United States Department of Labor
Employees' Compensation Appeals Board

J.M., Appellant	)	
and	)	**Docket No. 09-148**
	)	**Issued: January 26, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Aliquippa, PA, Employer	)	

Appearances:
Jeffrey P. Zeelander, 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 October 20, 2008 appellant, through counsel, filed an appeal from a February 8, 2008 decision of the Office of Workers' Compensation Programs denying his claim of erectile dysfunction and an October 8, 2008 decision denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the appeal.

ISSUES

The issues are: (1) whether appellant established that he sustained erectile dysfunction causally related to his accepted back injury; and (2) whether the Office properly denied his request for reconsideration under 5 U.S.C. § 8128(a).

On appeal, appellant contends that he does not have a vascular insufficiency and that his condition should be accepted as employment related.

FACTUAL HISTORY

This is appellant's second appeal before the Board.[1] In a June 15, 2007 decision, the Board affirmed a September 27, 2006 schedule award decision finding that appellant had no more than 13 percent impairment to his left leg.[2] The facts and the medical history of the case are set forth in the Board's prior decision and incorporated herein by reference.

Appellant claimed that he sustained erectile dysfunction as a consequence of his accepted injury. In a January 8, 2002 report, Dr. Paul M. Hoover, Board-certified in physical medicine and rehabilitation, diagnosed discogenic syndrome, herniated disc at L4-5 and chronic L5 radiculopathy. He noted that appellant complained of impotence.

In a December 19, 2001 note, Dr. Martin A. Koskrosky, a Board-certified urologist, advised that appellant was seen in follow up for erectile dysfunction. He noted that appellant had a history of back surgery and had spinal stenosis. Dr. Koskrosky noted that appellant had tried Viagra had had good results but complaints of left leg muscle spasms which interfered with intercourse.

The Office referred appellant to Dr. Satish A. Dhagat, a Board-certified urologist, for a second opinion examination. In an April 23, 2003 report, Dr. Dhagat noted that appellant had complained of poor erections for three years. There was no problem with voiding. Appellant had been treated with Viagra with good results. Dr. Dhagat listed the diagnosis of erectile dysfunction. He advised that it was unlikely that appellant's condition was due to his back injury and found it secondary to venous insufficiency.

On March 20, 2003 the Office referred appellant to Dr. Jimmy J. Ong, a Board-certified neurologist.[3] In an April 15, 2003 report, Dr. Ong provided a review of appellant's injury and history of treatment. He noted that appellant had complaints of lumbar radiculopathy with some decreased sensation in the L5-S1 dermatome and also nonanatomic changes. As to the erectile dysfunction, Dr. Ong advised that the condition was not directly related to appellant's back condition as there was no cauda equina or conus syndrome. He attributed the dysfunction as positional related because of some back and leg pain but did not warrant any impairment.

---

[1] Appellant had a prior history of surgery to his lumbar spine for chemonucleosis at L4-5 in 1983, a lumbar puncture at L5-S1 on April 13, 1985 and a discectomy and partial hemilaminectomy at L5-S1 on June 18, 1990. He sustained injury on October 28, 1995 accepted by the Office for a lumbar strain and recurrent herniated disc at L5-S1 for which he underwent surgery on November 28, 1995. A December 21, 1999 magnetic resonance imaging scan revealed no evidence of a recurrent herniated disc, minimal diffuse disc bulging at L4-5 and disc desiccation at L5-S1 with no recurrent herniation. A June 1, 2000 computerized tomography scan of the lumbar spine revealed maintained disc spaces at L1-2, L2-3 and L3-4 with no focal herniation and mild bulging and no significant spinal stenosis. At L4-5, there was disc space narrowing with a small localized herniated disc to the left with lateral recess and inferior foraminal stenosis. At L5-S1, severe degenerative changes were seen with diffuse bulging of the annulus but no distinct herniated disc and lateral recess stenosis.

[2] Docket No. 07-70 (issued June 15, 2007).

[3] The Board notes that the Office found a conflict in medical opinion as to the extent of permanent impairment to appellant's lower extremities. The Office referred appellant to Dr. Ong as an impartial medical specialist on that issue.

On December 19, 2003 an Office medical adviser noted that Dr. Dhagat did not relate appellant's erectile dysfunction to the effects of his lumbar injury or surgery. He distinguished problems arising from venous insufficiency from lumbar injury affecting the nerves going to the genitalia. Dr. Dhagat noted that venous incompetence was correctible through medication such as Viagra.

In a January 7, 2004 decision, the Office denied appellant's claim, finding that the medial evidence was not sufficient to establish that his erectile dysfunction was due to his accepted back injury.

On January 9, 2004 appellant, through counsel, requested review of the written record. In a January 30, 2004 note, Dr. David B. Patrick, a Board-certified urologist, advised that appellant had been seen at his office on several occasions. He described erectile dysfunction, for which appellant took medication. Appellant was able to get good firm erections but experienced back pain with intercourse and lost his erection. He now sought some sort of nerve test, but Dr. Patrick knew of no testing that would establish that the dysfunction was due to pain with motion. He advised that the solution was improvement of appellant's back pain.

