

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JOHNNY E. KELLY and DEPARTMENT OF DEFENSE,  
DEFENSE SUPPLY AGENCY, Memphis, Tenn.

*Docket No. 96-2169; Submitted on the Record;  
Issued August 12, 1998*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,  
A. PETER KANJORSKI

The issue is whether appellant had any disability on or after November 29, 1989 causally related to his June 11 or November 12, 1989 accepted soft tissue muscular strain employment injuries.

This is appellant's second appeal before the Board on this issue. In the prior appeal, the Board affirmed the July 6 and November 3, 1993 decisions of the Office of Workers' Compensation Programs finding that appellant had failed to present rationalized medical evidence supporting that he had disability after November 29, 1989 causally related to his June 11 or November 12, 1989 low back strain soft tissue injuries.<sup>1</sup> The facts and circumstances of the case are thoroughly set out in the Board's prior decision, and are hereby incorporated by reference.

Following the Board's August 9, 1995 decision appellant filed a petition for reconsideration, which was also denied by the Board on November 22, 1995.

Thereafter, appellant requested reconsideration of his case by the Office, and he theorized that the accepted June 11 and November 12, 1989 low back strain soft tissue injuries caused degenerative disc disease at L4-5. The Board notes, however, that the record supports that appellant had disc problems at L4-5 which predated his November 12, 1989 muscular strain injury and had a history of low back pain since a "slipped disc" in 1975 secondary to a military service injury. In support of his reconsideration request appellant submitted medical reports previously of record and considered by both the Office and the Board. Appellant also submitted some Social Security Administration documents and a January 9, 1996 report from Dr. James T. Robertson, a Board-certified neurosurgeon. Dr. Robertson stated that he reviewed the 1989 to 1993 medical reports provided to him by appellant, and commented that he was unable to find a statement that appellant was released to work. He did not address whether appellant had any

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<sup>1</sup> Docket No. 94-0529 (issued August 9, 1995).

disability after November 29, 1989 causally related to his June 11 or November 12, 1989 low back strain soft tissue injuries.

By decision dated March 5, 1996, the Office denied modification of its prior decision finding that the medical evidence submitted was not sufficient to warrant modification. The Office explained that appellant had not submitted rationalized medical evidence supporting that he continued to be disabled due to his June 11 and November 12, 1989 low back strain soft tissue injuries.

On March 14, 1996 the Office received another request from appellant for reconsideration of its prior decision. In support of his request, appellant submitted a March 6, 1996 report from Dr. Ernest L. Cashion, a Board-certified neurosurgeon, which stated that Dr. Cashion checked "yes" in error, to the form question of whether appellant could resume his regular work on November 29, 1989. Dr. Cashion now stated that he should have checked "no," as appellant had not been advised by anyone that he could return to his regular work. Dr. Cashion offered no opinion based upon his own medical evaluation as to whether appellant was or was not physically capable of returning to regular work on November 29, 1989, but limited his comments to an analysis of other reports of record. He did not provide a rationalized medical opinion supporting that appellant was disabled after November 29, 1989 due to his June 11 or November 12, 1989 low back strain soft tissue injuries.

Also submitted were several reports already of record and previously considered by the Office and Board.

By decision dated March 28, 1996, the Office denied modification of the prior decision finding that the evidence submitted in support of the request was insufficient to warrant modification. The Office noted that, although Dr. Cashion stated that he checked the "yes" box on the form report in error, he did not explain several other answers which were inconsistent with an allegedly intended "no" response, including the statement in the same block 16 in response to, "IF YES, SHOW DATE EMPLOYEE WAS INFORMED," that appellant was informed "[November 22, 1989] resume [November 29, 1989]," that in response to block 13; "WHAT PERMANENT EFFECTS, IF ANY, ARE ANTICIPATED," he wrote "none," and that in block 15 regarding whether disability would continue for 90 days or longer, he indicated "no." The Office found that these inconsistencies diminished the probative value of Dr. Cashion's 1996 letter, and that therefore this report was not sufficient to warrant modification of prior decisions.

The Board finds that appellant has failed to establish that he had any disability on or after November 29, 1989, causally related to his June 11 or November 12, 1989 accepted soft tissue muscular strain employment injuries.

Appellant has the burden of establishing by the weight of reliable, probative and substantial evidence that the disability claimed was caused or aggravated by his accepted employment injuries. As part of this burden, appellant must submit a rationalized medical opinion, based upon a complete and accurate factual and medical background, showing a causal

relationship between the disability claimed and the accepted employment injuries.<sup>2</sup> Causal relationship is a medical issue that can be established only by medical evidence.<sup>3</sup> The Board notes that the fact that a condition manifests itself or worsens during a period of employment does not raise an inference of an employment relationship.<sup>4</sup>

In the instant case, none of the medical reports submitted discussed appellant's disability for work after November 29, 1989, causally related to his accepted June 11 and November 12, 1989 soft tissue muscular strain injuries. In fact, none of the medical evidence submitted provided a rationalized medical opinion identifying any continuing disability at all. The only report which even alludes to appellant's work capability on and after November 29, 1989 is Dr. Cashion's 1996 letter stating that he checked a "yes" box on a form report in error, but this report is unpersuasive as this retraction is in conflict with other answers on the same form. This existing conflict diminishes the probative value of Dr. Cashion's retraction. Further, Dr. Cashion merely indicates that upon review of other health care practitioners' reports, he did not find where appellant was released to work by someone else. He does not include his own rationalized medical opinion as to what appellant's condition on and after November 29, 1989 actually was, and as to whether or not in his own medical opinion appellant was capable of returning to work. Consequently, Dr. Cashion's report is insufficient to warrant modification of the prior decisions.

Dr. Robertson's report also fails to discuss appellant's disability for work on and after November 29, 1989. He merely states that upon review of the records he was provided by appellant, he was unable to find evidence stating that appellant had been released to work. The Board notes that this statement is not probative of anything, as Dr. Robertson did not review all of the medical evidence of record, but instead reviewed only that evidence provided by appellant. Further, this report does not identify any disability on or after November 29, 1989 that he causally related to the two accepted low back muscular strain injuries, and hence does not support appellant's claim.

The remainder of the medical evidence submitted by appellant was repetitious of evidence already in the case record and previously reviewed by both the Office and the Board, and hence had no probative value. Appellant theorized that his present diagnosed condition of degenerative disc disease was causally related to his low back muscular strain soft tissue injuries, but he has failed to provide a scintilla of rationalized medical evidence to support that proposition. Hence, he has failed to establish that he was disabled on and after November 29, 1989, causally related to his back strain injuries.

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<sup>2</sup> *Steven R. Piper*, 39 ECAB 312 (1987); *see* 20 C.F.R. § 10.110(a).

<sup>3</sup> *Mary J. Briggs*, 37 ECAB 578 (1986); *Ausberto Guzman*, 25 ECAB 362 (1974).

<sup>4</sup> *Paul D. Weiss*, 36 ECAB 720 (1985); *Hugh C. Dalton*, 36 ECAB 462 (1985).

Accordingly, the decisions of the Office of Workers' Compensation Programs dated March 28 and March 5, 1996 are hereby affirmed.

Dated, Washington, D.C.  
August 12, 1998

George E. Rivers  
Member

David S. Gerson  
Member

A. Peter Kanjorski  
Alternate Member