U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN J. TROJECKI and DEPARTMENT OF THE NAVY, PHILADELPHIA NAVAL SHIPYARD, Philadelphia, PA

Docket No. 99-2479; Submitted on the Record;
Issued November 16, 2000

DECISION and ORDER

Before WILLIE T.C. THOMAS, A. PETER KANJORSKI,
VALERIE D. EVANS-HARRELL

The issue is whether appellant has established that he sustained a recurrence of disability, commencing November 1, 1996, causally related to his February 3, 1992 employment-related right foot fracture.

The Office of Workers' Compensation Programs accepted that on February 3, 1992 appellant, then a 44-year-old crane inspector, sustained a fracture of his right calcaneus when he fell from a crane to a steel plate, for which he underwent a subtalar fusion on November 10, 1992.

An April 12, 1993 notification of personnel action indicated that appellant was changed from a GS-9 equipment specialist to a WG-10 heavy mobile equipment mechanic at a lower grade and pay rate than he had had as an equipment specialist.[1]

By report dated July 20, 1993, Dr. Paul J. Hecht, a Board-certified orthopedic surgeon, noted that he "would like to release [appellant] to a light-duty job. I feel he cannot perform his job as a crane mechanic if it requires lifting greater than 50 pounds or climbing to excessive heights...."

In a September 7, 1993 work restriction evaluation, Dr. Hecht indicated that appellant was restricted to four hours per day walking, four hours per day standing, three hours per day lifting, bending, squatting, kneeling and twisting, and two hours per day climbing. He indicated that appellant had a lifting restriction of 20 to 50 pounds, and remarked that appellant was "probably unable to return to original job but should attempt it." In a medical progress note that

[1] The Office stated that appellant returned to his regular duty as an inspector. However, the Office's second opinion orthopedic medical specialist reported that appellant stated that he did the same job as before but without climbing and appellant stated that he returned to working only in the shop or on ground cranes by agreement with his supervisor. Another Office referral physician noted that appellant returned to work on light duty.

date, Dr. Hecht opined that appellant could return to work as of September 20, 1993 and opined, "I think that he will probably be unable to return to his original job, but should be given an attempt to do so if he so desires."

Appellant returned to duty on September 20, 1993 as a WG-10 heavy mobile equipment mechanic.

By report dated October 19, 1993, Dr. Hecht noted that appellant was "back to work at his original job and full duties," but was "having some pain, especially at the anterior aspect of the ankle joint."

By report dated June 1, 1994, Dr. David Weiss, an osteopathic orthopedist, noted that appellant's "job as a crane mechanic exacerbates his pain."

Appellant was separated from his employment effective September 15, 1995 due to a reduction-in-force resulting from the employing establishment's closure.

On January 17, 1996 appellant was granted a schedule award for a 25 percent permanent impairment of his right lower extremity for the period June 16, 1995 through October 31, 1996 for a total of 72 weeks of compensation. This schedule award was affirmed by a hearing representative decision dated February 11, 1997.

By letter dated September 17, 1996, the Office advised appellant that his schedule award would terminate on October 31, 1996, and that he was not entitled to additional compensation unless he had sustained a loss of wage-earning capacity due to his employment injury. The Office advised that to qualify for loss of wage-earning capacity, appellant must establish that his employment injury prevented him from performing the job he held when injured or from earning comparable wages.

On February 20, 1997 appellant claimed compensation for temporary total disability commencing November 1, 1996, the day after the expiration of his schedule award, causally related to his February 3, 1992 employment-related right foot fracture. On the reverse of the form, the employing establishment indicated that it was unable to certify the form, as it did not have any additional information indicating that appellant was totally disabled.

A computerized tomography (CT) scan report dated March 4, 1997 indicated abutment of the distal fibula with the adjacent calcaneus consistent with impingement, mild diffuse osteoporosis, and osteophytes abutting the calcaneal-cuboid articulation consistent with osteoarthritis. A small calcaneal spur arising from the medial aspect of the calcaneus and a small osteophyte along the anterior aspect of the tibiotalar joint were also noted.

By attending physician's supplemental report dated March 13, 1997, Dr. Hecht diagnosed degenerative joint disease of the right ankle, noted permanent effects as "intra-articular inj[ury] [right] foot," checked "yes" to the question of whether appellant was totally disabled, checked "yes" to the question of whether the disability would continue for 90 days or longer, and wrote "NA" to the question of whether appellant was able to resume regular work. Dr. Hecht then,

however, noted as a specific work restriction that appellant must sit for 10 minutes every hour and commented "Wants to work -- please employ this man!"

