U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL K. STONE and U.S. POSTAL SERVICE, PROCESSING & DELIVERY CENTER, Boston, MA

Docket No. 03-603; Submitted on the Record;
Issued June 18, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether appellant met his burden of proof in establishing that he sustained a recurrence of disability on August 15, 2001.

Appellant a 37-year-old clerk, filed a notice of occupational disease on September 25, 1997 alleging that he developed pain in his left shoulder, elbow and hand due to his employment duties. He described his duties as: "Working in automation…. [G]rabbing mail from bin reaching above my shoulder, then bending my arm at the elbow then turning to extend my arm above my shoulder to put mail in a tray." He stopped work on September 14, 1997 and returned to work on September 25, 1997 in a light-duty capacity with no use of his left arm. The Office of Workers' Compensation Programs accepted appellant's claim for left shoulder impingement, as well as cervical and trapezium strains.

Appellant filed a notice of recurrence of disability on August 19, 2001 alleging that he stopped work due to discomfort in his left hand, wrist, forearm, elbow and neck. He stated: "My limited duty was changed to include motions, repeatedly raising my arms to tray and label machines, which increased by symptoms severely." Appellant's supervisor indicated that he was on limited duty, working within his work restrictions.

In a letter dated September 6, 2001, the Office requested additional factual and medical evidence from appellant. Appellant responded and stated that when he returned to work following his 1997 employment injury his duties consisted of sitting at a table resting both arms on the table and grabbing a handful of mail with his right hand to sort it so that the return address was facing forward and then replacing the mail in the tray. He stated that his limited-duty job changed and he was required to include traying and labeling machines. Appellant stated that the repetitive motion of grabbing trays and placing them on the machine, then tearing 4 labels per tray for up to 225 trays caused his increased pain.

By decision dated January 23, 2002, the Office denied appellant's claim finding that he failed to establish that his current condition was causally related to his accepted employment

injury. He requested an oral hearing by letter dated February 4, 2002. The Office conducted the oral hearing on July 16, 2002. By decision dated October 7, 2002, the hearing representative affirmed the Office's January 23, 2002 decision finding that the medical evidence did not establish a causal relationship between appellant's current condition and his accepted 1997 employment injury.

The Board finds that this case is not in posture for a 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 to establish 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 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 light-duty requirements.[1]

In this case, on his claim form and in response to the Office's initial developmental letter, appellant alleged that he experienced a change in the nature and extent of his light-duty job requirements which resulted in his recurrence of total disability. He submitted a medical report dated September 14, 2001 from Dr. Arthur Bregoli, Jr., a Board-certified internist, relating appellant's history of injury. He diagnosed three herniated discs in his neck as well as a tear to his left supraspinatus muscle. Dr. Bregoli stated: "These problems are aggravated by repetitive movement occurring at work and I feel his problems are a result of repetitive stress injury at work."

Dr. Bregoli completed a report on July 12, 2002 and noted appellant's history of injury. He stated: "[Appellant's] original injury and the reoccurrence of the injury of neck pain, cervical disc protrusions, small partial tear to tendinopathy of his left shoulder, paresthesias [and] myofascial pain syndrome[2] are clearly the result of repetitive stress injury from working on an automated machine at the [employing establishment]." Dr. Bregoli indicated that he was aware that appellant's duties now required work on an automated machine and attributed his current condition to this alleged change in his light-duty work requirement.

The Office did not develop the factual evidence by requesting additional information from the employing establishment regarding whether or not appellant's light-duty job duties had changed. Instead, the Office referred appellant for a second opinion evaluation with Dr. Robert C. Runyon, a Board-certified orthopedic surgeon. In the statement of accepted facts, the Office noted only that appellant continued to work in a limited-duty capacity, without providing the work duties or addressing a change in these duties.

[1] *Terry R. Hedman*, 38 ECAB 222 (1986).

