

United States Department of Labor
Employees' Compensation Appeals Board

L.N., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS ADMINISTRATION MEDICAL)
CENTER, Danville, IL, Employer)

Docket No. 08-1644
Issued: September 21, 2009

Appearances:
Stephen D. Scavuzzo, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 21, 2008 appellant, through his attorney, filed a timely appeal from a July 19, 2007 merit decision of the Office of Workers' Compensation Programs and a February 25, 2008 hearing representative's decision finding that he did not establish a recurrence of disability.¹ 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 has established that he sustained an employment-related recurrence of disability on October 19, 2001.

¹ By decision dated July 20, 2007, the Office retroactively reduced appellant's compensation, finding that his actual earnings as a mail processing equipment operator fairly and reasonably represented his wage-earning capacity. Appellant has not appealed from this decision and it is not before the Board at this time. 20 C.F.R. § 501.2(c).

FACTUAL HISTORY

This case is before the Board for the third time. By decision dated October 6, 2004, the Board reversed a September 30, 2003 Office decision finding that appellant had not established a recurrence of disability on October 19, 2002 or warranted modification of the established loss of wage-earning capacity determination.² The Board noted that the Office had issued a retroactive wage-earning capacity determination after he stopped work and filed a claim for wage-loss compensation. The Board found that, prior to issuing the loss of wage-earning capacity determination, the Office should have adjudicated whether appellant sustained an employment-related recurrence of disability. The Board concluded that appellant established that the loss of wage-earning capacity decision was erroneously issued. On appeal, for the second time, the Board reversed a May 31, 2006 decision affirming a wage-earning capacity determination and finding that appellant did not establish a recurrence of disability.³ The Board noted that the Office had not complied with its instructions to adjudicate whether appellant sustained a recurrence of disability prior to issuing a retroactive wage-earning capacity determination. The findings of fact and conclusions of law from the prior decisions are incorporated by reference.

On October 19, 2001 Dr. Michel H. Malek, an attending Board-certified neurosurgeon, diagnosed failed back syndrome and opined that appellant should remain off work for four weeks while pending the results of diagnostic studies. He stated, "Given [appellant's] incapacitation, I think it not unreasonable to keep him off work for about a week or so during the time these studies are performed." On October 29, 2001 Dr. Malek advised that appellant should remain off work until November 9, 2001. In a progress report dated November 9, 2001, he diagnosed a history of a lumbar fusion "which has not taken" and found that appellant could not work as of October 19, 2001 due to pain. Dr. Malek interpreted a computerized tomography (CT) myelogram as showing foraminal narrowing, especially at L4-5 and L5-S1 and "no evidence of any definite solid fusion." On December 4, 2001 he indicated that appellant was off work beginning October 19, 2001 due to increased back and left leg pain and the need for extensive testing.

In a report dated December 4, 2001, Dr. Suhail N. Alnaqib, a Board-certified internist, noted that appellant was off work beginning October 19, 2001 due to increased back and left leg pain. He advised against any work until further notice.

In a December 7, 2001 work status report, Dr. Malek diagnosed failed back syndrome, a failed fusion, problems with appellant's leg supporting his weight, back pain and leg pain. He again recommended that appellant remain off work for four weeks. Dr. Malek found that appellant's symptoms might be due to failure of the L4-5 fusion and recommended possible surgery.

² Docket No. 04-569 (issued October 6, 2004). The Office accepted that on June 1, 1995 appellant, then a 50-year-old warehouseman, sustained lumbosacral strain and a herniated disc at L4-5. It further accepted that he sustained lumbar strains on October 19, 1988 and October 21, 1992. Appellant underwent a laminectomy and microdiscectomy at L4-5 on June 10, 1996. On January 25, 2000 he underwent a bilateral lateral fusion at L4-5 and on February 5, 2001 he sustained an exacerbation of the lumbar spinal fusion. On July 1, 2001 appellant returned to work as a full-time mail processing equipment handler.

³ Docket No. 06-1981 (issued March 19, 2007).

