U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THOMAS J. DELANEY and GENERAL SERVICES ADMINISTRATION, PUBLIC BUILDINGS SERVICE, New York, NY

Docket No. 98-452; Submitted on the Record;
Issued January 11, 2000

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly rescinded its acceptance of the condition of myocardial infarction, causally related to a December 29, 1989 employment incident.

The Board finds that the Office did not meet its burden of proof to rescind its prior acceptance of the condition of myocardial infarction.

This is appellant's second appeal before the Board. In the prior appeal, the Board found that there was a conflict in medical opinion evidence regarding whether or not appellant sustained a myocardial infarction in the performance of duty, which required resolution.[1]

Upon remand the Office referred appellant, together with a statement of accepted facts, questions to be answered and the complete case record to Dr. Saul Jack Landau, a Board-certified cardiologist. He noted that a Thallium's stress test conducted on January 3, 1990, five days after the alleged incident, demonstrated "a small area of infarction and a small area of ischemia." With respect to the question of whether appellant had sustained a myocardial infarction on October 29, 1989 Dr. Landau stated:

> "The overall impression is quite strong for coronary artery disease with perhaps a myocardial infarction in the past, recurrent and chronic atrial fibrillation and now congestive heart failure. [Appellant] suffered a severe run of atrial flutter and fribillation on December 29, 1989 as a direct result of his underlying condition and severe physical effort required by his employment. I do not know and no one could possibly know whether or not [appellant] suffered a myocardial infarction on that date. There is just not enough medical evidence that was presented or

[1] Docket No. 95-491 (issued February 24, 1997).

ascertained. The progression of [appellant's] condition is a matter of normal pathology and the natural course of events with coronary artery disease."

He also stated:

"There was further aggravation with the episode of September 1990 and again we do not know whether [appellant] suffered a myocardial infarction at that time. However, he certainly had aggravation of his underlying condition."

Dr. Landau went on to opine that appellant's bout of atrial fibrillation was temporary, but that he could not say when the temporary condition reverted to normal. He opined that appellant did not have any residuals from the work-related condition, which he identified as atrial fibrillation, at that time, however, he noted that appellant's employment might have aggravated his condition, but that he believed appellant had permanent disability because of the underlying nature of the coronary artery disease and its effect upon the heart.

Once the Office has accepted a claim, it has the burden of justifying the termination or modification of compensation benefits. Under such circumstances, the Office must either establish that its original determination was erroneous or that the employment-related disability has ceased.[2] To justify rescission of a prior acceptance, the Office has the burden of establishing through new or different evidence that its prior acceptance was erroneous.[3] The Office did not meet its burden of proof to rescind its acceptance of myocardial infarction based upon the report of Dr. Landau.

Dr. Landau noted that a Thallium stress test conducted five days after the alleged incident demonstrated a small area of infarction. This strongly and graphically supports that appellant, at some earlier time, sustained a myocardial infarction. The only question from that point on is whether or not it was caused by the December 29, 1989 incident. On this issue Dr. Landau is speculative, stating that "perhaps" appellant had a myocardial infarction on December 29, 1989 and that he did not know and no one could possibly know whether appellant suffered a myocardial infarction on that date. As Dr. Landau reports that a Thallium stress test revealed a myocardial infarction and as he was speculative about whether it occurred on the date in question, his opinion does not provide a sufficient basis upon which to base rescission of acceptance of myocardial infarction. Therefore, that part of the Office's September 12, 1997 decision is reversed.

Further, the Board finds that the case is not in posture for decision as to appellant's September 7, 1990 recurrence claim.

An individual who claims a recurrence of disability due to an accepted employment injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which compensation is claimed is causally related to the accepted

[2] *Thomas Meyers*, 35 ECAB 381 (1983); *Francis F. Fitzpatrick*, 33 ECAB 720 (1982).

