

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of STEVEN P. ANDERSON and DEPARTMENT OF THE AIR FORCE,
McGUIRE AIR FORCE BASE, NJ

Docket No. 98-726; Submitted on the Record;
Issued May 24, 2000

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's claim for a recurrence of disability beginning November 2, 1994.

On October 1, 1993 appellant filed a claim for an injury to his left leg sustained on that date at 2:00 a.m. when a cowl door fell. In a mishap report filed with the employing establishment, appellant stated that the October 1, 1993 injury occurred when he was exiting an engine on which he had been working. Appellant stated that the cowl door fell, striking him on the left leg, which "absorbed all of initial weight of cowl door pinning me under engine." In a statement dated January 27, 1994, appellant's supervisor stated that on October 1, 1993 he was parked at the aircraft on which appellant was working, that at approximately 2:00 a.m. he heard appellant yell, that he looked over and noticed appellant was pinned against a stand by a cowl, that he jumped out of the truck and pushed the cowl door open so appellant could crawl out, and that appellant had injuries to his left leg, upper thigh and lower calf.

Appellant returned to work on October 5, 1993 after scheduled days off on October 3 and 4, 1993. On October 6 and 7, 1993 he used annual leave and on October 18, November 9 and 20, December 8, 1993 and January 4, 18 and 26, 1994 he used sick leave. In a letter sent to his congressional representative on April 15, 1994, appellant stated that at the time of the injury he was unaware of problems other than those with his leg, that he continued to go to work even though he was sore, that he used sick leave on occasion due to the soreness and pain, and that he started to experience lack of motor skills and numbness in his leg, fingers and toes of his left side.

On February 28, 1994 appellant filed a claim for compensation for the period from January 28 to March 5, 1994. On March 22, 1994 he filed a claim for a recurrence of disability related to the October 1, 1993 injury. In a statement dated April 17, 1994, appellant stated:

“After the original injury I continued to go to work and perform my normal duties. But I was in a lot of pain. I continued to limp on my left leg and there was a constant pain in my lower back on the left side. As time went on I started to have involuntary spasms in my left leg and I noticed a numbness in the lower three digits of my left arm and also a loss of mobility and strength in the left arm. I thought I had a bruised nerve and that with heat packs at home it would eventually go away. About December the numbness and loss of mobility and strength began in my right arm and hand.”

In a report dated January 19, 1994, Dr. David J. Frank, a Board-certified neurologist, stated that appellant was seen on January 5, 1994 complaining of “loss of feeling in the third, fourth and fifth digits of both hands, numbness in both feet and gait difficulty which has been slowly worsening over the last several months.” Dr. Frank set forth appellant’s history and stated:

“[Appellant] states that shortly after an accident which occurred in October, when a cowling from an aircraft fell striking the back of his left leg, he began to experience numbness in the fingers. However, this resolved. He states that he does not remember any head or neck injury at the time of this incident, and remembers no neck or back pain afterward. Since this time, the symptoms have recurred, and in addition he notices dysesthesia to touch over the anterior thighs, stiffness of the legs when walking, inability to run due to ‘rubberyness’ of the legs when walking, and an alteration in sensation below the level of the nipple on the left side. He denies any disturbance of bowel or bladder function, and does not experience nocturia nor does he have any erectile dysfunction.... He does relate spontaneous clonus in both lower extremities at times, and this is precipitated by using the brake or clutch in his car as well.

“He continues to work, and notes no clumsiness in his upper extremities. He does not feel that he is dropping things, and relies a great deal on manual dexterity in his work as an aircraft mechanic.”

Dr. Frank stated, “symptoms are most suggestive of cervical myelopathy and the sensory loss in the upper extremities suggests an associated radicular sensory loss.” On his recommendation, a magnetic resonance imaging (MRI) scan of appellant’s brain and cervical spine was performed on January 24, 1994; this test showed a “large HNP [herniated nucleus pulposus] at the C5-6 level with associated osseous component causing cord compression and evidence of reactive changes in the cord.” In a report dated February 3, 1994, Dr. Frank diagnosed cervical cord compression secondary to HNP, and indicated that this condition was solely a result of appellant’s October 1, 1993 accident.