On December 12, 2001 Dr. John L. Beghin, a Board-certified orthopedic surgeon, noted that appellant stopped work on October 19, 2001 due to progressively severe symptoms. He noted that a November 8, 2001 CT scan showed a probable intact fusion on the left at L4-5 and a “questionable fusion on the right.” Dr. Beghin found that a magnetic resonance imaging scan study showed no nerve root compression or disc herniation. He stated, “I have issued an off work excuse dating back to October 19, 2001, which will be effective until [appellant] can undergo implant removal and recover from the surgical procedure.” Dr. Beghin excused appellant from work beginning October 19, 2001 due to pain rather than objective evidence of an abnormality. He asserted that hardware removal might help with his pain complaints.

On February 15, 2002 Dr. James J. Harms reviewed appellant’s history of injury and medical treatment and the diagnostic studies of record. He opined that appellant’s pain could be from degenerative changes, nerve inflammation, leading chemicals, sensitive nerves or a fusion failure. Dr. Harms found that the CT scan was suspicious but not definitive for a fusion that had not healed. He recommended against further surgery.

In a note dated February 18, 2002, Dr. Beghin advised that appellant had chronic pain of unclear origin that may be due to pseudoarthrosis. Appellant was unable to work from February 19 to March 19, 2002. On February 18, 2002 Dr. Thomas L. Sutter, an osteopath, diagnosed chronic back pain but advised that appellant could work at a light sedentary level.

On August 26, 2002 Dr. Alnaqib discussed his treatment of appellant from February 27, 2001 onward. Appellant was unable to work due to pain and the need for medication. Dr. Alnaqib indicated that appellant was no longer able to work and that he was “first off work October 19, 2001 [with] fusion failure.”

On June 11, 2002 Dr. Richard R. Rak, a Board-certified neurosurgeon, diagnosed back and leg pain following two back surgeries. He reviewed the diagnostic studies and noted that there was possible nonunion of the fusion on the right by CT scan. Dr. Rak listed findings on examination and concluded, “At this point, [appellant] is really incapacitated and not able to work.”

On October 7, 2002 Dr. Malek related that appellant’s work restrictions set forth on July 2000 extended to the present date. He diagnosed a failed back fusion. Dr. Malek noted that a discogram on November 27, 2001 showed no evidence of fusion and was negative at L3-4 but positive at L5-S1. He stated, “Based on the above, I do not think that [appellant] can perform the above duties and therefore his condition of disability is permanent until his condition is addressed medically.”

In a report dated December 12, 2002, Dr. Judith R. Lee-Sigler, a Board-certified psychiatrist, noted that appellant had worked with restrictions from February to October 2001. She stated:

“[A] second attempt to return to work without any further diagnostics or treatment would lead to ultimate failure, thus the rationale for [appellant’s] off work status.... In summary, it is not that he had objective weakness that le[d] to his off work status, but rather that he had failed attempts to return to work without what I

considered intervention to facilitate a return to work or even a second functional capacity evaluation determining basic work restrictions.”⁴

By decision dated July 19, 2007, the Office found that appellant did not establish a recurrence of disability on October 19, 2001 causally related to his accepted work injury.⁵ In a decision dated July 20, 2007, it retroactively reduced his compensation, finding that his actual earnings as a mail processing equipment operator fairly and reasonably represented his wage-earning capacity.⁶ On August 16, 2007 appellant, through his attorney, requested an oral hearing regarding the July 19, 2007 decision.

A hearing was held on December 14, 2007. Subsequent to the hearing, appellant submitted additional medical evidence.⁷ On August 26, 2002 Dr. Timothy Lund, Board-certified in family and preventive medicine, diagnosed chronic low back pain with some evidence of right-sided spasms. He listed work restrictions and suggested beginning at four hours per day due to deconditioning. On August 29, 2002 Dr. Lund diagnosed chronic low back pain. He did not change the work restrictions. On September 3, 2002 Dr. Lund diagnosed an acute exacerbation of chronic lumbar pain and noted that appellant related that the employing establishment was not adhering to his limitations. In a disability certificate dated October 2, 2002, Dr. Alnaqib found that appellant was unable to work until evaluated by a physician for chronic back and leg pain.

In a March 5, 2003 settlement agreement, the employing establishment agreed to support appellant’s application for disability retirement based on a nonwork-related injury or disease. On April 2, 2003 the Office of Personnel Management approved his application for disability retirement.

