U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH E. FANZO and U.S. POSTAL SERVICE,
POST OFFICE, Pittsburgh, PA

Docket No. 00-1115; Oral Argument Held June 12, 2002;
Issued August 16, 2002

Appearances: *Joseph E. Fanzo, pro se*; *Thomas G. Giblin, Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant met his burden of proof to establish that he sustained a recurrence of disability and was therefore entitled to wage-loss compensation for the period March 22, 1995 to September 11, 1996 when he returned to work; and (2) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's claim for merit review under 5 U.S.C. § 8128(a) constituted an abuse of discretion.

This case has been before the Board previously. By decision dated September 19, 1997, the Board found the case not in posture for decision because a conflict in medical opinion existed with respect to whether appellant was able to return to full-time work on March 23, 1995. The Board remanded the case to the Office to refer appellant, along with an updated statement of accepted facts, to an independent medical evaluation to resolve this question and to address the nature and extent of appellant's employment-related condition.[1]

Subsequent to the Board's September 19, 1997 decision,[2] by letter dated July 30, 1998, the Office referred appellant, along with the medical record, a set of questions, and an updated

[1] Docket No. 97-83.

[2] The Board notes that appellant returned to work on September 9, 1996. On September 24, 1996 appellant filed a recurrence claim, stating that on September 23, 1996 he sustained pain and blurred vision while sitting in a chair repairing mail. He did not stop work but missed intermittent periods thereafter until he was terminated in 1997. By decision dated January 16, 1997, the Office denied that appellant sustained a recurrence of disability on September 23, 1996. Appellant did not file an appeal with the Board regarding this decision.

statement of accepted facts,[3] to Dr. Patrick G. Laing, a Board-certified orthopedic surgeon, for an impartial medical evaluation.

In a report dated September 9, 1998, Dr. Laing noted that by history appellant sustained an employment-related cervical strain on April 16, 1991 and advised that, based on his examination, there was no objective evidence of residuals of strain and no evidence of any employment-related disability. He concluded that appellant was capable of performing the duties of mailhandler, full time, without restrictions. In an attached work capacity evaluation, Dr. Laing advised that appellant could work eight hours per day without restrictions.

Appellant submitted reports dated February 12, 1997, March 5, 1998 and August 17, 1999 in which his treating Board-certified family practitioner, Dr. George M. McCollum, noted that he began treating appellant for the employment injury in 1991 and advised that appellant's work-related condition continued to deteriorate. In his final report, Dr. McCollum advised that appellant was incapable of physical work.[4]

In a report dated March 24, 1997, Dr. Andrew D. Kranik, provided restrictions to appellant's physical activity and advised that he could work part time for four hours per day performing sedentary work.

In a report dated August 18, 1999, Dr. Laing advised that there was no documented medical reason why appellant could not work eight hours per day on March 25, 1995 on the job to which he was assigned.

By decision dated August 27, 1999, the Office credited the opinion of Dr. Laing and denied that appellant sustained a recurrence of disability. By letter dated September 26, 1999, appellant requested reconsideration and submitted additional medical evidence. In a January 5, 2000 decision, the Office denied appellant's reconsideration request, finding that the evidence submitted was duplicative. The instant appeal follows.

The Board finds that this case is not in posture for 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 of record establishes that he or she 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 show that he or she cannot perform such light duty. As part of this burden, the employee must show either a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.[5]

[3] The statement of accepted facts dated July 14, 1998 provides, *inter alia*, that the Office accepted that appellant sustained an employment-related herniated disc at C4-5 with chronic pain syndrome and headaches.

[4] Appellant further submitted treatment notes from Dr. McCollum dating from December 1996 to March 1998.

[5] *Mary A. Howard*, 45 ECAB 646 (1994); *Cynthia M. Judd*, 42 ECAB 246 (1990); *Terry R. Hedman*, 38 ECAB 222 (1986).

