U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HERMAN R. JOHNSON and DEPARTMENT OF THE ARMY, DIRECTORATE OF PERSONNEL, Tobyhanna, PA

Docket Nos. 02-2076 and 03-174; Submitted on the Record;
Issued June 16, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant sustained a recurrence of disability on August 10, 2001 causally related to his accepted back condition.

The Office of Workers' Compensation Programs accepted that on January 18, 1997 appellant, then a 49-year-old security guard, injured his lower back in a train accident while traveling in the performance of duty. The claim was accepted for lumbosacral strain. Appellant performed light duty for one week and then returned to regular duty. He did not stop work following the incident.

On August 10, 2001 appellant stopped work. In a letter dated February 15, 2002, appellant asserted that he sustained a recurrence of disability causally related to the 1997 work-related injury and that his work stoppage resulted therefrom. In the letter, appellant indicated that he could no longer commute to work due to severe pain and numbness. He asserted that standing and walking distances caused his legs to become weak and made it impossible for him to concentrate on tasks. Appellant also asserted that the medication taken to relieve his pain rendered him incapable of performing his work duties. Appellant further indicated that he also had part-time employment outside of the federal government as a police officer, which he had held for many years. He alleged that it was no longer possible for him to perform patrolling duties. Appellant noted that he had not experienced any new injuries since his January 1997 train accident.

In support of his recurrence claim, appellant submitted a report dated February 5, 2002 from Dr. Edwin Malloy, a Board-certified orthopedic surgeon. The physician stated that appellant injured his back in an injury on January 18, 1997 in the train accident and developed significant low back pain with radiation into the lower extremities. Dr. Malloy reported that appellant was treated for that injury and was able to return to work but that he had intermittent pain since that time. He specifically reported that appellant's pain worsened in May 2001 and that his evaluation in May 2001 revealed significant deterioration of the lumbar spine with a symptomatic disc at L3-4, more prominent on the left, which resulted in ridging and left sided

foraminal narrowing. Dr. Malloy diagnosed degenerative disc disease and hypertrophic osteoarthritis of the lumbar spine and opined that appellant was disabled from work as a result of his work-related injuries that occurred on January 18, 1997.

Appellant also submitted a medical report dated February 20, 2002 from Dr. Jack Henzes, an attending physician, who stated that appellant had been evaluated by him on May 7, August 10 and September 21, 2001, for low back symptoms. Dr. Henzes indicated that appellant attempted a return to work, however, he only completed four hours before his symptoms returned. The physician then stated that he concurred with Dr. Malloy that appellant had lumbar degenerative disc and degenerative joint disease and that his work activities at the employing establishment and as a part-time police officer aggravated and worsened his condition. Dr. Henzes opined that appellant was incapable of performing his current work duties.

In a letter dated February 13, 2002, the Office informed appellant that he would be referred for a second opinion examination to clarify the extent of his injury-related impairment. In a letter dated March 19, 2002, the Office cancelled the second opinion examination until further processing of the claim. In a second letter dated March 19, 2002, the Office requested information from appellant regarding his outside employment as a police officer.

In response, appellant indicated by letter that he worked 12-hour shifts on weekends and holidays with the borough of Clarks Summit, Pennsylvania beginning September 6, 1989 to the present day and that his duties consisted of general patrolling, including vehicle and foot patrols of the borough. Appellant further noted that he performed accident investigation and enforcement of the Pennsylvania vehicle code/crimes code. He also noted that he performed special duty when required, which consisted of providing security for special borough activities such as basketball, football games, wrestling matches and parades. Appellant reported that he had not worked in this position since August 2001, due to his severe back pain.

In a decision dated May 15, 2002, the Office denied appellant's recurrence of disability claim. The Office found that the medical evidence submitted including a report from Dr. Malloy dated February 5, 2002, was insufficient to support the claim. The Office found that while the evidence supported that appellant had been treated for a degenerative condition of the lumbar spine, it failed to support that appellant had suffered a recurrence of his January 18, 1997 injury, particularly since his treatment occurred four years after the injury and that he had also been involved in strenuous outside employment.

In a letter dated June 10, 2002, Raymond Ferrario, Esq. requested reconsideration on behalf of appellant of the prior decision.[1] Mr. Ferrario argued on appellant's behalf that sufficient evidence was submitted to causally connect appellant's current complaints with the work-related accident, which occurred on January 18, 1997. Further, he argued that appellant's employer may not have provided fair contents of the file, namely dispensary reports confirming on-going back complaints since the original accident. Mr. Ferrario indicated that in 1999, the employing establishment purchased a special chair to accommodate appellant and that in 1998,

[1] The Board notes that at the time of the request, the Office had not received written authorization from appellant for his attorney to serve as his representative. The Office notified Mr. Ferrario that there was no signed authorization concerning appellant's representation on June 15, 2002.

