United States Department of Labor
Employees' Compensation Appeals Board

L.A., Appellant	)	
and	)	**Docket No. 08-168**
	)	**Issued: March 24, 2009**
DEPARTMENT OF LABOR, MINE, SAFETY & HEALTH ADMINISTRATION, Denver, CO, Employer	)	

Appearances:
John S. Evangelisti, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 23, 2007 appellant filed a timely appeal of a September 7, 2007 merit decision of the Office of Workers' Compensation Programs finding that he had not established a 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 disability on April 11, 2006.[1]

[1] In a September 19, 2008 decision, the Board set aside the Office's September 7, 2007 merit decision, finding that the issue presented was whether a July 20, 2005 wage-earning capacity determination should be modified, and remanded the case for a decision based on proper criteria. (Docket No. 08-168, issued September 19, 2008). By order dated March 6, 2009, the Board granted the Director of the Office's petition for reconsideration and vacated the September 19, 2008 decision, finding that the Office had not issued a formal wage-earning capacity decision in this case and that, therefore, the issue presented was whether appellant had sustained a recurrence of disability on April 11, 2006. (Docket No. 08-168, issued March 6, 2009).

FACTUAL HISTORY

On January 2, 2001 appellant, then a 54-year-old mine inspector, filed a traumatic injury claim for a December 26, 2000 lower back injury. The Office accepted the claim for aggravation of cervical spondylosis with cervical fusion and aggravation of lumbar spondylosis with lumbar fusion. Appellant most recently underwent a repeat lumbar laminectomy, discectomy and fusion at L3, L4, L5 and S1 on November 10, 2003. Appellant returned to a light-duty position on July 1, 2004, working four hours per day, three days per week.

On March 10, 2005 appellant's treating physician, Dr. J. Carvil Jackson, a Board-certified physiatrist, stated that appellant was experiencing chronic lower back cervical spinal pain. Examination revealed mildly limited cervical spinal range of motion and intact lower extremity range of motion bilaterally. Appellant was able to stand from sitting without increased difficulty, effort or tenderness. Dr. Jackson recommended no change in appellant's work status.

In a second opinion report dated June 16, 2005, Dr. Michael Winer, a Board-certified orthopedist, opined that appellant's light-duty position, working four hours per day, every other day, represented his functional capacity. On July 20, 2005 the Office reduced appellant's compensation benefits, based on his actual earnings in the light-duty position since July 1, 2004.

In an April 11, 2006 report, Dr. Jackson stated that appellant was severely limited in his work capacity and was capable of working only three hours per day, every other day, for a total of nine hours per week. On examination, he found that appellant had severe loss of range of motion in his cervical and lumbar spine in essentially all planes. His reflexes were present and measured at 1+ and symmetric in bilateral upper and lower extremities. Straight leg raise was limited at 65 to 75 degrees bilaterally by low back and leg pain. He noted that appellant had chronic neck and low back pain with intermittent four-limb pain secondary to cervical and lumbosacral radiculopathy status post cervical and lumbar decompression and fusion procedures, and associated severe central spinal stenosis L3-4 and cervical spondylosis. Dr. Jackson opined that the cervical and lumbar diagnoses were causally related to appellant's industrial injuries. In an accompanying note, Dr. Jackson recommended that appellant be restricted from lifting more than 10 pounds; limit bending, stooping and squatting; change positions every half hour; and work not more than 9 hours per week.

On April 12, 2006 appellant informed the Office that, due to a regression of his condition, his work schedule would need to be reduced to three hours per day, three days per week. He requested that his compensation benefits be modified to reflect his increased disability.

The record contains reports of diagnostic tests, including a report of a November 10, 2003 electromyogram (EMG) and nerve conduction study (NCS). A December 7, 2005 EMG/NCS report reflected electrodiagnostic evidence of a mild-to-moderate progression of a left L5-S1 radiculopathy, compared to the November 2003 study, and mild improvement of a right S1 radiculopathy. There was also minimal ongoing denervation activity appreciated in the left lower extremity and none appreciated in the right.