In a report dated March 18, 1994, Dr. Bruce R. Rosenblum, a Board-certified neurosurgeon, stated that appellant’s accident at work was directly causative of his cervical

herniated disc. The Office accepted that appellant's herniated disc was related to his October 1, 1993 injury and authorized a microdiscectomy, which was performed on June 15, 1994 by Dr. Rosenblum. The Office paid appellant compensation for temporary total disability beginning January 28, 1994. In a report dated August 31, 1994, he indicated that appellant could perform sedentary duty being offered by the employing establishment in an office setting consisting mainly of computer input for six hours per day. Appellant returned to such duty on September 21, 1994, with the Office paying him compensation for two hours of disability per day.

On November 2, 1994 appellant stopped work and filed a claim for a recurrence of disability beginning that date; he stated that his symptoms at that time were the same as prior to his surgery. In a report dated February 1, 1995, Dr. Rosenblum stated that appellant was seen on October 4, 1994 complaining of falling down stairs one week earlier secondary to spasm of his lower extremities. He stated, "these spasms appear to be due to a recrudescence of his previous cervical myelopathy, which was a direct result of his work-related injury dated October 22, 1993." In a report dated March 8, 1995, Dr. Rosenblum stated that the fall down stairs was secondary to appellant's cervical herniated disc and myelopathic residuals and resulted in the pathology demonstrated on a January 20, 1995 myelogram.

On April 13, 1995 the Office referred appellant, his medical records and a statement of accepted facts to Dr. Kenneth Brait, a Board-certified neurologist, for a second opinion of whether the accepted condition of HNP at C5-6 had completely resolved and whether appellant's fall down stairs at home was related to his accepted condition. In a report dated May 8, 1995, Dr. Brait noted that appellant did "not remember any trauma specifically to the cervical spine" at the time of his October 1, 1993 employment injury, and listed three "corrections" to the Office's statement of accepted facts, the second of which was: "The cowl door that closed on him closed on the left side of the body, not just his left leg." Later in this report Dr. Brait characterized this as a "small point" and "minor correction." After reviewing appellant's medical history, Dr. Brait stated that appellant's two MRI scans showed "evidence not only of an extrinsic disc herniation, but evidence of edema and eventually scarring within the spinal cord and this, I believe, is the reason for his continued myelopathy." Dr. Brait concluded that appellant's "cervical myelopathy was directly caused by the accident in question. I believe that this patient is totally and permanently disabled from any significant work in the future, aside from a 'desk job' and even that is going to be difficult."

By letter dated June 26, 1995, the Office referred appellant and an amended statement of accepted facts to Dr. Brait and advised him that he must use the statement of accepted facts only and that information provided by appellant that did not agree with the statement of accepted facts should not be considered. The amended statement of accepted facts stated that on October 1, 1993 "a 400-pound door closed on his left leg and left side of his body." In a report dated

July 19, 1995, Dr. Brait stated that he had reviewed the Office's amended statement of accepted facts, and that his findings were unchanged since his first evaluation. Dr. Brait concluded:

"To answer the specific questions that you asked, I do not feel that the effects of the blunt trauma to the left leg, back and neck have resolved. I feel this trauma caused the patient's myelopathy, and that this is a permanent disabling condition. The herniated C5-6 disc has been resolved by surgical intervention.

"I do feel that the patient's fall down the stairs was related to the myelopathy, which in turn was related to the work injury. This is not at all uncommon in patients with myelopathic processes and indicates central nervous system changes."

* * *

"So far as the claimant alleging a recurrence of disability on November 22, 1994 (sic), I cannot make any comment about a recurrent disability, since I never saw the patient beforehand. It is certainly, however, very reasonable to assume that it is related to his cervical myelopathy. Whether or not it was related to the fall down the stairs or progression of his underlying condition for other reasons is impossible to state."

The Board finds that the May 8, 1995 second opinion report of Dr. Brait and the subsequent supplemental report which reviewed the amended statement of accepted facts dated July 19, 1995, contains sufficient rationale to establish that appellant's fall at home down the stairs constituted a consequential injury directly related to his accepted employment injury of October 1, 1993. These reports from Dr. Brait coupled with the reports of Drs. Frank and Rosenblum are sufficient for appellant to establish a recurrence of disability commencing November 2, 1994.

