United States Department of Labor
Employees' Compensation Appeals Board

BRUCE A. WILLIAMS, Appellant	)	
and	)	**Docket No. 03-1831**
	)	**Issued: May 24, 2004**
DEPARTMENT OF THE ARMY, DIRECTORATE OF LAW ENFORCEMENT, PRESIDIO OF MONTEREY, Monterey, CA, Employer	)	

Appearances:
Sylvia R. Johnson., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On July 15, 2003 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated July 16, 2002 denying his claim for a July 20, 1998 recurrence of disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant sustained a recurrence of total disability on July 20, 1998 causally related to his accepted employment injuries.

FACTUAL HISTORY

On October 7, 1993 appellant, then a 48-year-old tool and parts attendant filed a traumatic injury claim alleging that on October 5, 1993 he sustained injury to his back and right leg while lifting heavy boxes and equipment. The Office accepted appellant's claim for a back strain, herniated disc, radiculitis of both legs and authorized back surgery on January 10 and

February 11, 1994. The Office also accepted his claim for depression due to the 1993 employment injury. Appellant sustained a recurrence of total disability for the period November 6, 1996 to January 27, 1997.

In 1995 the employing establishment offered appellant a light-duty job as an office automation clerk, a primarily sedentary position with some walking, standing and carrying up to 10 pounds. The job permitted appellant to sit, stand or walk at will to perform his duties and required no lifting, twisting or bending. Appellant accepted the position on November 7, 1995.[1]

On August 10, 1998 appellant filed a claim for a recurrence of total disability on July 20, 1998 causally related to chronic back and left leg pain due to his 1993 employment injury. He stated that on July 20, 1998 he was bending over to put something in his refrigerator at home and he felt pain in his back.

In a report dated August 10, 1998, Dr. Gus G. Halamandaris, appellant's attending neurosurgeon, stated that he had continuing low back pain with burning in the right leg. The physician stated, "He seems to have finally been overwhelmed by his chronic back pain. His back went out on him three weeks ago and [he] continues to … be sore, which leaves him unable to work." On August 18 and October 8, 1998 Dr. Halamandaris indicated that appellant was totally disabled and recommended spinal fusion surgery.

In a December 28, 1998 report, Dr. John Lavorgna, a Board-certified orthopedic surgeon and Office referral physician, examined appellant and found that he was not disabled from performing light-duty work. He recommended conservative treatment before considering further back surgery. Dr. Lavorgna stated:

> "There is no evidence of any new herniation or nerve root compression that would make his back condition worse since the injury he had [in] 1993 and the subsequent [surgeries] in 1994. I do not believe [appellant] is totally disabled from [his] light-duty position because of his back condition."

In a January 19, 1999 report, Dr. Rukhsana Khan, a Board-certified psychiatrist and Office referral physician, reviewed a history of appellant's accepted emotional condition and the results of a mental status evaluation. She diagnosed an adjustment disorder with depressed mood caused by the 1993 back injury. Dr. Khan stated:

> "The psychiatric condition, *per se*, is not disabling, because with adequate psychiatric treatment, [appellant] does not have any active symptoms…. He is responding very well to medication and supportive therapy. The stressors involve the pain which is always present, and is a limiting factor within his life; therefore, he has residual symptoms of feeling frustrated and angry, which, I presume, will last as long as his medical and legal matters exist. From a mental-health perspective, he did not show any difficulty at his job. Even when he returned in

[1] Appellant was assigned to the Directorate of Security. In 1996 he was reassigned to the Directorate of Law Enforcement.

part-time and full-time capacities, there did not appear to be any specific problems. Therefore, I do not have any suggestions of job modification for psychiatric reasons."

In response to a question as to whether appellant had any period of disability due to his accepted emotional condition, Dr. Khan stated:

"There appears to be a correlation of a worsening of medical problems with complications that led to the onset of depression…. From a psychiatric point of view, the period of disability was since his hospitalization in 1996 until now … 1999. At this time, however, he does not appear to present with a lot of psychiatric symptoms that would qualify him to be disabled on those grounds."[2]

Due to the conflict in the medical opinion evidence between Dr. Halamandaris and Dr. Lavorgna concerning appellant's physical disability due to his back condition, the Office referred appellant, together with the entire case file, to Dr. Joseph C. Johnson, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated August 25, 1999, Dr. Johnson reviewed a history of appellant's back condition and detailed his findings on physical examination. He noted that appellant was not in any active treatment program. Dr. Johnson diagnosed a lumbar strain, underlying degenerative disc disease, residual back and nerve root symptomatology, and osteomyelitis of the lumbar spine. He stated that these conditions were causally related to the 1993 employment injury, noting:

"[Appellant's] work disability based on objective findings only would be a disability precluding heavy work. There would be no lifting over 25 pounds…. He would be precluded from any prolonged standing. He would need to sit about two hours and then stand for six hours. He needs to be able to sit about 15 minutes per hour.

