United States Department of Labor
Employees' Compensation Appeals Board

JAMES P. CLARKE, Appellant	)	
and	)	**Docket No. 05-1438**
	)	**Issued: May 16, 2006**
U.S. POSTAL SERVICE, POST OFFICE, New Fairfield, CT, Employer	)	

Appearances:
James P. Clarke, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 27, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decisions dated September 4, 2004 and April 13, 2005, that denied his claim for a recurrence of disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant sustained a recurrence of disability on or after December 15, 2001 causally related to his accepted December 13, 1994 employment injury.

FACTUAL HISTORY

On January 11, 1995 appellant, then a 51-year-old rural letter carrier, filed an occupational disease claim stating that he had degenerative wear of the disc tissue of his lower back, aggravated by his duties as a rural letter carrier. He was first aware that his employment caused his condition on December 13, 1994. On December 13, 1994 Dr. Robert T. Deveney, appellant's treating orthopedic surgeon, released him to modified duty with restrictions against

bending, stopping, pushing and pulling and intermittent standing, sitting or walking. On January 9, 1995 Dr. Deveney repeated his prior work restrictions. In a report dated February 27, 1995, he stated that appellant had herniated disc pulposus and degenerative disc disease and that he should be limited in requirements of prolonged standing and repetitive lifting, bending, twisting or carrying, as these activities would aggravate his condition.

On April 5, 1995 the Office accepted appellant's December 13, 1994 occupational disease claim for lumbar strain and aggravation of degenerative disc disease. The Office previously accepted a lower back strain and right knee strain sustained on April 18, 1994. On April 25, 1995 Dr. Deveney approved the employing establishment's limited-duty job offer at the Danbury, Connecticut, Post Office as a modified clerk. Restrictions included a lifting and pushing/pulling restriction of 20 pounds and intermittent sitting and standing/walking requirements. He noted that there were no restrictions regarding bending, stooping or twisting. The job offer did not include any reference to kneeling or climbing. Dr. Deveney noted an additional restriction by adding the phrase: "limit driving to 30 minutes" to the signature page. On May 6, 1995 appellant a resident of Sherman, Connecticut, accepted the modified clerk position at the Danbury Post Office with the following duties: answering telephones, recording messages, transferring calls, assisting customers and processing certain types of mail. Appellant's tour of duty was from 6:00 a.m. to 2:30 p.m., Monday through Friday. The job offer stated that all limitations and restrictions would be accommodated.

Appellant subsequently filed claims for recurrences of disability on October 17, 1995 and January 9, 1996, which the Office denied on May 15, 1996.

In a separate claim, on January 16, 1996 the Office accepted that appellant's bilateral carpal tunnel syndrome was work related and subsequently authorized bilateral carpal tunnel releases. However, appellant remained symptomatic postsurgery, resulting in an April 1, 1998 finding of permanent bilateral hand disability by his treating orthopedic surgeon, Dr. Anthony R. Viola, who placed limitations of no repetitive work and no fine hand movement.[1]

The record does not show any changes in appellant's limited-duty job from May 6, 1995, until a new offer on December 13, 2001. On that day, the employing establishment made a limited-duty job offer to appellant as a modified clerk to work at the Stamford, Connecticut, Processing & Distribution Center to begin on December 15, 2001. The job offer was based on restrictions required by his December 13, 1994 work-related injury and included lifting, pushing and pulling restrictions of no more than 20 pounds, intermittent standing and walking throughout the 8-hour shift and restrictions against climbing, stooping, bending, kneeling or twisting. As part of appellant's duties, he was required to observe security monitor systems displays and cover the security room during leave absences of the security tour person and on Sundays. The tour of duty was from 3:30 p.m. to 12:00 midnight, Friday through Tuesday.

On December 14, 2001 appellant filed a claim for a recurrence of disability of the December 13, 1994 work-related injury, alleging that he was unable to accept the limited-duty

[1] Appellant noted that he received a schedule award on June 22, 1998 for 19 percent of the bilateral upper extremities under claim number 010333685. The Office reviewed Dr. Viola's report in its September 1, 2004 decision denying modification of appellant's request for reconsideration.

job offer. Appellant stated that he experienced severe back pain, bilateral carpal tunnel syndrome, Baker's cyst, plantar fascitis and major depression. These conditions had deteriorated since the original job offer and that he could not work anywhere else. The employing establishment noted that appellant stopped work on December 15, 2001.

By letter dated December 14, 2001, appellant declined the limited-duty job offer. He argued that his doctor had not had the opportunity to review the changes in the new job offer including a change in the place of work, shift changes and different activities required by the new offer.