The Board notes that from this point, the case record is replete with patent and blatant evidence of doctor shopping. In this connection, on August 18, 1995 the Office referred appellant, his medical records and a statement of accepted facts to Dr. Allan Drapkin, a Board-certified neurosurgeon, for a second opinion on whether appellant's disability after January 24, 1994 was related to his October 1, 1993 employment injury and whether his accepted conditions of herniated disc at C5-6 and blunt trauma to the left leg and back had resolved. In a report dated August 30, 1995, he set forth this history of appellant's employment injury: in "October 1993 when, while working on an aircraft engine, a door of the compartment fell, pinning him against the engine and forcing him to remain in a fixed position with rotation of his neck to the side and extension of the neck for about 15 to 20 minutes until his condition was detected and he was taken out of that compartment by fellow workmen." Dr. Drapkin concluded: "We are definitely dealing with a cervical myelopathy developing a few days following the accident described in October 1993 when the patient was pinned in an extended neck position for a period of 15 to 20 minutes." By letter dated November 20, 1995, the Office advised Dr. Drapkin that the evidence did not support that appellant was pinned for the period of time specified in his report, and requested a supplemental report. He did not respond.

By letter dated March 6, 1996, the Office referred appellant, his medical records and a statement of accepted facts to Dr. Richard Hartwell, a Board-certified neurosurgeon, for a second opinion of whether appellant's accepted herniated disc had resolved and whether appellant's fall down the stairs resulted from appellant's accepted condition. In a report dated March 26, 1996, Dr. Hartwell set forth a history of the October 1, 1993 employment injury and its sequelae, stating that appellant noted "no specific injury to his neck" and that appellant began to notice numbness in his hands and dysesthesias and rubberyness in his legs prior to his examination by Dr. Frank on January 5, 1994. After reviewing appellant's medical history and results on physical examination and diagnostic testing, he stated:

"The patient's diagnosis is C5-6 disc herniation, with spinal cord compression in the face of a congenitally narrow cervical spinal canal. This led to severe cervical myelopathy, with incomplete recovery after his surgery of June 15, 1994. The incomplete recovery in his gait led to a fall down a flight of steps, producing a disc herniation at the second level, that is at C6-7. At the present time, he is totally disabled from any type of work or employment with the use of his hands or his legs.

"To answer your medical questions -- (1) I can give no opinion as to the direct cause of his stated accident of October 1, 1993, to the C5-6 herniation, identified on MRI of January 24, 1994, which is the cause of his initial problems. I agree, that given the type of injury described on October 1, 1993, it is hard to relate it to the cervical disc herniation identified on [an] MRI of January 24, 1994, but I must point out that it has been an accepted fact that the disc herniation is a work[-]related injury. (2) The condition of the C5-6 disc herniation has resolved, by surgery, but the spinal cord injury has not due to a congenitally narrow spinal canal. The condition is worsened by a second accident, a direct result of his residual gait disorder, which leaves him with further spinal cord compression from a C6-7 disc herniation. His physical signs of myelopathy are clear, by physical exam[ination], and they are due to: (1) residual damage left unresolved from his C5-6 herniation[;] and (2) the current spinal cord compression produced by the C6-7 disc herniation, which was caused by the residual deficits left behind by his initial disc herniation."

The Office then sent a second set of questions to Dr. Hartwell, asking whether the diagnosed condition of herniated disc at C5-6 was related to appellant's October 1, 1993 employment injury, including an explanation of how and why it was related, whether appellant had a medical condition attributable to his employment injury, whether appellant's fall down stairs at home was related to his October 1, 1993 injury, and whether appellant's inability to work after November 2, 1994 was related to his employment injury. In a report dated April 16, 1996, Dr. Hartwell stated, "[I]t is my opinion, given the description of the accident of October 1, 1993, it is difficult to believe that the mechanics of such an accident caused the C5-6 dis[c] herniation identified by the MRI of January 24, 1994. I definitely question the causality but cannot exclude cause and effect based on [appellant's] denial of any other injuries." By letter dated April 26, 1996, the Office requested Dr. Hartwell's opinion of "whether an aircraft engine door falling on an individual's left leg and hip can cause, aggravate, accelerate or precipitate a