2000 and 2001, appellant underwent sports therapy at the recommendation of his physicians. He further stated that Dr. Malloy provided appropriate and adequate medical foundation and basis for indicating that appellant was unable to perform his duties due to his original work-related injury.

By decision dated June 26, 2002, the Office denied the request for reconsideration, finding that the evidence was insufficient to warrant modification of the prior decision.

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

Where appellant claims a recurrence of disability due to an accepted employment-related injury, the employee has the burden of establishing by the weight of reliable, probative and substantial evidence that the recurrence of disability is causally related to the original injury.[2]

In the instant case, the relevant medical evidence includes a report from Dr. Malloy dated February 5, 2002, which related the facts of the 1997 employment injury, discussed appellant's resulting low back pain and that appellant had intermittent pain since that time, which worsened in May 2001. Dr. Malloy diagnosed degenerative disc disease and hypertrophic osteoarthritis of the lumbar spine and opined that appellant was disabled from work as a result of his work-related injuries that occurred on January 18, 1997. The relevant evidence also includes a report dated February 20, 2002 from Dr. Henzes, who evaluated appellant for low back symptoms and concurred with Dr. Malloy regarding the diagnosis and cause. He opined that appellant's work activities at the employing establishment and as a part-time police officer aggravated and worsened his condition and that appellant was incapable of work.

Proceedings under the Federal Employees' Compensation Act[3] 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 responsibility in the development of the evidence and the Office has an obligation to see that justice is done.[4] This holds true in recurrence claims and consequential injury claims, as well as in initial traumatic and occupational disease claims. The Office in this case had originally scheduled a second opinion examination with a specialist to clarify the cause and extent of appellant's injury-related impairment, however, it was cancelled for want of additional information regarding appellant's concurrent employment as a township police officer. A second opinion examination by a specialist did not take place in this case, which was initially found necessary, to determine whether appellant had continual residuals causally related to the original injury.

Although the physician's reports discussed above do not supply sufficient rationale to completely discharge appellant's burden of proof establishing a recurrence of total disability on August 10, 2001 causally related to the accepted employment injury, the Board finds that this evidence raises an uncontroverted inference of causal relationship between appellant's current condition and the accepted employment injury, lumbosacral strain. The Board does note that

[2] *Jose Hernandez*, 47 ECAB 288, 293-94 (1996).

[3] 5 U.S.C. §§ 8101-8193.

[4] *See Lourdes Davila*, 45 ECAB 139 (1993).

appellant's employment injury occurred four years prior to his claimed recurrence and that appellant had other outside employment, which might have been an intervening cause of appellant's current condition. Notwithstanding, the Board finds that the evidence in this case is sufficient to require further development of the case by the Office.[5]

Upon remand, the Office should further develop the medical evidence by referring appellant and an updated statement of accepted facts to an appropriate Board-certified specialist for a rationalized medical opinion on the issue of whether appellant's back condition and work stoppage on and after August 10, 2001 was causally related to the January 18, 1997 employment injury. Further, it should be determined precisely when appellant became employed as a police officer and whether the duties of this outside employment could have been an independent intervening cause of the current condition and disability from work. After such development of the case record as the Office deems necessary, a *de novo* decision shall be issued.

Further, the Board notes that appellant filed a subsequent appeal with the Board of an Office decision dated September 24, 2002 denying a request for an oral hearing, which the Office issued since the Board has had jurisdiction of the instant case. It is well established that the Board and the Office may not have concurrent jurisdiction over the same case and those Office decisions that change the status of the decision on appeal are null and void.[6] The Board, therefore, finds that the September 24, 2002 decision denying appellant's request for an oral hearing is, therefore, null and void.

[5] *See John J. Carlone*, 41 ECAB 354 (1989).

[6] *Douglas E. Billings*, 41 ECAB 880, 895 (1990).

The May 15 and June 26, 2002 decisions of the Office of Workers' Compensation Programs are hereby vacated and the case is remanded to the Office for proceedings consistent with this opinion.[7]

Dated, Washington, DC
June 16, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[7] The Board notes that this case record contains evidence, which was submitted subsequent to the Office's May 15 and June 26, 2002 decisions. The Board has no jurisdiction to review this evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952).