U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN B. SPEIGNER, JR. and U.S. POSTAL SERVICE, POST OFFICE, Birmingham, AL

Docket No. 99-671; Submitted on the Record; Issued November 15, 2000

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM, A. PETER KANJORSKI

The issue is whether appellant had disability after October 1, 1993 due to his accepted back conditions.

This is the second appeal in this case to the Board. By decision dated January 23, 1997, the Board found that the Office of Workers' Compensation Programs had improperly developed loss of wage-earning capacity and set aside that portion of the Office's July 14, 1995 decision. The Board also granted the Director's request to set aside the Office's November 20, 1995 decision and remanded the case for further development and a *de novo* decision as the evidence was inconclusive regarding whether appellant was disabled from his light-duty distribution clerk position after October 1, 1993.[1]

Following further development, the Office, by decision dated July 29, 1997, determined that the weight of the medical evidence of record rested with the reports of Dr. Joseph C. Kendra, a Board-certified orthopedic surgeon and an Office referral physician, who opined that appellant had the physical capabilities of performing the requirements of the modified distribution position after October 1, 1993.

By decision dated October 19, 1998, an Office hearing representative affirmed the July 29, 1997 decision.

On November 12, 1998 appellant's attorney filed an application for review with the Board and reiterated the legal arguments, which he presented before the Office hearing representative. These arguments asserted that the Office engaged in "doctor shopping" by referring appellant to Dr. Kendra. He additionally argued that the Office ignored the opinions of Drs. Edward Kissel, a Board-certified orthopedic specialist and an Office referral physician and James G. White, III as well as a report from an Office vocational specialist which supported total

[1] Docket No. 96-511 (issued January 23, 1997).

disability. Appellant's attorney further asserted that the Office improperly shifted the burden of proof to appellant after he accepted a temporary trial light work period which he was unable to complete due to back pain.

On March 16, 1999 the Director of the Office filed a memorandum in justification of the Office's decision and contended that the Office properly adjudicated appellant's claim.

On June 4, 1999 appellant's attorney filed a supplemental memorandum and argued, based on the Board's ruling in *Sandra J. Corson*, Docket No. 95-1933 (issued July 2, 1997), that the Office failed to evaluate the reasons why appellant did not continue his modified temporary light-duty job.

On June 8, 1999 the Director filed a motion to strike appellant's supplemental memorandum arguing that appellant's attorney apparently filed the June 4, 1999 pleading without leave. In the alternative, the Director argued that appellant's argument was irrelevant to the instant appeal.

On July 22, 1999 appellant's attorney filed a motion for leave to file pleading out of time. The attorney asserted that appellant's reasons for not continuing to work were much stronger than the appellant in *Corson* and the Office failed to evaluate reasons why appellant did not continue his modified temporary light-duty job. The attorney further asserted that no new theories or arguments were presented and that no one was prejudiced by the June 4, 1999 submission.[2]

The Board has given careful consideration to the issue involved, appellant's contentions on appeal and the entire case record. The Board finds that the decision of the hearing representative of the Office dated October 19, 1998 is in accordance with the facts and the law in this case and hereby incorporates those facts by reference into this decision.

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence, a recurrence of total disability and to show that he or she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.[3] As part of this burden, appellant must furnish rationalized medical opinion evidence, based on a complete and accurate factual and medical history, showing a causal relationship between the claimed recurrence of

[2] The Director correctly notes that appellant did not request leave to file a supplemental pleading before the Board. Not withstanding this, the Board will consider the arguments contained with appellant's June 4, 1999 pleading as it relates to and is relevant to the instant appeal.

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

disability and an accepted employment injury.[4] Causal relation and disability are medical issues that must be resolved by competent rationalized medical evidence.[5]

Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment injury. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment injury identified by the claimant. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[6]

The Board finds that appellant has not established that he sustained a recurrence of disability after October 1, 1993 due to his accepted back conditions.

In this case, appellant returned to work in a light-duty position on July 7, 1993 and lost intermittent time from work until August 26, 1993, when he stopped worked completely. The job duties of the position indicated that appellant was to "sit at a case to work SCF letters; stand at a case to work SCF flats; markup duties, including sitting at a desk cutting out and mailing Form 3579; stand to box mail; and other miscellaneous duties as assigned by the supervisor which are within the medical limitations." The Board notes that the actual job offer of July 1, 1993 indicated a lifting requirement of up to 50 pounds. At the time the light-duty position was offered to appellant, the most recent medical evidence was the May 3, 1993 OWCP-5c form from Dr. John Higginbotham, a Board-certified orthopedic surgeon and an Office referral physician, which advised that appellant could not lift over 50 pounds. As the light-duty offer was consistent with appellant's medical restrictions, appellant's light-duty job was consistent with his medical requirements on July 7, 1993.