cervical spine condition such as herniated disc.” The Office stated: “If that incident is related to the condition in any of these ways, we need to know how *and* why they are related, *in your medical opinion*. If the two are not related, we need to know why you believe (and nothing more) this to be the case, *in your medical opinion*.” (Emphasis in the original.) Dr. Hartwell replied “yes” to the question posed by the Office, and stated, “He may have twisted his neck during the injury, not recalling the neck injury at the time the door fell on his left leg.”

On July 2, 1996 the Office referred appellant, his medical records and a statement of accepted facts to Dr. David M. Anapolle, a Board-certified orthopedic surgeon, for a second opinion on, among other matters, “the medical feasibility of this incident [on October 1, 1993] causing a herniation, even if nothing happened to cause it, as the claimant states.” In a report dated August 29, 1996, Dr. Anapolle, after reviewing appellant’s history and findings on examination and diagnostic testing, stated:

“I find no evidence, based on the history and the statement of accepted facts, that his cervical spine injuries and the residuals he is now suffering, are in any way related to the accident, which occurred on October 1, 1993. The statement of accepted facts does not describe a mechanism of injury, which in any way is consistent with the findings he subsequently developed, with regard to his cervical spine, and a reported cervical myelopathy. In addition, no neck symptoms were reported at the time of injury. The findings on his initial MRI, which was performed in January of 1994, also show an osseous component at each level of disc bulging or herniation identified. This suggests that these findings are chronic in nature, as bony changes would not be expected to have developed in the short period of time from October 1, 1993 to January of 1994. Findings such as these are not unusual on a cervical spine MRI, even in patients previously asymptomatic. It is my opinion rather, with a reasonable degree of medical certainty, that the development of his cervical spine problems and subsequent neurological deficits, are unrelated to the injury which occurred, but rather related to the natural progression of degenerative cervical spine disease.

“With regard to the patient’s fall down the stairs, it is my opinion that this is not related to the injury to his leg and low back, which he suffered at work, but rather to his residual gait abnormality related to his cervical myelopathy, which is not related to his work injury.”

On February 25, 1997 the Office referred appellant, the case record and a statement of accepted facts to Dr. Charles Kososky, a Board-certified neurologist, to resolve a conflict of medical opinion. In a report dated April 15, 1997, Dr. Kososky concluded that appellant’s herniated cervical discs were not related to his October 1, 1993 employment injury, as his symptoms of cervical spine disease did not begin until “at least a month or two months later.” Dr. Kososky stated that the herniated discs were “directly related to cervical discogenic disease” and were “most likely spontaneous due to his discogenic disease,” noting that the calcification and desiccation of the discs seen on the MRI’s suggested old findings.

By decision dated September 29, 1997, the Office denied appellant’s claim for a recurrence of disability beginning November 2, 1994 due to his October 1, 1993 employment

injury. The Office also found that the reports of Drs. Brait, Drapkin and Hartwell were “invalid,” since these physicians did not use the Office’s statement of accepted facts to arrive at their conclusions. The Office found that the medical evidence established that appellant’s disc herniation at C5-6 was not causally related to his October 1, 1993 employment injury. The Office terminated appellant’s entitlement to compensation and medical benefits effective November 2, 1994.

The Board notes that the Office accepted that appellant’s October 1, 1993 employment injury resulted in a herniated disc at C5-6 and paid him compensation for this condition for over nine months, including compensation for partial disability after appellant’s return to work for six hours per day on September 21, 1994. After appellant filed a claim for a recurrence of total disability beginning November 2, 1994, the Office began adjudication of the claim for a recurrence of disability, but ended up terminating appellant’s compensation including medical benefits effective November 2, 1994 and determining that appellant’s herniated disc at C5-6 was not causally related to his October 1, 1993 employment injury. The Office in effect rescinded its prior acceptance of the herniated disc. Since the Office rescinded its acceptance of the occurrence of a herniated disc and terminated appellant’s compensation, the Office, rather than appellant, has the burden of proof.¹ Appellant, however, as earlier noted herein, has met that burden with respect to his recurrence of disability claim commencing November 2, 1994 by the two reports of Dr. Brait and the reports of Drs. Frank and Rosenblum.