In a report dated December 14, 2001, Dr. Lauren Fox, an attending optometrist, stated that, due to appellant's recent Lasik eye surgery, he should not be required to drive in excess of 30 minutes at night. Further, she stated that he should not observe security monitors until his eyesight stabilized. On December 17, 2001 Dr. Matthew J. Klein, a Board-certified psychiatrist, stated that appellant was under his care for major depression and that any change in appellant's routine would jeopardize his recovery.

On December 17, 2001 the employing establishment notified the Office that, due to "excessing" from the duty station in Danbury pursuant to an agreement with the union, appellant was reassigned to the Stamford Processing & Distribution Center, adding that he had refused to accept the job offer. The employing establishment asked the Office to review the job offer to determine suitability.

By letter dated January 30, 2002, the Office advised appellant of the evidence needed to support his claim including a report from his treating physician with an opinion and reasons why the current conditions were causally related to the work-related injuries and also an opinion as to whether he was disabled as a result of that condition.

On April 1, 2002 the Office referred appellant to Dr. Herbert Bessen, a Board-certified orthopedic surgeon and a second opinion physician. The statement of accepted facts noted appellant's back and right knee injury, an aggravation of a degenerative disc disease, lumbar strain and bilateral carpal tunnel syndrome. It noted that appellant's doctor placed him on a 30-minute driving limit and that his position had moved from Danbury to Stamford, which was located further from appellant's home.

In a report dated April 8, 2002, Dr. Klein stated that appellant was able to work at his prior job through December 14, 2001 and that there were no restrictions against working an eight-hour day. He noted that appellant had major depression, carpal tunnel syndrome, cervical radiculopathy and eye surgery problems.

On April 9, 2002 Dr. Bessen stated that appellant's back examination revealed normal lumbar curve and that he noted no tenderness to palpation or muscle spasm. Leg extension, ankle and patella reflexes were normal with normal sensations in both legs. The right knee was normal and thigh circumference was equal bilaterally. He found that appellant's back condition had improved significantly and that it no longer impacted his ability to work. He noted severe right shoulder atrophy. Dr. Bessen attributed appellant's driving concerns to upper extremity issues adding that he could drive with his left hand. Dr. Bessen found that the job duties of the

light-duty position were within restrictions and that he was capable of driving to his employment. In a work capacity evaluation dated that same day, Dr. Bessen stated that appellant was capable of sitting 4 to 6 hours daily, walking and standing for 4 hours, operating a motor vehicle for 2 hours, repetitive wrist movements with 5-minute breaks every 2 hours, pushing up to 20 pounds for 4 hours and could lift 10 pounds with his right side for 2 hours daily and pull up to 10 pounds for 2 hours daily. He could also squat, kneel and lift for an hour daily and lift on the right up to 10 pounds for 2 hours daily.

On May 31, 2002 appellant stated that he had problems working and with his neck, back and eyesight. He noted that Dr. Bessen stated a lifting limitation of 10 pounds in his dominant hand but that the Office approved a limited-duty job offer that required lifting 20 pounds. On June 2, 2002 Dr. Klein stated that appellant could work an eight-hour day provided it was proximate to his home. He noted that appellant's major recurrent depression should be considered in assigning work to him.

In a work capacity evaluation dated June 3, 2002, Dr. Daniel C. George, a Board-certified orthopedic surgeon and a treating physician, noted the following restrictions: sitting, walking and standing with rest; no reaching above the shoulder, twisting, squatting, kneeling or climbing. Appellant was restricted to pushing, pulling and lifting no more than 20 pounds but could operate a motor vehicle up to 2 times a day for 30 minutes each time. In an undated report received by the Office on July 5, 2002, Dr. George stated that aspects of appellant's December 14, 2001 job offer could exacerbate his medical conditions. He stated that appellant was restricted to driving no more than one half hour at a time or no more than one hour a day, to prevent precipitation of lumbar strain and aggravation of degenerative disc disease and minimize pain caused by cervical radiculopathy and brachial plexopathy. He also noted that appellant's carpal tunnel syndrome can be exacerbated by the repetitive nature of the job, noting that repetitive motions of the hand should be eliminated.

By decision dated August 12, 2002, the Office denied appellant's claim of a recurrence of disability commencing on December 17, 2001 based on a December 13, 1994 work-related injury.[2] On September 6, 2002 appellant, through his representative, requested reconsideration. By decision dated July 10, 2003, the Office denied modification of its August 12, 2002 decision.

