diagnosis and recent complaints regarding the worsening of appellant's symptoms, and what caused the exacerbation of appellant's symptoms. He stated that appellant's work restrictions remained that he should avoid prolonged sitting for greater than 1 hour without a 20-minute break for stretching. Further, Dr. Stein reiterated that appellant should avoid driving any vehicle which caused jarring movements such as, an aircraft towing tug. He concluded that these restrictions were permanent.

Dr. Stein's May 17, 1997 medical report indicated that appellant had a nerve entrapment syndrome in his right thigh which caused persistent pain and discomfort, and was related to a gunshot wound that appellant sustained in 1969. He noted appellant's permanent physical restrictions. Dr. Stein opined:

> "[Appellant's] former job duty as an aircraft towing tug operator did aggravate his discomfort and pain to the point that he was no longer able to perform that job duty. [Appellant] currently is essentially unable to perform any job duty which involves sitting. This significantly decreases his ability to compete in the work market. It has also significantly limited his ability to continue employment with the [employing establishment]."

Dr. Stein noted appellant's current permanent physical restrictions and stated that his neurological opinion remained that appellant's condition was permanent and stationary. He further stated that appellant may continue to have periodic exacerbation of his symptoms particularly, if he was aggravated by prolonged sitting as he previously described. Dr. Stein also stated that it was unlikely that appellant would suffer permanent damage to his nerve unless his symptoms were significantly aggravated such as, by prolonged sitting. He concluded that "[i]t remains my recommendation that, if [appellant] cannot be provided with a job description with the above restrictions, he should be placed on a permanent disability status."

Although, Dr. Stein's reports are insufficiently rationalized to discharge appellant's burden of proving by the weight of reliable, substantial and probative evidence that his alleged increase in disability is causally related to his accepted aggravation of an underlying right lower extremity condition, his reports raise an uncontroverted inference of causal relationship sufficient to require further development of the case record by the Office.[5]

On remand the Office should obtain the case record regarding appellant's original April 22, 1993 employment injury and consolidate this claim into the current claim. Further, the Office should compile a new statement of accepted facts and refer appellant, together with the complete case record and questions, to a Board-certified specialist for a detailed opinion on the nature and extent of the accepted injuries and their relationship to factors of appellant's employment, and whether appellant is partially or totally disabled due to factors of his employment. After such further development of the case record as the Office deems necessary, a *de novo* decision shall be issued.

[5] *See Gary L. Fowler*, 45 ECAB 365 (1994); *Horace Langhorne*, 29 ECAB 821 (1978).

The July 11, 1997 decision of the Office of Workers' Compensation Programs is hereby set aside and the case is remanded for further development in accordance with this decision.

Dated, Washington, D.C.
January 18, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member