U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALBERT C. BROWN and DEPARTMENT OF THE ARMY, NEW JERSEY NATIONAL GUARD, Fort Dix, NJ

Docket No. 98-2320; Submitted on the Record;
Issued November 29, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issue is whether appellant sustained a recurrence of total disability commencing June 18, 1996, causally related to his May 1, 1992 lumbosacral strain injury.

The Office of Workers' Compensation Programs accepted that on May 1, 1992, appellant, then a 40-year-old mechanic, sustained lumbosacral strain when he slipped trying to get onto a metal ladder. He received appropriate compensation benefits through July 24, 1994, when he returned to modified duty.

Appellant continued to work at his modified duty eight hours per day until June 18, 1996 when he was terminated. The reason given on the notification of personnel action form for the termination was his loss of military membership. The employing establishment explained in an April 16, 1997 memorandum that a military membership was a prerequisite for employment and further noted that "[t]he loss of military membership was for nonmedical reasons, had it been for a medical reason he would have been allowed to file for a disability retirement." It noted that "[appellant] was not put out of the military for his injury, he was put out because he refused a direct order to go for a physical examination on three occasions and then refused to reenlist in the National Guard, which is a prerequisite for employment in this agency, therefore he was terminated for not having military membership." The employing establish also noted that "[b]ecause of the circumstances that involved [appellant's] loss of military membership (expiration of his term of service) his leaving the agency was considered a voluntary action on his part."

On March 26, 1997 appellant claimed a recurrence of disability due to a worsening of his back condition and he claimed compensation entitlement for the period June 18 to December 31, 1996.

On March 25, 1997 Dr. Honesto N. Poblete, appellant's attending Board-certified surgeon, completed an attending physician's form report noting diagnoses of lumbosacral spine

sprain, cervical cranial syndrome, vertebrogenic and muscle spasms. He described appellant as being unable to lift, bend or sit for extended periods of time and he referred appellant to Dr. Jeffrey Cook, a chiropractor, at a chiropractic center.

By letter dated April 25, 1997, the Office advised appellant of what was necessary to establish that he sustained a recurrence of disability.

In response, appellant provided a narrative explaining his recurrence and a May 13, 1997 report from Dr. Cook, a chiropractor, which noted that appellant was seen for a workers' compensation injury that had occurred on May 1, 1992. Dr. Cook noted that appellant's history was significant for "involvement in work[-]related back injuries which occurred in 1975 and 1985." He diagnosed cervicocranial syndrome, muscle spasms and vertebroganic syndrome of the lower extremity and recommended treatment for the correction or reduction of the spinal subluxation and distortions about the injured area.

On May 20, 1997 Dr. Poblete diagnosed "right low ilium, lateral flexion malposition of left T12, RL3, retrolisthesis of L5 on S1, posterior wedging and facet jamming, Lushka joint degeneration of C4-5, C5-6 and most marked by C6-7, spur formatyion of C4-7, cervicocranial syndrome, vertebrogenic syndrome to lower extremity and muscle spasms."

By decision dated September 13, 1997, the Office rejected appellant's recurrence claim finding that the evidence of record failed to establish either a change in the nature or extent of appellant's injury-related condition or a change in the nature or extent of his modified-duty requirements. The Office specifically noted that no spinal subluxations had been accepted by the Office as being injury related.

Thereafter appellant, through his representative, requested an oral hearing, which was held on February 24, 1998 at which appellant testified. At the hearing his representative argued that Dr. Poblete's reports confirmed that his condition had worsened and he argued that a January 28, 1993 memorandum from Albert Beierschmitt showed that appellant lost his military membership because he was not able to continue in his drills.

By decision dated April 23, 1998, the hearing representative affirmed the Office's September 13, 1997 decision finding that Dr. Poblete failed, in his post-termination reports, to explain how appellant's condition at the time of those reports was causally related to the original May 1, 1992 soft tissue muscular strain injury or how the lumbosacral soft tissue muscle strain injury evolved into appellant's present diagnoses. The hearing representative further found that Dr. Poblete's reports did not clearly establish a change in the nature or extent of appellant's condition on June 18, 1996 which caused a recurrence of disability and that there was no factual evidence of record which established a change in the nature or extent of appellant's modified-duty job requirements. The hearing representative found that Cpt. Beierschmitt's opinion did not demonstrate that appellant lost his military membership from not being able to continue his drills, but that it was merely a personal opinion that appellant should not be retained in 1993.

The Board finds that appellant has failed to establish that he sustained a recurrence of total disability commencing June 18, 1996, causally related to his May 1, 1992 lumbosacral strain injury.

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 reliable, probative and substantial evidence and to show that he cannot perform the light duty.[1] 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.[2] Appellant has failed to meet that burden of proof in this case.

In support of his claim for a recurrence of temporary total disability commencing June 18, 1996, causally related to his accepted soft tissue muscular strain injuries on May 1, 1992, appellant submitted a May 20, 1997 report, notes dated October 31, 1997 and January 13, 1998, and form reports dated March 25 and May 9, 1997 from Dr. Poblete, as well as a May 13, 1997 report from Dr. Cook. While Dr. Poblete's notes and reports state that appellant's claimed recurrence of disability is causally related to his May 1, 1992 soft tissue muscular strain injury, these notes and reports are devoid of any explanation or medical rationale in support of this conclusion.

The Board has frequently explained that medical conclusions unsupported by rationale are of diminished probative value and are insufficient to establish causal relation.[3] As these notes and reports are merely conclusory, they are of diminished probative value and are, therefore, insufficient to support a change in the nature or extent of appellant's injury-related condition and to establish appellant's recurrence claim.

The Board further notes that the report of Dr. Cook is not probative on the issue in question as he diagnosed conditions which had not been accepted by the Office as being injury-related and he provided no rationale as to how a soft tissue muscular strain injury in May 1992 resulted in vertebral malpositions in 1997. Therefore, this report also does not support a change in the nature or extent of appellant's injury-related condition or establish his recurrence claim.

With respect to appellant's arguments on appeal that he was not allowed to reenlist in the active duty Guard due to his physical profile, the Board notes that all of the official documents of record that relate to appellant's dismissal from the Guard on June 24, 1995 are consistent with the employing establishment's assertion that appellant voluntarily failed to reenlist when he was eligible to do so. The January 28, 1993 memorandum from Cpt. Beierschmitt is not inconsistent with this assertion, since it was written two and one half years prior to appellant's failure to reenlist, when he was still temporarily totally disabled due to his accepted back injury and undergoing treatment for this condition with Dr. Poblete. Therefore, the reservations expressed by appellant's commanding officer in that memorandum are completely irrelevant to this claim two and one half years later and provide no support for the allegation that appellant was "not allowed to reenlist" at that time because of his physical condition. Appellant has not submitted any concrete evidence which shows that he formally applied for reenlistment in the National

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

[2] *Id.*

[3] *See Vicky L. Hannis*, 48 ECAB 538 (1997); *Jacquelyn L. Oliver*, 48 ECAB 232 (1996).

Guard and that his application was denied or rejected. Under these circumstances, appellant's back condition did not "constructively" or otherwise, cause the termination of his light-duty civilian employment with the employing establishment. The record in this case supports that appellant's termination from his light-duty employment occurred automatically when he voluntarily failed to reenlist in the National Guard.[4]

Accordingly, the decision of the Office of Workers' Compensation Programs dated April 23, 1998 is hereby affirmed.

Dated, Washington, DC
November 29, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

[4] *See Jerry C. Gilliam*, 39 ECAB 1003 (1988).