However, as there is evidence in the record which contradicts the lifting restriction of 50 pounds, the exact requirements of the position must be determined as a discrepancy exists between the job offer of July 1, 1993 which indicated lifting up to 50 pounds and the May 8, 1997 job description, which indicated a maximum lifting of 20 pounds. The Office hearing representative properly noted that appellant, in his previous hearing testimony of March 29, 1995, failed to describe any activity requiring lifting over 20 pounds. Appellant acknowledged pulling a crate that the mail is stored in and loading mail into a tray which he stated, when full, weighed approximately 50 pounds. The employing establishment indicated that appellant pushed, not pulled, the mail containers or "GPMC's." The mail containers also were unloaded by the truck driver, not appellant, into the building. The mail trays were handled one at a time and weighed an average of approximately 16 pounds. As the employing establishment's statements of appellant's duties were consistent with the standard postal position descriptions,

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[4] *Armando Colon*, 41 ECAB 563 (1990).

[5] *Debra A. Kirk-Littleton*, 41 ECAB 703 (1990); *Ausberto Guzman*, 25 ECAB 362 (1974).

[6] *James Mack*, 43 ECAB 321 (1991).

the hearing representative properly found that, although the original job offer of July 1, 1993 did stipulate lifting of up to 50 pounds, the factual evidence in this case established that appellant was not actually required to lift more than 20 pounds.

Appellant has submitted medical evidence in an effort to establish a change in the nature and extent of his condition. In the present case, the Board notes that, in its January 23, 1997 decision, the case was remanded for a *de novo* decision as the prior medical evidence of record was inconclusive regarding whether appellant was disabled from his light-duty distribution clerk position after October 1, 1993.[7] On remand, the Office referred appellant to Dr. Kendra, a Board-certified orthopedic surgeon, for a second opinion evaluation. The referral to him constitutes the second time appellant was referred to an Office referral physician. The Board has carefully reviewed the opinion of Dr. Kendra as set forth in his reports of June 11 and July 15, 1997 and notes that it has the reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue in this case. His opinion is based on a proper factual and medical history in that he had the benefit of an accurate and up-to-date statement of accepted facts dated July 2, 1997, which indicated all of appellant's compensable lumbar conditions including a herniated nucleus pulposus at the L4-5 level which Dr. Kendra had previously believed was not compensable. Moreover, he provided a proper analysis of the factual and medical history and the findings on examination, including the results of diagnostic testing and reached conclusions regarding appellant's ability to perform the modified distribution clerk position which comported with this analysis.[8] Dr. Kendra provided medical rationale for his opinion that appellant was not disabled from his light-duty position after October 1, 1993 due to any residuals of his accepted injuries. Dr. Kendra stated that appellant had objective evidence of an L4-5 herniated disc with resultant L5 radiculopathy. He noted that those conditions generally restricted a person from doing repetitive pushing, pulling, twisting and lifting heavy loads. Dr. Kendra also noted that sitting for an extended period could increase symptoms associated with herniated lumbar discs. He opined that appellant's job description, which allowed the ability to sit and stand interchangeably with intermittent walking and a lifting restriction of no more than 20 pound, would easily fall under appellant's restrictions given his back problems. Dr. Kendra explained that the only physical findings which would possibly prohibit appellant from performing his light-duty position would include weakness with observable muscular atrophy or asymmetry, spasm in the lumbar musculature or objective evidence of significant restriction of range of motion of the lumbar spine. He opined that appellant does not exhibit any of those findings.

The record also contained reports from Drs. White and Kissel which appellant's attorney argues are sufficient to establish that appellant was unable to perform the duties of this light-duty position after October 1, 1993. The Director properly notes that the Board considered and rejected this same argument on the prior appeal of appellant's claim. Appellant bears the burden of proof to establish that he was disabled after October 1, 1993.[9] In a February 14, 1994

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[7] The Board had acknowledged and the record reflects that appellant was paid temporary total disability during the period August 26 through October 1, 1993 on the daily roll.