The Office found a conflict in medical opinion as to the cause of appellant's erectile dysfunction. On November 8, 2005 it referred appellant to Dr. Richard W. Pidutti, a Board-certified urologist, for an impartial medical examination. In a December 9, 2005 report, Dr. Pidutti reviewed the history of injury and medical treatment. He noted that appellant had undergone various treatments and that his medications included Vicodin and testosterone replacement. Appellant noted that he was able to obtain good erections with or without the use of Viagra and attributed his problem to a loss of erection with changes in posture and discomfort in his left leg. He reported that he was able to ejaculate without difficulty and to reasonably regain an erection if he has taken Viagra. Appellant noticed no change in function since starting testosterone replacement therapy. Dr. Pidutti noted that appellant had gained 60 pounds since 2001 and weighed 328 pounds. Additionally, he had a history of smoking until two years prior. Dr. Pidutti noted the results of examination of the genitalia and that he was unable to palpate pedal pulses. He found that appellant's loss of penile function was not due to appellant's accepted injury or surgery. Dr. Pidutti attributed appellant's dysfunction to vascular insufficiency which was ameliorated with the use of Viagra. He advised that vascular insufficiency was the most common cause of erectile dysfunction and noted this was impacted by appellant's physical findings, including short-lived erections, history of smoking, obesity and the inability to palpate pedal pulses. Dr. Pidutti found no neurologic basis for appellant's condition.

In a September 27, 2006 decision, the Office denied appellant's claim of erectile dysfunction causally related to his accepted injury.

Appellant sought reconsideration and submitted a February 18, 2007 report from Dr. Hoover, who noted that he sought objective verification of the cause of appellant's dysfunction and advised that electromyography testing was obtained on January 12, 2007. Dr. Hoover diagnosed: "left pudendal mononeuropathy verses evidence of a left S3 to S5 polyradiculopathy." He characterized this as objective neurological evidence of appellant's dysfunction that went against the opinion of Dr. Pidutti. Dr. Hoover stated that the work injury

created a spinal disorder manifest as stenosis, which was notorious for causing polyradiculopathy emerging into the sacral segments as evidenced on the EMG.

In a February 8, 2008 decision, the Office denied appellant's claim for erectile dysfunction.

On August 5, 2008 appellant requested reconsideration. He submitted office treatment notes of May 15 and June 16, 2008 from Dr. K.K. Incorvati, a general surgeon, who obtained a noninvasive arterial study which revealed no evidence of vascular disease. He also submitted a copy of the January 12, 2007 electromyography study reviewed by Dr. Hoover.

In an October 8, 2008 decision, the Office denied appellant's reconsideration request without further merit review.

LEGAL PRECEDENT -- ISSUE 1

The basic rule respecting consequential injuries is that when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence of that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause. Once the work-connected character of an injury has been established, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause. An employee who asserts that a nonemployment-related injury was a consequence of a previous employment-related injury has the burden of proof to establish that such was the fact.[4]

When there exist opposing medical opinions 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 and medical background, will be given special weight.[5]

ANALYSIS -- ISSUE 1

The Office accepted appellant's claim for lumbar strain and a recurrent herniated disc at L5-S1 for which he underwent surgery. On appeal, appellant contends that his erectile dysfunction is a consequence of his accepted injury. In support of his claim, he submitted reports from Dr. Hoover, who first noted complaints of impotence in 2002. On April 15, 2002 Dr. Hoover provided an impairment rating regarding appellant's sexual dysfunction as 19 percent of the whole person. However, he did not provide any medical narrative explaining how appellant's sexual impairment was caused by the accepted conditions in this case.[6] Dr. Patrick, a Board-certified urologist, noted that he had treated appellant on several occasions for sexual

[4] *See Kathy A. Kelley*, 55 ECAB 206 (2004); *Carlos A. Marrero*, 50 ECAB 170 (1998).

[5] *R.C.*, 58 ECAB 238 (2006); *Bernadine P. Taylor*, 54 ECAB 342 (2003).

[6] The Board notes that Dr. Hoover submitted numerous office treatment forms pertaining to appellant's back condition that did not include any medical narrative addressing causal relation.

dysfunction. With medication, appellant was able to get a good erection but experienced pain with motion and would loose his erection.

The Office developed the issue of sexual dysfunction by referring appellant to Dr. Dhagat, a Board-certified urologist. On April 23, 2003 Dr. Dhagat noted that appellant had complained of poor erections over the prior three years but had no problem with voiding. He noted that appellant had good results with medication. Dr. Dhagat attributed appellant's condition to venous insufficiency and not the accepted back injury. Dr. Ong, a Board-certified neurologist, did not attribute appellant's complaint of sexual dysfunction to his back condition, noting there was no evidence of cauda equina or conus syndrome.

