U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALLEN W. HERMES and DEPARTMENT OF AGRICULTURE, POULTRY GRADING BRANCH, Austin, TX

Docket No. 02-1591; Submitted on the Record;
Issued November 14, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether appellant has established that he sustained a recurrence of disability in August 1995 causally related to his accepted work injury of February 21, 1984.

The case has previously been before the Board. The facts of the case as presented in the last Board decision[1] are hereby incorporated by reference. The only decisions before the Board in this appeal is the April 1, 2002 decision denying appellant's claim for a recurrence of disability and the May 29, 2002 decision denying modification of that decision.

To briefly summarize the facts, on February 23, 1984 appellant, then a 32-year-old eggshell grader, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1), alleging that on February 21, 1984, when attempting to catch a falling box of eggs he sustained an injury to his lower back. On April 20, 1984 the Office of Workers' Compensation Programs accepted appellant's claim for a lumbosacral strain and herniated nucleus pulposus L4-5 and he was provided with compensation and continued medical care. Compensation benefits were paid through May 4, 1991, when appellant elected to receive benefits from the Civil Service Retirement System. Appellant returned to work as a veteran's service officer, for the Veterans of Foreign Wars on February 15, 1991. By letter dated November 2, 1995, appellant notified the Office of his desire to return to the Office rolls. The letter stated that effective November 1, 1995 he terminated his employment as a veterans' service officer due to his "continuing low back disability."

On November 28, 1995 the Office determined that the veterans' service officer position fairly and reasonably represented appellant's wage-earning capacity. This loss of wage-earning capacity decision was made retroactive to February 15, 1991, the date appellant returned to work as a veteran's service officer. He was given the opportunity to continue his retirement benefits or elect benefits under the Federal Employees' Compensation Act. Appellant elected to receive

---

[1] *Allen W. Hermes*, Docket No. 98-161 (issued December 13, 1999).

benefits from the Office and was notified that these benefits would begin effective February 1, 1996.

On December 10, 1995 appellant filed a notice of recurrence of disability due to the February 21, 1984 injury. In his Form CA-2a, he noted that the recurrence occurred in August 1995, with work stoppage on November 1, 1995. As explanation with regard to the recurrence, appellant stated:

> "The position of veterans service officer changed. The Commissions Court eliminated my secretary's position and that required me to perform most of her duties as well as mine. The main problems were that I had to sit for longer periods of time and work many more hours. There was not a recurrence of my disability, the working conditions simply changed which forced me to resign from the position because of my low back disability.

In support of his recurrence claim, appellant submitted a December 27, 1995 medical report by Dr. Maurice G. Wilkinson, a family practitioner, wherein he indicated that appellant was still having a great deal of back discomfort. He opined:

> "Aggravation of [appellant's] back injury, I think was indeed caused by the amount of filing, bending and stooping that he had been doing since he is used to sedentary work seated or standing. … It is not anticipated that [appellant's] back is going to recover a great deal more than at present."

By decision dated January 24, 2001, the Office denied appellant's claim for recurrence as it found that the evidence submitted failed to establish a causal relationship to the work-related injury of February 21, 1984.

By letter dated January 27, 2001, appellant requested an oral hearing. However, by letter dated September 7, 2001, he withdrew this request and requested a review of the written record. In this letter, appellant further explained that in approximately August 1995, his secretary's position was eliminated due to budget cuts and that this required him to do more sitting which aggravated his back.

In a decision dated November 13, 2001, the hearing representative remanded the case for further development of the evidence. The hearing representative noted that although Dr. Wilkinson's reports were not entirely sufficient to meet appellant's burden of proof to establish the claim, they raised an uncontroverted inference between the claimed injury or disability and the accepted employment injuries and were sufficient to require the Office to further develop the evidence. The Office was instructed to: (1) verify whether the physical requirements of the veterans' service officer position changed in August 1995 and if so, in what way did the requirements change; (2) advise appellant of specific medical opinions that must be submitted in support of the alleged recurrence of total disability; (3) review the medical evidence of record in his right knee claim in conjunction with the instant claim; (4) if deemed necessary refer appellant for a second opinion; and (5) issue a *de novo* opinion.

By letters dated December 3, 2001, appellant was advised of the need for specific medical and factual information to support his claim and the Office requested information from appellant's previous employer, Veterans of Foreign Wars, regarding his job description.

By letter dated December 5, 2001, appellant responded to the Office's letter by noting that he was employed by the Veterans of Foreign Wars from February 15, 1991 to December 31, 1991 and that he was employed by Lavaca County, as a veterans service officer from January 1, 1992 to November 1, 1995 (the position he alleged changed).

By letter dated December 7, 2001, the Veterans of Foreign Wars sent copies of prior letters with regard to appellant's employment. These letters indicated that he was employed in January 1991 to drive the service officer mobile van and that on July 1, 1991 he was employed as a service officer.