[3] *See Daniel E. Phillips*, 41 ECAB 201 (1989); *Roseanna Brennan*, 41 ECAB 92 (1989), *petition on recon. denied*, 41 ECAB 371 (1990).

injury. This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.[4] Causal relationship is a medical issue and can be established only by medical evidence.[5]

In the instant case, in support of his September 7, 1990 recurrence claim appellant submitted a January 9, 1991 report from Dr. Anthony J. Marano, a Board-certified cardiologist, who recommended that appellant be immediately hospitalized for cardioversion. He opined that appellant had a serious heart condition which would get worse if he was put under stress and strain and he recommended that appellant retire due to heart disease. Dr. Marano noted that in September 1990 appellant ran up three flights of stairs chasing a suspect but had to stop because he experienced sickness, diaphoresis and weakness.

In a June 2, 1992 report, Dr. Marano noted the September 7, 1990 incident of weakness and diaphoresis after appellant chased a suspect up three flights of stairs and he opined that these symptoms were causally related to appellant's December 29, 1989 heart attack. In a July 13, 1992 report, Dr. Marano noted the September 7, 1990 occurrence of appellant chasing a suspect up several flights of stairs and he opined that appellant aggravated his underlying arteriosclerotic heart disease (the result of the December 29, 1989 myocardial infarction) and became totally disabled thereafter. These reports are highly supportive of appellant's recurrence claim.

Although an Office second opinion specialist, Dr. Wallace B. Lebowitz, a Board-certified cardiologist, opined that there was no contemporaneous documentation of cardiac problems related to the September 7, 1990 incident and hence implied that nothing happened on that date, he based this opinion on his belief that appellant did not sustain a myocardial infarction on December 29, 1989, which was contrary to the accepted facts of this case. Further, Dr. Lebowitz contradicted himself when he stated that appellant was not in atrial fibrillation as a permanent mechanism, but rather had degenerative disease of the sinus node and then later opined that appellant was in present atrial fibrillation which was an apparent permanent mechanism. As Dr. Lebowitz's unrationalized opinions were based upon an inaccurate history of accepted injury and were contradictory, they are of greatly diminished probative value.

Thereafter Dr. Landau even admitted that there was further aggravation of appellant's condition with the episode of September 1990 and again opined that he did not know whether appellant suffered a myocardial infarction at that time, but noted that appellant certainly had aggravation of his underlying condition. This opinion is also supportive of appellant's recurrence claim.

Proceedings under the Federal Employees' Compensation Act are not adversary in nature, nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence

[4] *Stephen T. Perkins*, 40 ECAB 1193 (1989); *Dennis E. Twardzik*, 34 ECAB 536 (1983); *Max Grossman*, 8 ECAB 508 (1956); 20 C.F.R. § 10.121(a).

[5] *Mary J. Briggs*, 37 ECAB 578 (1986); *Ausberto Guzman*, 25 ECAB 362 (1974).

to see that justice is done.[6] This holds true in recurrence claims as well as in initial traumatic and occupational claims. In the instant case, although none of appellant's treating physicians' reports contain rationale sufficient to completely discharge appellant's burden of proving by the weight of reliable, substantial and probative evidence that he sustained a recurrence of total disability on September 7, 1990, or experienced residuals which required him to leave his federal employment, causally related to his December 29, 1989 accepted conditions of atrial fibrillation and precipitation of myocardial infarction, they constitute substantial evidence in support of appellant's claim and raise a substantive inference of causal relationship between his allegedly disabling complaints and periods of disability and his original traumatic injuries, that is sufficient to require further development of the case record by the Office.[7] Additionally, there is no probative opposing medical evidence in the record.

[6] *William J. Cantrell*, 34 ECAB 1223 (1983).

[7] *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978); *see also Cheryl A. Monnell*, 40 ECAB 545 (1989); *Bobby W. Hornbuckle*, 38 ECAB 626 (1987) (if medical evidence establishes that residuals of an employment-related impairment are such that they prevent an employee from continuing in the employment, he is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity).

Consequently, the decision of the Office of Workers' Compensation Programs dated September 12, 1997 is hereby reversed in part and is remanded for further development on the recurrence aspect of appellant's claim.

Dated, Washington, D.C.
Janurary 11, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member