In a letter dated May 2, 2006, the Office informed appellant that the decrease in his work schedule might constitute a recurrence of disability. Appellant was advised to explain why he

believed the increase in his disability was related to his original injury and to provide a medical report containing a diagnosis and an opinion as to the cause of his disabling condition.

On May 22, 2006 appellant submitted a notice of recurrence. He alleged that his condition had regressed neurologically due to the nature of his original injury.

By decision dated August 1, 2006, the Office denied appellant's recurrence claim, finding that the evidence did not support a worsening of his condition which rendered him incapable of working in the limited-duty position.

On July 26, 2007 appellant, through his representative, requested reconsideration of the August 1, 2006 decision. Appellant submitted a November 28, 2006 report from Dr. Richard Ruskin, a treating physician, who diagnosed chronic pain syndrome; cervical and lumbar degenerative disc disease at multiple levels; cervical spondylosis; and lumbar post laminectomy syndrome. Dr. Ruskin stated that appellant's symptoms were worsening.

Appellant submitted reports dated September 7 and November 9, 2006 from Dr. Jackson, who found that appellant had severe restrictions in cervical and lumbar range of motion and reiterated his recommendation that appellant's work schedule be reduced to three hours per day, three days per week. In a report dated July 13, 2007, Dr. Jackson noted that appellant was on light duty secondary to a diagnosis of cervical spondylosis with cervical fusion, lumbar stenosis with lumbar fusion with aggravation and associated lumbar and cervical strains. He stated that appellant's condition had been exacerbated by performing prolonged light-duty work activities, noting nerve root irritation and inflammation in the lumbar and cervical spine regions, with associated radicular symptomatology of the cervical and lumbar roots. Dr. Jackson opined that it was medically justifiable to reduce appellant's schedule to three hours per day, three days per week.

On July 24, 2007 Dr. Jackson diagnosed cervical spondylosis and stenosis; status post decompression laminectomy, discectomy and fusion; lumbar and cervical strain; chronic pain and deconditioned state; and poor balance secondary to lumbar stenosis. He reiterated his previous restrictions and opined that appellant's diagnosed conditions were causally related to the accepted December 26, 2000 work injury. In an accompanying work capacity evaluation, Dr. Jackson provided additional restrictions, including pushing, pulling and lifting no more than 10 pounds, and 15-minute breaks every 2 hours.

By decision dated September 7, 2007, the Office denied modification of the August 1, 2006 decision, finding that the medical evidence did not establish that appellant had sustained a recurrence of disability on or after April 11, 2006.

LEGAL PRECEDENT

Section 10.5(x) of the Office's regulations defines "recurrence of disability" as 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.[2] This term also means

[2] 20 C.F.R. § 10.5(x) (2002). *See Carlos A. Marrero*, 50 ECAB 117 (1998).

an inability to work that takes place 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.[3]

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 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 job requirements.[4]

ANALYSIS

The Board finds that the case is not in posture for a decision as to whether appellant sustained a recurrence of disability. The case must be remanded to the Office for further development.

Appellant returned to a light-duty position on July 1, 2004, working four hours per day, three days per week. In 2006 he claimed that his condition had worsened such that he was no longer able to work four hours per day. Appellant did not allege a change in his light-duty job requirements. Therefore, he has the burden to establish that he cannot perform such light duty. As part of this burden, he must show a change in the nature and extent of the injury-related condition.[5]