By letter from the Office to Lavaca County dated December 7, 2001, the Office requested information with regard to appellant's duties as a veterans' service officer from January 1992 to November 1995, including a job description, a listing of physical requirements of the job and a statement as to whether these requirements changed. In a letter dated December 17, 2001, a Lavaca County Judge replied to the Office's letter and enclosed the job description for a veterans service officer and indicated that to the best of his knowledge, the job description for that position had not changed. The job description noted that the duties of the position were to assist the county's veterans in securing benefits and noted the office equipment that would be used, which included, *inter alia,* typewriters, computers, telephone and fax machines.

In a medical report dated February 19, 2002, Dr. Wilkinson noted that appellant continued to have pain almost constantly in his lumbar spine. He noted that with the addition of the severe degenerative condition of his right knee, appellant's gait was somewhat impaired, which further aggravated his back condition. Dr. Wilkinson noted that because of appellant's chronic back pain, he "is virtually unable to do anything productive at this time."

The record also contains internal correspondence noting that the Office had attempted to speak to the judge from Lavaca County regarding the alleged change in appellant's job position, but there was no notation made that the judge returned the call.

By decision dated April 1, 2002, the Office denied appellant's claim for a recurrence as it found that the evidence failed to establish a causal relationship to the work-related injury of February 21, 1984.

By letter to the Office dated April 4, 2002, appellant requested reconsideration and again noted that he had to assume the majority of his secretary's duties when her position was eliminated and further advised that he had not been told what specific medical opinions were needed with regard to his claim, as required in the remand decision. Appellant also stated that there was no written position description of his job when he was employed by Lavaca County. By letter dated April 14, 2002, appellant forwarded copies of minutes from the Lavaca County Texas Commissioner's Court, to support his statements. In minutes from August 1995, it is indicated that a secretary's position, which appellant alleges was his secretary, was eliminated. In copies of the minutes from July 1996, it is noted that the county adopted job descriptions.

In a decision dated May 29, 2002, the Office denied modification of the prior decision, as it found that the evidence submitted was not sufficient to warrant modification.

The Board finds that this case is not in posture for decision.

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he can perform the light-duty position, the employee has the burden of establishing by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he cannot perform such light duty. As part of his 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.[2]

Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence a causal relationship between his recurrence of disability and his February 21, 1984 employment injury.[3] This burden includes the necessity of furnishing 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 employment factors and supports that conclusion with sound medical reasoning.[4]

In the instant case, appellant has submitted credible evidence that his job duties changed when his secretary's position was eliminated and he needed to do more clerical work that involved more sitting. However, the medical evidence is insufficient to show that this change in duties resulted in appellant having increased disability. Dr. Wilkinson's statement that appellant sustained an aggravation of his back injury due to filing, bending, stooping and sedentary work, was not fully rationalized -- it did not contain a complete description of appellant's duties nor did it sufficiently explain how the disability had worsened as a result of the alleged change in his duties. However, Dr. Wilkinson's opinion does raise an uncontroverted inference that appellant's duties resulted in a recurrence of his disability. The Board notes that a hearing representative previously remanded this case for, *inter alia*, further development of the medical evidence. The Office did not effectively respond to this portion of the remand decision. The Board agrees with the hearing representative that the medical evidence in this case is insufficiently developed. Although Dr. Wilkinson's opinion is not sufficient to establish a causal relationship under the Act, it is sufficient to require further development by the Office.[5] Proceedings under the Act are not adversarial in nature, nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares

[2] *Ralph C. Spivey*, 52 ECAB ___ (Docket No. 01-263, issued December 4, 2001); *Terry R. Hedman*, 38 ECAB 222 (1986).

[3] *Maurissa Mack*, 50 ECAB 498, 503 (1999).

[4] *Id.*

[5] Medical reports not containing rationale on causal relation, or which are not based on a complete and accurate factual and medical history, are generally insufficient to meet an employee's burden of proof. *Judith J. Montage*, 48 ECAB 292 (1997).

responsibility in the development of the evidence to see that justice is done.[6] Therefore, while Dr. Wilkinson's reports are insufficient to meet appellant's burden of proof to establish the recurrence, they raised an uncontroverted inference of a recurrence and are sufficient to require the Office to further develop the evidence.[7]

The case is, therefore, being remanded to the Office for a referral, accompanied by the complete case record, a statement of accepted facts and a list of questions to be answered, to an appropriate specialist for a second opinion as to whether appellant sustained a recurrence of disability causally related to his accepted injury of February 21, 1984. After such further development as necessary, the Office shall issue a *de novo* decision.

The decisions of the Office of Workers' Compensation Programs dated May 29 and April 1, 2002 are hereby set aside and the case remanded for further development consistent with this decision of the Board.

Dated, Washington, DC
November 14, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[6] Proceedings under the Act are not adversarial in nature and while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence. *Shirley A. Temple*, 48 ECAB 404 (1997); *Mary A. Wright*, 48 ECAB 240 (1996).

[7] *Katherine J. Friday*, 47 ECAB 591 (1996); *Richard E. Konnen*, 47 ECAB 388 (1996); *John J. Carlone*, 41 ECAB 354 (1989).