By letter dated April 14, 1997, the employing establishment claimed that appellant returned to work on full duty on September 20, 1993.

The record supports that appellant began working full time on April 14, 1997 as a school custodian (building manager trainee). On April 23, 1997 he also claimed compensation for the period February 21 through April 21, 1997.

In a May 23, 1997 attending physician's supplemental report, Dr. Hecht diagnosed degenerative joint disease of the right ankle but checked "no" to the question of whether appellant was totally disabled and checked "yes" to the questions of whether appellant was able to resume regular work and whether the current condition was due to the injury for which compensation claimed. He noted that appellant must sit for 10 minutes every hour as a specific work restriction.

By letter dated June 22, 1997, appellant claimed that he was demoted while he "was out injured," that he never went back to work as an inspector and that he went back to work as a mechanic with the agreement between his general foreman and immediate supervisor that he would work in the shop and/or on ground cranes to avoid strain on his leg.

On June 25, 1997 appellant claimed compensation from April 22 through June 22, 1997 and indicated that he worked 40 hours per week as a school district building custodian, (building manager trainee), for that period.

By letter dated July 16, 1997, the Office noted that appellant claimed that he was demoted and it requested that the employing establishment explain the basis for the downgrade and in particular address whether it was due to his inability to perform his job due to the work injury. No employing establishment response was forthcoming.

By decision dated October 23, 1997, the Office rejected appellant's recurrence claim finding that the evidence failed to establish that the claimed recurrence of November 1, 1996 was causally related to the February 3, 1992 employment injury. The Office found that appellant failed to explain the basis for his recurrence, as the March 13, 1997 report from Dr. Hecht indicated that appellant was capable of working with the restriction that he must be able to sit for 10 minutes every hour. The Office found that appellant had returned to his regular duties and that the base closure did not constitute a recurrence of disability. The Office stated that the Form CA-3 dated September 21, 1993 indicated that appellant's assignment did not change due to his disability.[2] The Office also claimed that the SF-50 notice of personnel action gave no indication that the position change had anything to do with appellant's accepted work injury.

By letter dated October 28, 1997, appellant, through his representative, requested an oral hearing on the rejection of his recurrence claim.

[2] The Board is unable to locate the September 21, 1993 Form CA-3 that the Office referred to in the present case record.

In support appellant submitted a September 28, 1998 report from Dr. Hecht which reported his history of treatment, noted that on July 20, 1993 he felt light duty was appropriate for appellant, indicated that on September 7, 1993 he had filled out a physical capacities assessment and released appellant to work at that level on September 20, 1993, and noted that on October 19, 1993 appellant had made the transition back to his original job and full duties, but had some front ankle joint pain. Dr. Hecht indicated that appellant was seen on September 13, 1994 with an inability to tolerate his arthritis medication, and was not seen again until February 20, 1997 when he claimed that he had noted a significant increase in his pain over the prior several years. Dr. Hecht noted that on March 13, 1997 he injected appellant's calcaneocuboid joint with steroids which appellant reported was helpful. He noted that on May 7, 1998 appellant reported an increase in his symptoms, and that x-rays demonstrated progressive changes in the calcaneocuboid joint, consistent with degenerative joint disease. A new steel shank shoe with a rockerbottom sole was prescribed and further arthrodesis was suggested. Dr. Hecht expected that appellant's "disability" in terms of pain, loss of range of motion and persistent arthritic change would continue.

A hearing was held on October 27, 1998 at which appellant testified. The stenographer who transcribed the hearing was unable to produce a transcript.

By decision dated May 5, 1999, the hearing representative affirmed the October 23, 1997 decision finding that appellant worked at the WG-10 mobile equipment mechanic position until the reduction-in-force on September 15, 1995, that he received a schedule award which expired on October 31, 1996, that he claimed recurrence of disability on November 1, 1996, but that the only medical evidence to support such claim were March 13 and May 23, 1997 reports from Dr. Hecht which indicated that appellant could work, with the only restriction being that he be allowed to sit for 10 minutes every hour. The hearing representative stated that appellant was performing his regular job at the time of base closure.