On June 2, 2004 appellant requested reconsideration and submitted evidence relative to his previously accepted claim for bilateral carpal tunnel syndrome. In a report dated December 8, 2003, Dr. Peter O. Rostenberg, an internist, stated that appellant was unable to fulfill the job requirements in the employing establishment's limited-duty job offer. Specifically, he stated that appellant's severe lumbar degenerative disc disease prevented him from operating a motor vehicle for more than an half hour and that he was unable to perform fine and repetitive hand motions due to his carpal tunnel syndrome. He also noted that appellant's other conditions

[2] The Office used December 17, 2001 as the date of appellant's claim for a recurrence of disability as appellant used that date in his December 14, 2001 (Form CA-2 claim). However, the employing establishment noted on the claim form that appellant stopped work on December 15, 2001. Appellant subsequently sought compensation for lost wages from December 15, 2001. Therefore, the date of the recurrence of disability in this claim is December 15, 2001.

including cervical fusion in 2002, a torn left biceps, hallux rigidus of the first toe right foot and episodes of major depression, affected his ability to perform certain activities.

On September 1, 2004 the Office denied modification of its July 10, 2003 decision denying benefits on the grounds that he failed to show he could not perform the offered position of a modified clerk due to a change in the nature of the work-related injury. Furthermore, the Office found that appellant failed to establish that the limited-duty job offer was not within his work restrictions.

On January 21, 2005 appellant requested reconsideration and submitted an August 20, 2002 report from Dr. S.J. Shalid, a Board-certified orthopedic surgeon. He related familiarity with appellant's right shoulder condition. Upon examination, Dr. Shalid noted that appellant's cervical ranges of motion in flexion and extension were performed without pain, lateral rotation was to about 45 degrees on either side and that he had a negative L'Hermitte's sign. He determined that the C4-5 disc herniation caused symptoms in October 2001 and that the degenerative cervical spondylitic disease caused cervical stenosis.

Appellant also submitted a statement concerning the August 2001 right biceps incident, a statement from the employing establishment noting it was unable to meet his medical restrictions once he filed for disability retirement, and a statement from the State of Connecticut regarding his handicap condition.

On April 13, 2005 the Office denied modification of its prior decisions denying the recurrence of disability claim.

LEGAL PRECEDENT

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[3] This term also means an inability to work when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force) or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.[4]

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 establishes that, light duty can be performed, the employee has the burden to establish by the weight of reliable, probative and substantial evidence a recurrence of total disability. As part of

[3] 20 C.F.R. § 10.5(x).

[4] *Id*.

this burden of proof, 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]

Section 8123(a) of the Federal Employees' Compensation Act[6] provides, "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."[7] In situations were 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.[8]

ANALYSIS

The Office accepted appellant's claims for lower back strain, right knee strain, bilateral carpal tunnel syndrome, lumbar strain and aggravation of degenerative disc disease. On May 6, 1995 appellant accepted a modified clerk position at the Danbury Post Office. On December 13, 2001 the employing establishment made a limited-duty job offer to appellant as a modified clerk to work in Stamford, CT, beginning on December 15, 2001. On December 14, 2001 appellant filed a claim for a recurrence of disability and stopped work on December 15, 2001. The Office denied appellant's claim for a recurrence of disability.

The Office based its decision on the April 9, 2002 second opinion evaluation of Dr. Bessen, a Board-certified orthopedic surgeon, who found that appellant's back condition had resolved and that he could drive to work. Dr. Beeson noted that appellant could operate a motor vehicle for up to two hours a day using his left hand. Appellant submitted reports from Dr. George indicating that appellant could not drive more than half an hour at time due to his lumbar conditions. The Board notes that appellant's duty station changed on December 13, 2001 from Danbury CT, a town about 15 miles north of Sherman, CT, appellant's hometown, to Stamford, CT, a town about 46 miles north of Sherman.

The Board finds that there is a conflict in the medical evidence between Dr. Beeson, the second opinion physician and Dr. George, a treating orthopedic surgeon, regarding his work capacity due to his accepted injuries, including his ability to drive.

The case should be referred to an impartial medical specialist to resolve the conflict in the medical evidence between Dr. Beeson and Dr. George, regarding appellant's work capacity due to his accepted injuries.[9] On remand the Office should refer appellant, along with the case file

---

[5] *Shelly A. Paolinetti*, 52 ECAB 391 (2001); *Robert Kirby*, 51 ECAB 474 (2000); *Terry R. Hedman***,** 38 ECAB 222 (1986).

[6] 5 U.S.C. §§ 8101-8193.

[7] 5 U.S.C. § 8123(a).

[8] *Barbara J. Warren*, 51 ECAB 413 (2000).

[9] *See supra*, note 7.

and the statement of accepted facts, to an appropriate specialist for an impartial medical evaluation and report including a rationalized opinion on this matter. After such further development as the Office deems necessary, the Office should issue an appropriate decision regarding appellant's claim.

CONCLUSION

The Board finds that, due to a conflict in the medical evidence, the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the April 13, 2005 and September 1, 2004 decisions of the Office of Workers' Compensation Programs are set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: May 16, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board