[2] In a report dated May 16, 2002, Dr. Simon Helfgott, a Board-certified internist, noted appellant's history of repetitive use injury in the neck and shoulder and diagnosed myofascial pain syndrome. He stated: "The cause of persistent myofascial pain is never understood and I can[not] say that I can readily explain why five years after his initial injury he continues to have discomfort."

In a report dated January 7, 2002, Dr. Runyon stated that, following his initial injury, appellant returned to limited-duty primarily using his right hand for sorting. He noted that in July 2001 appellant returned to his date-of-injury type work with some modifications. Dr. Runyon reported that appellant noted an increase of symptoms after his duties changed. He performed a physical examination and noted that appellant had limited extension of his neck with no spasm and limited range of motion in his left shoulder. Dr. Runyon found normal motion of his wrists, elbows and hands. He stated that on strength testing appellant had difficulty sustaining strength in his left upper extremity with a fair amount of fading. Dr. Runyon diagnosed history of left neck, shoulder, arm, wrist and hand pain occurring in the period of 1995 to 1997 possibly contributed to, by aggravation, by stretching and preexisting reactive changes of the cervical spine related to daily activities of living, exercise, sleep position and repetitive use of the upper extremities in work activities. He further diagnosed adhesive capsulitis of the left shoulder secondary to restricted use of his shoulder. Dr. Runyon stated:

> "Although [appellant] states that the symptoms are similar to those that he had in 1995 to 1997 and are a continuation of the same symptoms, they are not related to the work caused conditions under the diagnosis of shoulder impingement syndrome, cervical strain and trapezium strain."

Dr. Runyon concluded:

> "On the basis of by objective examination, there appeared to be some restriction of motion in the left shoulder but, I did n[o]t find any other significant abnormalities. It is my opinion at this time, that [appellant] can resume regular full[-]time duty and be more comfortable if he avoided forceful use of the left upper extremity and would not stress that extremity beyond the range of motion that is comfortable until he resolves his adhesive capsulitis. In my opinion, this should not be considered a work restriction occasioned by his occupational activities, but one that could be further aggravated by such activity."

In an addendum dated January 22, 2002, Dr. Runyon stated that he read the statement of accepted facts and opined that appellant's current conditions were not related to his accepted employment injuries.

Proceedings before the Office are not adversarial in nature and the Office is not a disinterested arbiter; in a case where the Office "proceeds to develop the evidence and to procure medical evidence, it must do so in a fair and impartial manner."[3] In this case, appellant alleged that he sustained a recurrence of disability due to a change in the nature and extent of his light-duty job requirements. Appellant indicated that he returned to the type of duties which resulted in his initial employment injury and that he felt that the lifting with both arms required to work on the automated machine caused his recurrence of disability. The Office did not provide the employing establishment with appellant's factual assertions and did not inquire whether or not appellant's light-duty job requirements had changed.[4] Without the necessary factual

[3] *Walter A. Fundinger, Jr.*, 37 ECAB 200, 204 (1985).

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.7a(3) (May 1997).

development essential to appellant's claim, the Office cannot properly develop the medical evidence in a "fair and impartial manner." Therefore, as the Office failed to provide Dr. Runyon, the second opinion physician, with an accurate factual history his reports are not based on a proper factual background and cannot constitute the weight of the medical opinion evidence. Although Dr. Runyon noted appellant's description of his change in job duties, he also stated that he reviewed the statement of accepted facts in reaching his conclusions.

On remand, the Office should develop the factual record to determine if appellant's light-duty job requirements changed, as alleged and address any change in his light-duty job requirements in the statement of accepted facts, then refer appellant, the revised statement of accepted facts and a list of specific questions to an appropriate physician, to determine if appellant has sustained a recurrence of total disability due to his accepted employment-related injury. After this and such other development as the Office deems necessary, the Office should issue an appropriate decision.

The October 7 and January 23, 2002 decisions of the Office of Workers' Compensation Programs are hereby set aside and remanded for further development consistent with this decision of the Board.

Dated, Washington, DC
June 18, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member