Appellant submitted numerous reports from Dr. Jackson supporting his recurrence claim. On March 10, 2005, a year prior to the date of the alleged recurrence, Dr. Jackson stated that, although appellant was experiencing chronic lower back cervical spinal pain, his cervical spinal range of motion was only mildly limited, and lower extremity range of motion was intact bilaterally. Appellant was able to stand from sitting without increased difficulty, effort or tenderness. Dr. Jackson recommended no change in appellant's work status at that time. On the other hand, on April 11, 2006 he provided detailed examination findings, which revealed severe loss of range of motion in the cervical and lumbar spine in essentially all planes. Dr. Jackson noted chronic neck and low back pain, with intermittent four-limb pain secondary to cervical and lumbosacral radiculopathy status post cervical and lumbar decompression and fusion procedures, and associated severe central spinal stenosis L3-4 and cervical spondylosis. He indicated that appellant was severely limited in his work capacity, and was capable of working only three hours

[3] *Id.*

[4] *Conard Hightower*, 54 ECAB 796 (2003).

[5] *Joseph D. Duncan*, 54 ECAB 471 (2003); *Jackie D. West*, 54 ECAB 158 (2002); *Roberta L. Kaaumoana*, 54 ECAB 150 (2002); *Terry R. Hedman*, 38 ECAB 222 (1986).

per day, every other day, for a total of nine hours per week. Dr. Jackson opined that the cervical and lumbar diagnoses were causally related to appellant's industrial injuries.

On July 13, 2007 Dr. Jackson stated that appellant's condition had been exacerbated by performing prolonged light-duty work activities, noting nerve root irritation and inflammation in the lumbar and cervical spine regions, with associated radicular symptomatology of the cervical and lumbar roots. He opined that it was medically justifiable to reduce appellant's schedule to three hours per day, three days per week. On July 24, 2007 Dr. Jackson diagnosed cervical spondylosis and stenosis, status post decompression laminectomy, discectomy and fusion; lumbar and cervical strain; chronic pain and deconditioned state; and poor balance secondary to lumbar stenosis. He reiterated his previous restrictions and opined that appellant's diagnosed conditions were causally related to the accepted December 26, 2000 work injury. Dr. Jackson's reports support a worsening of appellant's accepted condition and are consistent in reflecting his opinion that appellant was unable to work four days per week in his limited-duty position after April 11, 2006.

The remaining medical evidence of record also supports appellant's claim. Dr. Ruskin's November 28, 2006 report provided diagnoses of chronic pain syndrome, cervical and lumbar degenerative disc disease at multiple levels, cervical spondylosis and lumbar postlaminectomy syndrome. He stated that appellant's symptoms were worsening. The record also contains reports of November 2003 and December 2005 EMGs and nerve conduction studies, which reflect evidence of a progression of a left L5-S1 radiculopathy. The Board notes that the Office incorrectly noted that the record was devoid of any objective evidence documenting a worsening in appellant's underlying condition.

Proceedings under the Federal Employees' Compensation 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 responsibility in the development of the evidence to see that justice is done.[6] This holds true in recurrence claims as well as in initial traumatic and occupational claims. In the instant case, although the reports of appellant's physicians contain rationale insufficient to discharge his burden of proof to establish that he sustained a recurrence of disability on April 11, 2006, causally related to his December 26, 2000 injury, the Board finds that they constitute substantial evidence in support of his claim and raise an unrefuted inference of a worsening of appellant's accepted condition and a causal relationship between his current condition and the original traumatic injury. The evidence is sufficient to require further development of the case record by the Office.[7]

On remand, the Office should develop the medical evidence as appropriate to obtain a rationalized opinion regarding whether appellant sustained a recurrence of disability on or about April 11, 2006 causally related to the December 26, 2000 injury and, if so, the period of disability. Following such further development of the case record as it deems necessary, the Office should issue a *de novo* decision.

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[6] *See Phillip L. Barnes*, 55 ECAB 426 (2004). *William J. Cantrell*, 34 ECAB 1223 (1983).

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

CONCLUSION

The Board finds that the case is not in posture for a decision as to whether appellant has established that he sustained a recurrence of disability on April 11, 2006 causally related to his December 26, 2000 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the September 7, 2007 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further development consistent with this decision.

Issued: March 24, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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