[8] *See Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

[9] *Charles E. Robinson*, 47 ECAB 536 (1996); *Donald Leroy Ballard*, 43 ECAB 876 (1992).

deposition, Dr. White reiterated his opinion that he considers appellant to be totally disabled due to his back pain. He discussed several diagnostic tests completed in September 1993, including a negative myelogram and a magnetic resonance imaging which revealed no recurrent disc herniation. Dr. White stated, however, that the electromyogram (EMG) results indicated a new diagnosis, an L5-S1 radiculopathy, which he defined as "nerve damage." He indicated that the L5-S1 radiculopathy was probably the source of appellant's pain. Dr. White stated that he could not identify the cause of the nerve damage, but stated that it was "by history most likely due to the injuries he has had requiring surgery." He opined that the L5-S1 radiculopathy was not due to scar tissue or to anything impinging on the nerve, but rather to the damage to the nerve. A thoracic epidural implant was recommended. In his April 27, 1995 deposition, Dr. White stated that the EMG testing in 1986, 1994 and 1995 demonstrated chronic nerve damage to the S1 nerve root due to "interminable delay" in getting the 1985 surgery approved. Signs of chronic depression due to pain and financial troubles were noted. Dr. White's opinion is of diminished probative value as it is speculative and without supporting medical rationale.[10] It does not contain a complete and accurate history of the accepted injury or provide a medical rationale for the finding of total disability based on pain. Dr. White refers to "injuries" and attributes appellant's pain to a radiculopathy at L5-S1 which he speculates most likely resulted from the delay in getting the 1985 surgery approved. A delay in the approval for surgery, without supporting medical rationale, is not sufficient probative medical evidence to support that appellant's work stoppage was due to a recurrence or worsening of his injury-related conditions.

In his September 7, 1995 report, Dr. Kissel provided examination findings and results of objective testing which included findings consistent with L5-S1 radiculopathy. He opined that appellant's "failed back syndrome" was exacerbated by appellant's current work injury. In his October 12, 1995 report, Dr. Kissel stated that he did not think that appellant was qualified for the limited-duty job offer when he stopped working in August 1993. Dr. Kissel opined that appellant was significantly limited with regards to kneeling, stopping, squatting, lifting and standing and should not be allowed to lift over 20 pounds. To the extent that he found appellant capable of performing light-duty work involving lifting to 20 pounds, this is consistent with the actual light-duty work performed by appellant. It is noted that Dr. Kissel disagreed with the job offer because it indicated a lifting requirement of 50 pounds. Dr. Kissel's opinion, however, fails to address the question, which the Office specifically directed Dr. Kissel to answer in its letter of October 5, 1995 as to whether appellant was disabled from his modified distribution clerk position after October 1, 1993. Accordingly, contrary to appellant's assertion, Dr. Kissel's report is not sufficient to satisfy appellant's burden.

Appellant's attorney argued that the Office ignored a report from an Office rehabilitation specialist indicating total disability. A vocational rehabilitation specialist, however, is not considered a physician within the definition of the Federal Employees' Compensation Act.[11] Accordingly, this argument is moot.

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[10] *Geraldine H. Johnson*, 44 ECAB 745 (1993).

[11] 5 U.S.C. § 8101(2).

Appellant's attorney argued that the Office "doctor shopped" when it referred appellant to Dr. Kendra for another second opinion evaluation as Dr. Kissel's opinion supported disability. The Board finds that the Office's action in referring appellant to Dr. Kendra for another second opinion examination to determine whether appellant was disabled from his modified distribution clerk position after October 1, 1993 was reasonable under the circumstances of this case and did not constitute an abuse of discretion. As previously noted, Dr. Kissel provided a conclusory opinion without medical explanation after the Office's October 5, 1995 request for clarification. As the Board noted that the medical evidence regarding appellant's capabilities were inconclusive and remanded for a *de novo* decision, the Office properly exercised its authority under section 8123 (a) of the Act and referred appellant to Dr. Kendra for another second opinion evaluation by an Office referral physician. As a corollary to this argument, appellant's attorney on appeal cites to the cases of *Carlon L. Owens*[12] and *Myrtle C. Pittman*[13] in support of his contention that the Office engaged in doctor shopping by referring appellant to Dr. Kendra.

In the case of *Owens*, the Board had directed the Office to clarify the opinion of the impartial medical examiner. An Office medical adviser reviewed the supplemental report from the impartial medical examiner and recommended that appellant be referred to another Office specialist. The Office complied with this request and then forwarded the new opinion of the referral physician to the impartial medical examiner for further clarification of his opinion.