By decision dated February 25, 2008, the hearing representative affirmed the July 19, 2007 decision. He determined that none of the physicians provided objective findings supporting disability from employment.

LEGAL PRECEDENT

Where 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 the employee 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 to show that he or she cannot perform such light duty. As part of this burden, the

⁴ In a report dated March 12, 2002, Dr. Lee-Sigler diagnosed status post lumbar sprain/strain, failed back syndrome, degenerative disc disease with nerve root irritation and L5 radiculitis. She opined that appellant should remain off work. Dr. Lee-Sigler submitted throughout 2002.

⁵ The Office noted that appellant returned to work for partial days in August 2002. It accepted that he sustained an aggravation of cervical radiculitis due to lying on a concrete floor under file number xxxxxx237.

⁶ As previously noted, appellant has not appealed this decision and thus it is not before the Board.

⁷ Appellant also submitted evidence already considered by the Office and set forth in prior decisions.

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.⁸

Office regulations provide that 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.⁹ This term also means 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.¹⁰

ANALYSIS

The Office accepted that appellant sustained lumbosacral strain, a herniated disc at L4-5 and an exacerbation of a lumbar spinal fusion due to work injuries. Appellant sustained intermittent periods of disability. The Office authorized a June 10, 1996 laminectomy and microdiscectomy at L4-5 and a January 25, 2000 bilateral lateral mass fusion at L4-5. On July 1, 2001 appellant began working for the employing establishment as a mail processing equipment handler. He stopped work on October 19, 2001. On November 8, 2001 appellant filed a claim requesting compensation beginning that date.

Appellant has not alleged a change in the nature and extent of his light-duty job requirements. Instead, he attributed his recurrence of disability to a change in the nature and extent of his employment-related conditions. Appellant must thus provide medical evidence establishing that he was disabled due to a worsening of his accepted work-related conditions.¹¹

Appellant submitted reports from physicians who generally advised that he was unable to work beginning October 19, 2001 due to increased pain and a possible fusion failure. He did not, however, submit evidence from a physician who, on the basis of a complete and accurate factual and medical history, concluded that his disability was causally related to his work injury and supported that conclusion with sound medical reasoning.¹² On October 19, 2001 Dr. Malek diagnosed failed back syndrome and opined that appellant should remain off work for four weeks or pending the results of diagnostic studies. On October 29, 2001 he found that appellant should remain off work until November 9, 2001. In a progress report dated November 9, 2001, Dr. Malek diagnosed a lumbar fusion which may have been unsuccessful based on a CT myelogram and found that appellant could not work beginning October 19, 2001 due to pain. On

⁸ *Jackie D. West*, 54 ECAB 158 (2002); *Terry R. Hedman*, 38 ECAB 222 (1986).

⁹ 20 C.F.R. § 10.5(x).

¹⁰ *Id.*

¹¹ *See Jackie D. West*, *supra* note 8.

¹² *Sandra D. Pruitt*, 57 ECAB 126 (2005).

December 4, 2001 he related that appellant was unable to work beginning October 19, 2001 due to increased back and left leg pain and the need for extensive testing. In a December 7, 2001 work status report, Dr. Malek diagnosed failed back syndrome, a failed fusion, back pain and leg pain. He recommended that appellant remain off work for four weeks. Dr. Malek opined that appellant's symptoms might be due to failure of the L4-5 fusion and recommended possible surgery. In his reports, however, he did not explain why appellant was no longer able to perform his light-duty employment. Instead, Dr. Malek speculated that he may have had an unsuccessful fusion and recommended further evaluation. The Board thus finds that Dr. Malek's reports are of diminished probative value as they do not contain sufficient medical rationale to demonstrate that his conclusion reached regarding appellant's disability was sound, logical and rationale.¹³

On December 4, 2001 Dr. Alnaqib related that appellant was off work beginning October 19, 2001 due to increased back and left leg pain. He advised against any work until further notice. Dr. Alnaqib, however, did not explain why appellant was unable to perform his limited-duty employment. Additionally, findings on examination are needed to justify a physician's opinion that an employee is disabled for work.¹⁴