Causal relationship is a medical issue,[6] and the medical evidence required to establish a causal relationship is rationalized medical evidence. Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. 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 factors identified by the claimant.[7]

Under the Federal Employees' Compensation Act,[8] the term "disability" means incapacity, because of the employment injury, to earn the wages that the employee was receiving at the time of injury. Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn the wages. An employee who has a physical impairment causally related to a federal employment injury, but who nonetheless has the capacity to earn wages she was receiving at the time of injury, has no disability as that term is used in the Act.[9]

In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[10] However, when the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in medical opinion evidence and the opinion from such specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the impartial specialist for the purpose of correcting the defect in the original report.[11]

In the instant case, the Office referred appellant to Dr. Laing, a Board-certified orthopedic surgeon, for an independent medical evaluation. The Board, however, finds that the reports of Dr. Laing are not sufficiently rationalized to be according special weight.[12] In his report dated September 9, 1998, Dr. Laing stated that appellant's accepted condition was cervical strain and advised that he had no evidence of an employment-related disability. The record indicates that the accepted condition is herniated disc at C4-5, headaches and chronic pain syndrome. In his supplementary report dated August 18, 1999, Dr. Laing merely stated that appellant could work eight hours a day on March 25, 1995 because "there was no documented medical reason why he would not have been able to do so." The record, however, contains

[6] *Mary J. Briggs*, 37 ECAB 578 (1986).

[7] *Gary L. Fowler*, 45 ECAB 365 (1994); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[8] 5 U.S.C. §§ 8101-8193.

[9] *See Maxine J. Sanders*, 46 ECAB 835 (1995).

[10] *See Kathryn Haggerty*, 45 ECAB 383 (1994); *Edward E. Wright*, 43 ECAB 702 (1992).

[11] *See Talmadge Miller*, 47 ECAB 673 (1996).

[12] *See Elmer K. Kroggel*, 47 ECAB 557 (1996).

evidence of magnetic resonance imaging and electromyographic findings of pathology regarding appellant's cervical spine.

In assessing medical evidence, the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors which enter in such an evaluation include the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of the analysis manifested and the medical rationale expressed in support of the physician's opinion.[13] Furthermore, the Office has a responsibility to secure a supplemental report from an impartial medical specialist to correct a defect in the original report.[14]

As Dr. Laing did not base his opinion on an accurate medical history of accurate accepted condition,[15] his report was insufficient to resolve the conflict in medical opinion.[16] The Board thus finds that a conflict in the medical evidence remains. The case will therefore be remanded for the Office to prepare an updated statement of accepted facts for referral to another impartial specialist.[17] After such development as it deems necessary, the Office shall issue a *de novo* decision.

Lastly, in light of the Board's finding regarding the first issue, the question of whether the Office abused its discretion in denying merit review is moot.[18]

[13] *Gary R. Sieber*, 46 ECAB 215 (1994).

[14] *Richard O'Brien*, 53 ECAB ___ (Docket No. 00-1665, issued November 21, 2001).

[15] *See Gwendolyn Merriweather*, 50 ECAB 411 (1999).

[16] *See Leonard M. Burger*, 51 ECAB ___ (Docket No. 98-1532, issued March 15, 2000).

[17] When the impartial medical specialist's statement of clarification or elaboration is not forthcoming to the Office, or if the physician is unable to clarify or elaborate on the original report, or if the physician's report is vague, speculative or lacks rationale, the Office must refer the employee to another impartial specialist for a rationalized medical opinion on the issue in question. *Id.*

[18] The Board notes that on November 4, 1996 appellant filed a claim for a schedule award and in a letter dated January 7, 1997 asked Dr. McCollum to evaluate appellant's impairment under the American Medical Association, *Guides to the Evaluation of Permanent Impairment.* In response, Dr. McCollum submitted reports dated January 15, 1997. By letter dated January 12, 2000, the Office informed appellant that he was not entitled to a schedule award because his entitlement to compensation benefits was terminated on August 10, 1995 because he had abandoned suitable employment and therefore, pursuant to 5 U.S.C. § 8106, he was not entitled to a schedule award. The record indicates, however, that in a decision dated May 9, 1996, the Office properly found that section 8106 is not applicable in the instant case. The Board thus finds that the Office should adjudicate appellant's entitlement to a schedule award under relevant Office procedures.

The decisions of the Office of Workers' Compensation Programs January 5, 2000 and August 27, 1999 are hereby vacated and the case is remanded to the Office for proceedings consistent with this opinion.

Dated, Washington, DC
August 16, 2002

Michael J. Walsh
Chairman

Alec J. Koromilas
Member

A. Peter Kanjorski
Alternate Member