"However, if his disability is to take into account his subjective symptomatology, his category would change to disability resulting in a limitation to sedentary work. He would be able to work predominantly in a sitting position … with a minimum of demand for physical effort with some degree of walking and standing being permitted and [appellant] should be permitted to take short rest periods every two hours in the lying position."[3]

By letter dated May 5, 2000, the Office requested Dr. Johnson to provide a supplemental opinion as to whether appellant was disabled from his light-duty position at any time on or after July 20, 1998 and whether further back surgery was recommended.

[2] Apparently appellant was hospitalized for his emotional condition for five days at the end of 1996.

[3] On September 8, 1999 Dr. Johnson provided a list of work restrictions.

On May 23, 2000 Dr. Johnson provided a supplemental report. Based on his review of appellant's medical file, physical findings, and the results of diagnostic x-rays, computerized tomography (CT) scans and magnetic resonance imaging (MRI) scans Dr. Johnson opined that additional surgery was not warranted and appellant was able to perform his light-duty position. He stated:

> "Although [appellant] complains of radicular symptoms, there is no evidence on the myelogram or CT scan showing any significant or major nerve root impingement."
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> * * *
>
> "[Appellant] stated that in July of 1998, he was bending over opening an ice box when he had sudden spasms in the lower back and this was accompanied by increased low-back pain and a list to one side and increased leg pain. He received physical therapy and he was off work for a short time…. At the time of his evaluation in my office on [August 25, 1999], [appellant's] gait was normal. He could walk on toes and heels. There was no pelvic tilt, no evidence of muscle spasm, no scoliosis. There was no atrophy of thigh or calf. The reflexes were normal. Straight leg raising test was negative bilaterally. Sensation was intact. There was limitation of lumbar motion when [appellant] was asked to bend. Similarly when he was asked to bend over to touch his toes, there was limitation…. There was no evidence of any neurological loss from his low-back condition at the time of that examination.
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> "Therefore as best as I can determine from [appellant's] history and the medical records presented to me, [appellant] worked at a light-duty job beginning March 31, 1996. He had an episode of a flare[up] of symptoms in July of 1998 after bending over opening an ice box. And it would be expected that he would have a brief time off work and then was able to return to work probably within six weeks. He had a similar episode in July of 1999 from which he has recovered by the time of his evaluation of August 25, 1999.[4] In my opinion, as best that I am able to determine, he would be able to perform his modified-duty position from July 20, 1998 to the present time…."

In a report dated January 28, 2000, Dr. Halamandaris noted the results of a bone scan and opined that appellant was totally disabled. He again recommended further back surgery.

Dr. Don Williams, an attending Board-certified orthopedic surgeon, provided findings on examination in an August 8, 2000 report and diagnosed a lumbar disc protrusion at L4-5, a lumbar disc bulge at L3-4, spinal stenosis and degenerative facet arthritis. He indicated that appellant's job required kneeling, bending, crouching, overhead work, sitting and standing.

[4] There is no evidence of record concerning an injury in July 1999.

Dr. Williams opined that appellant could not perform his light-duty position and he recommended surgery. The restrictions noted by Dr. Williams were:

> "[N]o prolonged standing with a limit of 10 minutes and no prolonged sitting with a limit of ½ hour to 45 minutes. He needs to be able to change positions. He can do no heavy work, no heavy lifting, no repetitive bending or stooping, and is restricted to a semi-sedentary position where he can change positions, occasionally lay down."

On November 6, 2000 appellant filed another claim for a recurrence of total disability on July 20, 1998 due to his back, right leg and emotional condition. He alleged that his light-duty job exceeded his physical restrictions and described the job as requiring "prolonged sitting and standing, bending, stooping, lifting, pulling." On the claim form, appellant's supervisor, Alexander Kerekes, stated that appellant performed only "very light clerical work." He instructed appellant not to engage in any activity that would cause injury and appellant was permitted to stop work, go for a walk or otherwise change positions as needed.

By decision dated May 30, 2001, the Office denied appellant's claim for a recurrence of total disability on July 20, 1998.

Appellant requested a hearing that was held on March 28, 2002. He testified that his job as an office automation clerk required prolonged sitting and standing, twisting, and pushing and pulling heavy file drawers. Appellant stated that when he was transferred from the Directorate of Security to the Directorate of Law Enforcement, he began working a mandatory flextime schedule of 10 hours a day, 4 days a week required of all administrative staff. He submitted additional medical evidence at the hearing.

In a report dated May 24, 2000, Dr. Daniel S. Robbins, a clinical psychologist, noted that appellant had a six-year history of depression. He stated his opinion that appellant's depression was exacerbated by the pain from his back condition and the stress of pursuing his compensation claim.[5]

On April 30, 2002 Mr. Kerekes denied that appellant was asked to perform work that exceeded his medical restrictions and noted that appellant was able to change his position as desired. Mr. Kerekes noted that appellant took advantage of the freedom to move around, stating that appellant chose to work the 4-day, 10-hour schedule so that he could have an extra day off each week.

By decision dated and finalized July 16, 2002, the Office hearing representative affirmed the May 30, 2001 decision.