On August 26, 2002 Dr. Alnaqib related that appellant was disabled from work because of pain and the necessity for medication. In another report of the same date, he indicated that appellant was unable to work beginning October 19, 2001 due to fusion failure. Dr. Alnaqib, however, did not include rationale explaining how he reached his conclusion regarding disability. Consequently, his opinion is of diminished probative value.¹⁵

On December 12, 2001 Dr. Beghin noted that appellant stopped work on October 19, 2001 due to progressively severe symptoms. He found that a November 8, 2001 CT scan showed a probable intact fusion on the left at L4-5 and a "questionable fusion on the right." Dr. Beghin stated, "I have issued an off work excuse dating back to October 19, 2001, which will be effective until [appellant] can undergo implant removal and recover from the surgical procedure." In another note dated December 12, 2001, Dr. Beghin clarified that he excused appellant from work beginning October 19, 2001 due to pain rather than evidence of an abnormality. He did not find appellant disabled because of a change in his condition but instead due to his pain complaints. When a physician's statements regarding an employee's ability to work consists only of a repetition of the employee's complaints that he hurt too much to work without objective signs of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.¹⁶ Further, pain, is a description of symptoms rather than a clear diagnosis of a medical condition and does not constitute a basis for the payment of compensation.¹⁷

¹³ *K. W.*, 59 ECAB ____ (Docket No. 07-1669, issued December 4, 2007).

¹⁴ *Laurie S. Swanson*, 53 ECAB 517 (2002).

¹⁵ *Beverly A. Spencer*, 55 ECAB 501 (2004).

¹⁶ *William A. Archer*, 55 ECAB 674 (2004).

¹⁷ *Robert Broome*, 55 ECAB 339 (2004).

On February 18, 2002 Dr. Beghin diagnosed chronic pain of uncertain origin and found that appellant was unable to work. He did not, however, provide a firm diagnosis of appellant's condition. Without a firm diagnosis supported by medical rationale, the report is of little probative value.¹⁸

On February 15, 2002 Dr. Harms asserted that appellant's complaints of pain could be from a number of causes, including degenerative changes, nerve inflammation, leading chemicals, sensitive nerves or a fusion failure. He opined that the CT scan was suspicious but not definitive for a fusion that had not healed. Dr. Harms recommended against further surgery. As he did not address the issue of disability beginning October 2001, his opinion is of little probative value.

On June 11, 2002 Dr. Rak diagnosed back and leg pain following two back surgeries. He found that diagnostic studies showed a possible nonunion of a fusion. Dr. Rak opined that appellant was disabled from employment. He did not, however, provide any supporting rationale for appellant's conclusion that he was unable to perform his limited-duty work. Medical conclusions unsupported by rationale are of diminished probative value.¹⁹

Dr. Lund evaluated appellant on August 26, 2002 and listed work restrictions. As he did not address the issue of whether appellant sustained a recurrence of disability beginning October 2001, his report is of little probative value.

In a report dated December 12, 2002, Dr. Lee-Sigler noted that appellant worked with restrictions from February to October 2001. She related that she took him off work not because of "objective weakness" but because he required assistance and possibly another functional capacity evaluation to increase his chance of a successful return. Dr. Lee-Sigler's disability finding appears to be prophylactic in nature; however, the possibility of future injury does not constitute a basis for the payment of compensation under the Federal Employees' Compensation Act.²⁰

On appeal, appellant's attorney argues that the medical evidence establishes that appellant was disabled beginning October 19, 2001. As discussed, however, appellant has not submitted rationalized medical evidence supporting that he was disabled beginning October 19, 2001. Consequently, he has not met his burden of proof.

CONCLUSION

The Board finds that appellant has not established that he sustained an employment-related recurrence of disability on October 19, 2001.

¹⁸ See *Samuel Senkow*, 50 ECAB 370 (1999) (finding that, because a physician's opinion of Legionnaires disease was not definite and was unsupported by medical rationale, it was insufficient to establish causal relationship).

¹⁹ *Jacquelyn L. Oliver*, 48 ECAB 232 (1996).

²⁰ See *Brenda L. DuBuque*, 55 ECAB 212 (2004); *Manuel Gill*, 52 ECAB 282 (2001).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 25, 2008 and July 19, 2007 are affirmed.

Issued: September 21, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board