The Office found a conflict in medical opinion between Dr. Patrick and Dr. Dhagat and referred appellant to Dr. Pidutti, a Board-certified urologist, selected as the impartial medical specialist. On December 9, 2005 Dr. Pidutti reviewed appellant's history of injury and medical treatment. He noted that appellant underwent various treatments, including testosterone replacement therapy. Appellant reported that he was able to achieve good erections and ejaculate without difficulty. Dr. Pidutti noted that on examination the genitalia were normal. He found that appellant's sexual dysfunction was not due to his accepted back injury or as a result of his accepted surgery. Dr. Pidutti noted that on examination he was unable to palpate pedal pulses and diagnosed vascular insufficiency. He noted that appellant's condition was also impacted by his history of smoking and obesity.

Based on the report of Dr. Pidutti, the Office denied appellant's request to expand the acceptance of his claim for sexual dysfunction related to his accepted lumbar conditions. The Board finds that the report of Dr. Pidutti, a Board-certified specialist in urology, constitutes the special weight of medical opinion. Dr. Pidutti provided a thorough medical review addressing the history of injury and medical treatment, set forth findings on examination and provided support for his opinion that appellant's sexual dysfunction was a result of venous insufficiency and not related to this accepted back injury.[7]

On February 18, 2007 Dr. Hoover noted that he sought objective verification for appellant's sexual dysfunction. He stated that an EMG was obtained on January 12, 2007 that established "left pudendal mononeuropathy versus evidence of a left S3 to S5 polyradiculopathy." Dr. Hoover characterized this as neurological evidence for appellant's sexual dysfunction connected with spinal stenosis caused by the employment injury. In addressing causal relation, he stated: "The work injury connection to the neurological evidence is through the polyradiculopathy differential diagnosis of the test result and not through a direct left pudendal mononeuropathy, which is the other possible differential diagnosis which would not be connected with the work injury." The Board finds that the report of Dr. Hoover is insufficient to create a conflict of medical opinion with the opinion of the impartial medical specialist, Dr. Pidutti. The Board notes that Dr. Hoover provided differential diagnosis based on the EMG test obtained. It is not clear how Dr. Hoover attributes causal relation to the accepted lumbar sprain or recurrent herniated disc at L5-S1, for which surgery was performed. Appellant has significant preexisting disease of the lumbar spine which was not addressed by Dr. Hoover or

[7] *See Darlene R. Kennedy*, 57 ECAB 414 (2006); *Carl Epstein*, 38 ECAB 539 (1987).

otherwise ruled out as causative. Moreover, Dr. Hoover's statement on causal relationship is vague and speculative, as it is couched in terms of possibility between the two differential diagnoses. He did not adequately explain the basis for attributing appellant's spinal stenosis to the accepted injury. There was no discussion by Dr. Hoover of prior diagnostic tests obtained of the lumbar spine or how the results of the 2007 EMG compared in contrast with prior findings. He also noted that appellant's testosterone levels had been blunted by long-term pain management with Vicodin. This reduces the probative value of Dr. Hoover's medical opinion on causal relationship.[8]

The Board finds that the weight of medical opinion is represented by the opinion of Dr. Pidutti, the impartial medical specialist. The Office properly found that appellant did not establish that his sexual dysfunction was a consequence of his accepted lumbar conditions.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for further merit review under section 8128(a) of the Act, the implementing federal regulations provide that evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a relevant legal argument not previously considered; or (3) constitute relevant and pertinent new evidence not previously considered.[9] When a claimant fails to meet one of these standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[10]

ANALYSIS -- ISSUE 2

Appellant did not contend that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered. In support of his request for reconsideration, he submitted office treatment notes from Dr. Incorvati who noted that appellant had been referred by Dr. Hoover to rule out vascular disease. Dr. Incorvati provided findings on examination and stated that appellant underwent noninvasive studies, the results of which were purported to show no evidence of vascular disease. The Board notes that the evidence, while new, is not relevant to the underlying issue of whether appellant's sexual dysfunction is related to his accepted low back injury. Dr. Incorvati did not provide any opinion on this issue. There is no opinion addressing causal relationship or any medical history of the accepted condition in this claim. Dr. Incorvati did not address the issue on which appellant's claim was rejected. This evidence was not sufficient to require the Office to reopen the case for further merit review.

---

[8] *See Michael S. Mina*, 57 ECAB 379 (2006); *Duane B. Harris*, 49 ECAB 170 (1997).

[9] 5 U.S.C. § 8128(a) provides that "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." *See* 20 C.F.R. § 10.606(b)(2).

[10] *Id*. at 10.608(b).

CONCLUSION

The Board finds that appellant has not established that his sexual dysfunction is causally related to his accepted injury. The Board also finds that the Office properly denied further merit review under section 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the October 8 and February 8, 2008 decisions of the Office of Workers' Compensation Programs be affirmed.

Issued: January 26, 2010
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