[5] Appellant also submitted a June 19, 2000 report from Dr. Alberto G. Lopez, a Board-certified psychiatrist and neurologist, who diagnosed chronic major depression and opined that he was not capable of returning to his usual work because he could not deal with the stress of working with demanding personalities and schedules in his light-duty position as an automation clerk. This report relates to appellant's claim that he developed a new emotional condition due to his light-duty job.

LEGAL PRECEDENT

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 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.[6]

ANALYSIS

Appellant alleged that his light-duty job requirements had changed such that he could not perform the job. He alleged that his light-duty job exceeded his physical restrictions and he described it as requiring "prolonged sitting and standing, bending, stooping, lifting, pulling." However, appellant's supervisor, Mr. Kerekes, stated that appellant performed only "very light clerical work." He advised appellant that he should not engage in any activity that would cause him injury and he was permitted to stop work, go for a walk or otherwise change positions as needed. Mr. Kerekes denied that appellant was asked to perform work that exceeded his medical restrictions. Although appellant changed his 5-day, 8-hour schedule at some point to a 4-day, 10-hour day schedule and alleged that this schedule was mandatory, his supervisor denied that this schedule was a job requirement and indicated that appellant chose the 4-day schedule in order to have an extra day off each week. There is no evidence to support appellant's claim that the physical requirements of his light-duty position exceeded his work limitations and caused a worsening of his accepted back condition resulting in total disability on July 20, 1998.

Regarding the issue of whether there was a change in the nature and extent of appellant's employment-related back condition, in reports dated August 10 and 18, 1998, Dr. Halamandaris, appellant's attending neurosurgeon, stated that appellant was totally disabled. However, in a December 28, 1998 report, Dr. Lavorgna, a Board-certified orthopedic surgeon and an Office referral physician, opined that appellant was not disabled from continuing to perform light duty. Due to the conflict in the medical opinion evidence between Dr. Halamandaris and Dr. Lavorgna, the Office properly referred appellant to Dr. Johnson, a Board-certified orthopedic surgeon, for an impartial medical examination.[7]

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[6] *Cynthia M. Judd*, 42 ECAB 246 (1990); *Stuart K. Stanton*, 40 ECAB 859 (1989).

[7] Section 8123(a) of the Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." 5 U.S.C. § 8123(a). When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence. *William C. Bush*, 40 ECAB 1064, 1975 (1989). In situations where there exist 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 upon a proper factual background, must be given special weight. *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

In reports dated August 25, 1999 and May 23, 2000, Dr. Johnson reviewed the history of appellant's back condition and detailed findings on examination. He reported physical findings on examination, and the results of diagnostic testing Dr. Johnson found that appellant was able to perform his light-duty position. He provided medical rationale in support of his opinion by explaining that appellant's very limited findings on examination and diagnostic testing showed that he could perform the position.

The Board finds that the thorough and well-rationalized opinion of the impartial medical specialist, Dr. Johnson, based on a complete and accurate factual background, establishes that appellant did not sustain a recurrence of total disability on July 20, 1998.

In a report dated January 28, 2000, Dr. Halamandaris again opined that appellant was totally disabled. However, he provided no new medical rationale in support of his opinion. As Dr. Halamandaris was on one side of the conflict of medical opinion which was referred to Dr. Johnson as the impartial medical specialist, his subsequent report is insufficient to outweigh or create a new conflict with Dr. Johnson's opinion that appellant could perform his light-duty job.[8]

Dr. Williams opined in an August 8, 2000 report that appellant could not perform the light-duty position. However, his opinion is of diminished probative value because it is not based on an accurate description of appellant's physical job requirements. Dr. Williams indicated that appellant's job required kneeling, bending, crouching, overhead work, sitting and standing and appellant was not allowed to change positions as needed. This job description, provided to Dr. Williams by appellant, is not accurate based on the written job description of record and the statements of appellant's supervisor that the position was primarily sedentary and permitted him to change his position as needed.

Appellant also alleged that his accepted emotional condition caused a recurrence of total disability on July 20, 1998. In a January 19, 1999 report, Dr. Khan, a Board-certified psychiatrist and Office referral physician, provided a history of appellant's accepted emotional condition, the results of a mental status evaluation and found that appellant was not disabled due to his emotional condition at the time of her examination. In response to a question as to whether appellant had any period of disability due to his emotional condition, Dr. Khan indicated that appellant was disabled due to his accepted physical injury. She noted that appellant did not have a disability psychiatric condition and did not have suggestions of job modification based on his emotional condition. Although she noted a correlation of the worsening of symptoms leading to depression, the report does not support appellant's claim for a recurrence of disability on July 20, 1998, based on bending over while at home to place an item in the refrigerator.

CONCLUSION

The Board finds that appellant has failed to establish either a change in the nature and extent of his light-duty job requirements or a change in the nature and extent of his accepted

[8] *Dorothy Sidwell*, 41 ECAB 857 (1990).

injury-related back condition such that he sustained a recurrence of total disability on July 20, 1998.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 16, 2002 is affirmed.

Issued: May 24, 2004
Washington, DC

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member