The Board held that the Office's actions following receipt of the impartial medical examiner's opinion gave the appearance of impropriety of shopping for a medical opinion and was not in conformance with the Board's pronouncements regarding the opinion of an impartial medical specialist selected to resolve a conflict in the medical evidence.

In *Pittman,* multiple referrals were made to impartial medical examiners to resolve a conflict in the medical evidence. The Board found that there was insufficient medical evidence of record which could have lead to a conflict in the medical evidence. The instant appeal, however, is distinguishable from the *Owens* and *Pittman* cases as a conflict in medical opinion evidence never arose. In this case, the medical evidence relevant to appellant's recurrence claim was inconclusive and the Office properly exercised its authority under section 8123(a) of the Act by referring appellant to Dr. Kendra for a second opinion evaluation. Inasmuch as Dr. Kendra's opinion was well rationalized and none of the other medical reports of record contained a well-rationalized opinion supporting causal relationship, a conflict of medical opinion evidence never arose in this case.

Appellant's attorney asserts that Dr. Kendra's reports were "impeached" by his subsequent testimony in the August 27, 1997 deposition. The Board finds that Dr. Kendra's testimony is consistent with his two written reports and fully supports his earlier conclusion that, although appellant has objective evidence of an L5 radiculopathy, he was still able to perform the duties of his modified clerk position after October 1, 1993. Dr. Kendra considered appellant's argument concerning the Office's omission in its statement of accepted facts and

[12] 36 ECAB 608 (1985).

[13] *Petition for recon. denied*, 40 ECAB 880 (1989).

found the point irrelevant in formulating his opinion regarding the degree of disability. Although Dr. Kendra agreed that appellant would not be able to do the July 1993 light-duty job offer, which indicated lifting up to 50 pounds, this point is moot as he noted that appellant could lift only 20 pounds and the factual evidence in this case established that appellant was not actually required to lift more than 20 pounds.

Appellant's attorney argues that he should have been allowed input into the amended statement of accepted facts prior to it being sent to Dr. Kendra. The Board has held that, when working conditions are alleged as factors in causing a condition or disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship.[14] The Board notes that, in the Office's decision of July 29, 1997, the Office properly found that appellant's assertion that he should have been permitted an opportunity to provide input into the amended statement of facts it sent to Dr. Kendra was inconsistent with the Office's adjudicatory role as the "trier of the facts." Moreover, the Board notes that the hearing representative was properly within her adjudicatory role as "trier of the facts" in accessing appellant's assertions regarding his work duties at the March 29, 1995 hearing. As previous discussed, the hearing representative's conclusions were substantiated by the record to support the hearing representative's conclusions that the factual evidence in this case established that appellant was not required to lift more than 20 pounds.

Appellant's attorney argued that the Office failed to evaluate the reasons why appellant did not continue his modified temporary light-duty job and cites to *Corson*. This argument, however, is irrelevant to the facts of this case. The *Corson* case concerned whether the Office had met its burden of proof to justify a termination under section 8106(c) of the Act on the grounds that appellant had refused suitable work. The instant case concerns whether appellant met his burden of proof to establish he was disabled due to his accepted back conditions after October 1, 1993. Inasmuch as appellant bears the burden of proof to establish his recurrence claim, the *Corson* case is not applicable to the present case. Although appellant's attorney further argues that "The [Office's] refusal to pay benefits in this case is an illegal taking of [appellant's] benefits in violation of the due process clause of the Constitution," the Director properly notes that appellant does not have a protected property interest as the filing of a Form CA-8 only gives rise to an expectation of continued disability benefits. The Board has previously stated that a claimant has a property interest in not having his or her benefits terminated and in such instances, the Office has the burden of proof.[15] Appellant was working a light-duty job and experienced a work stoppage due to an alleged recurrence of disability. The filing of the requisite forms does not give rise to a vested interest. This is not a termination case as appellant was not in the receipt of disability benefits.

Accordingly, without the necessary medical opinion evidence based on a proper factual background and including medical rationale to establish the causal relationship between appellant's diagnosed condition with resultant disability and his accepted back conditions,

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[14] *See generally Margaret S. Krzycki*, 43 ECAB 496 (1992).

[15] *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.,* 43 ECAB 818 (1992).

appellant has failed to meet his burden of proof and the Office properly denied his claim for a recurrence of disability.

The decision of the Office of Workers' Compensation Programs dated October 19, 1998 is hereby affirmed.

Dated, Washington, DC
November 15, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member