The Board finds that appellant has failed to establish that he sustained a recurrence of disability commencing November 1, 1996, causally related to his February 3, 1992 employment-related right foot fracture.

Appellant had demonstrated that he had the ability to perform work, as he returned to his position of heavy equipment mechanic for two years prior to the reduction-in-force. Therefore, he had a clear capacity to earn wages.

Further, appellant did not claim a recurrence of disability at the time of the loss of his employing establishment job, the September 15, 1995 reduction-in-force, but claimed that the recurrence of temporary total disability occurred on November 1, 1996, after an extended period when he had not been working and more than a year after the reduction-in-force.

As used in the Federal Employees' Compensation Act,[3] the term "disability" means incapacity, because of employment injury, to earn the wages that the employee was receiving at

[3] 5 U.S.C. §§ 8101-8193.

the time of injury.[4] 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 injury. This burden includes the necessity of furnishing rationalized 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.[5] Causal relationship is a medical issue and can be established only by medical evidence.[6]

In this case, appellant has not submitted any medical evidence contemporaneous to the claimed 1996 recurrence identifying the onset of disability and the medical evidence which was submitted does not establish any recurrence of disability. Dr. Hecht's March 13, 1997 form report contains merely checked boxes noting disability, unaccompanied by any explanation or rationale, a specific work restriction that appellant must sit for 10 minutes every hour and a comment that appellant "Wants to work -- please employ this man!"[7] This report is not rationalized and is internally inconsistent, claiming disability yet strongly recommending employment of appellant with a minor restriction, and therefore, it is insufficient to establish that appellant sustained a recurrence of disability commencing November 1, 1996.

Dr. Hecht's May 23, 1997 report does not even mention disability as he checked "no" to the question of whether appellant was totally disabled, and checked "yes" to the question of whether appellant was able to resume regular work. Therefore, this report does not support appellant's contention of a November 1, 1996 recurrence of disability. Further, the Board notes that appellant had been working full time as a school custodian commencing April 14, 1997.

Dr. Hecht's most recent report dated May 7, 1998 noted only that appellant reported an increase in his symptoms and that x-rays demonstrated progressive changes in the calcaneocuboid joint, consistent with degenerative joint disease. He prescribed a new steel shank shoe with a rockerbottom sole and suggested further arthrodesis surgery. Dr. Hecht stated that he expected that appellant's "disability" in terms of pain, loss of range of motion, and

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[4] *Richard T. DeVito*, 39 ECAB 668 (1988); *Frazier V. Nichol*, 37 ECAB 528 (1986); *Elden H. Tietze*, 2 ECAB 38 (1948); 20 C.F.R. § 10.5(f). Disability is not synonymous with physical impairment. An employee who has a physical impairment, even a severe one, but who has the capacity to earn the wages he was receiving at the time of injury, has no disability as that term is used in the Act and is not entitled to disability compensation; *see Gary L. Loser*, 38 ECAB 673 (1987) (although the evidence indicated that appellant had sustained a permanent impairment of his legs because of thrombophlebitis, it did not demonstrate that his condition prevented him from returning to his work as a chemist or caused any incapacity to earn the wages he was receiving at the time of injury). *Cf.* 5 U.S.C. § 8107 (entitlement to schedule compensation for loss or permanent impairment of specified members of the body).

[5] *Stephen T. Perkins*, 40 ECAB 1193 (1989); *Dennis E. Twardzik*, 34 ECAB 536 (1983); *Max Grossman*, 8 ECAB 508 (1956).

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

[7] The Board has held that when a physician's opinion consists only of checking "yes" to a form question, where there is no explanation or rationale supporting that opinion, such opinion has little probative value and is insufficient to establish the contention proffered. *See, e.g., Lillian M. Jones*, 34 ECAB 379, 381 (1982).

persistent arthritic change would continue. His use of the term "disability" in this statement is not consistent with the term usage as it is defined under the Act, and therefore does not establish that appellant had a recurrence of disability commencing November 1, 1996.[8]

Therefore, appellant has failed to submit medical evidence sufficient to support that he sustained a recurrence of disability commencing November 1, 1996.

Accordingly, the decision of the Office of Workers' Compensation Programs dated May 5, 1999 is hereby affirmed.

Dated, Washington, DC
November 16, 2000

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

Valerie D. Evans-Harrell
Alternate Member

[8] *See supra* note 7 and accompanying text.