U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JACQUES J. MORIN and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, West Roxbury, MA

Docket No. 01-372; Submitted on the Record;
Issued December 11, 2001

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether appellant met his burden of proof to establish that he sustained a recurrence of disability after August 24, 1996 due to his November 17, 1995 employment injury; and (2) whether the Office of Workers' Compensation Programs' hearing representative abused his discretion by denying appellant's requests for subpoenas.

On December 4, 1995 appellant, then a 32-year-old nurse, filed a notice of traumatic injury, alleging that he injured his low back lifting a patient on November 17, 1995. On January 31, 1996 the Office accepted appellant's claim for low back strain. On February 12, 1996 appellant began working in a limited-duty position for the employing establishment. The position was essentially clerical in nature and restricted appellant from lifting more than 20 pounds.[1] He filed a notice of recurrence of disability on August 6, 1996, alleging a recurrence of disability from August 1 to 7, 1996. The Office accepted appellant's claim for recurrence on September 13, 1997 finding that he was disabled on August 1, 1996 and expanded his claim to include a herniated disc at L5-S1. Appellant resigned from the employing establishment on August 24, 1996 citing personal, business, mental and physical reasons.

The Office issued a retroactive loss of wage-earning capacity determination on June 23, 1998. Appellant, through his attorney, requested an oral hearing on July 16, 1998 and by decision dated May 7, 1999, the hearing representative set aside the Office's June 23, 1998 decision and remanded the case for further development. By decision dated September 22, 1999, the Office found that appellant had no loss of wage-earning capacity. He again requested an oral hearing on October 14, 1999.

In a letter dated December 13, 1999, appellant's attorney requested subpoenas for five people on the grounds that these people had first-hand knowledge of the duties that he was required to perform from February through August 1996.

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[1] The position did not require walking more than four hours per day or standing more than four hours per day.

By decision dated May 31, 2000 and finalized June 5, 2000, an Office hearing representative set aside the Office's September 22, 1999 decision regarding the loss of wage-earning capacity. He further found that appellant did not meet his burden of proof to establish that he sustained a recurrence of disability after August 24, 1996 due to his November 17, 1995 employment injury.

The Board finds that appellant did not meet his burden of proof to establish that he sustained a recurrence of disability after August 24, 1996 due to his November 17, 1995 employment injury.

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a limited-duty position or the medical evidence of record establishes that he can perform the limited-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 show that he cannot perform such limited 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 limited-duty job requirements.[2]

The record contains an October 23, 1997 report, in which Dr. Richard A. Alemian, a Board-certified orthopedic surgeon, who served as an Office referral physician, indicated that appellant's condition had not changed since he last examined him in May 1996. Dr. Alemian indicated that appellant did not exhibit any back abnormalities other than a slight flattening of his lumbar lordosis.[3] He indicated that appellant's employment-related disability was "quiescent" and that he was capable of working 8 hours a day and lifting up to 35 pounds. This report does not show that appellant sustained an employment-related recurrence of disability on or after August 24, 1996 because it indicates that appellant's employment-related work restrictions in October 1997 would have allowed him to perform the duties of his limited-duty position.[4] The record contains other reports, dated between mid 1996 and late 1999, in which attending physicians detailed appellant's condition. Although these reports indicate that appellant had continuing back problems, they do not provide any indication that he was unable to perform the duties of the limited-duty position he left in August 1996.

Appellant asserted that there was a change in the nature and extent of his limited-duty job requirements, but he did not submit sufficient evidence to support his assertion. The record contains statements in which coworkers indicated that appellant had reported to them that his limited-duty position required him to perform duties beyond his work restrictions. However, these statements do not clearly show that appellant in fact was required to perform duties beyond his work restrictions; the statements are essentially vague and generalized in nature with respect to this matter.

[2] *Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

[3] He indicated that appellant's right foot swelling would not be related to his employment-related back condition.

[4] As noted above, the position required lifting up to 20 pounds, standing up to 4 hours and walking up to 4 hours.

For these reasons, appellant did not meet his burden of proof to establish that he sustained a recurrence of disability after August 24, 1996 due to his November 17, 1995 employment injury.

The Board further finds that the Office hearing representative did not abuse his discretion by denying appellant's request for subpoenas.

Section 8126 of the Federal Employees' Compensation Act provides, in relevant part: "The Secretary of Labor, on any matter within his jurisdiction under this subchapter, may -- (1) issue subpoenas for and compel attendance of witnesses within a radius of 100 miles."[5] An abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from known facts.[6]

Appellant requested that coworkers, supervisors and the Office nurse be subpoenaed to testify regarding the nature of the limited-duty position he performed from February through August 1996. The Office hearing representative properly noted that the record contained statements from each of these persons. Appellant did not indicate how the testimony would differ from the written statements and the Board must conclude that the Office did not abuse its discretion in denying appellant's requests.

The June 5, 2000 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
December 11, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

[5] 5 U.S.C. § 8126.

[6] *Joseph D. Lee*, 42 ECAB 172 (1990).