Appellant’s attending neurological specialists, Drs. Frank and Rosenblum concluded that appellant’s October 1, 1993 employment injury caused his herniated disc at C5-6, and the Office accepted this condition. Dr. Rosenblum also supported appellant’s claim for a recurrence of disability beginning November 2, 1994, concluding that appellant’s fall down stairs at home around the end of September 1994 was due to residuals of his October 1, 1993 employment injury.

At this point the Office referred appellant to Dr. Brait, a Board-certified neurologist, for a second opinion of whether the accepted herniated disc had resolved and of whether the fall down stairs at home was related to the herniated disc. Dr. Brait answered both questions in the affirmative. At this point the Office decided to obtain another second opinion, but inadvertently referred the case back to Dr. Brait. The Office later determined that Dr. Brait’s report was “invalid” because he had not relied upon the Office’s statement of accepted facts. While Dr. Brait did make a “correction” to the statement of accepted facts to indicate that the cowl door hit appellant on the left side of the body and not just on the left leg, Dr. Brait characterized this as a “small point” and “minor correction.” There is no indication that this “correction” influenced Dr. Brait’s opinion on the causal relationship between appellant’s October 1, 1993 employment injury and his herniated disc at C5-6. Instead the Office referred the case back to Dr. Brait with an amended statement of accepted facts which contained the history relied upon by Dr. Brait -- that the cowl door hit appellant’s left side. The Office subsequently invalidated Dr. Brait’s report even though it adopted the statement of accepted facts used by Dr. Brait. This action by the Office strongly suggests that the Office was shopping around for the purpose of securing a medical opinion that would justify denial of appellant’s claim.

¹ *E.g., William C. Iadipaolo*, 39 ECAB 530 (1988); *Warner E. Armbruster*, 39 ECAB 132 (1987).

The Board has often disapproved of the Office's shopping for medical opinions.² While most of these cases have involved an impartial medical specialist resolving a conflict of medical opinion, the Board has also applied the prohibition against shopping for a favorable medical opinion to the securing of a second opinion.³ The Board has stated that when the Office selects a physician for an opinion on causal relationship, it has an obligation to secure, if necessary, clarification of the physician's report and to have a proper evaluation made.⁴

The Office's actions after Dr. Brait provided his opinion that appellant's condition, including his fall down the stairs at home, was causally related to his October 1, 1993 employment injury reinforce the notion that the Office was shopping for a medical opinion that would allow denial of appellant's claim or rescission of the Office's acceptance of a herniated disc. The referral to the second second opinion specialist, Dr. Drapkin, was accompanied by a leading question: "Since the claimant was injured on October 1, 1993, and did not complain of any neck or back pain while he continued to work until January 22, 1994, please give your opinion as to the sequence of medical events that led to his total disability as of January 24, 1994." The Office's finding that Dr. Drapkin's report could not be used, however, was proper, given that Dr. Drapkin provided a history -- that appellant was pinned with his neck in a rotated and extended position for 15 to 20 minutes -- that did not previously appear in the case record and is contradicted by the evidence, particularly that from appellant's supervisor. The Office asked Dr. Drapkin for a supplemental opinion, but did not receive a response.

By the time of the Office's third referral for a second opinion, the Office was asking whether the accepted condition was related to the employment injury. The Office's statement of accepted facts provided to Dr. Hartwell, the third second opinion specialist, also stated, "The evidence of record does not support that this fall [down the stairs at home] was related to the accepted work injury of October 1, 1993." This was not an accurate statement, as all the medical evidence that addressed this issue -- the reports of Drs. Rosenblum and Brait -- concluded that the fall at home was due to residuals of the employment injury. Dr. Hartwell concluded that it was hard to relate the herniated disc at C5-6 to the employment injury, but pointed out that the Office had accepted that the herniated disc was caused by the October 1, 1993 employment injury. In his first supplemental opinion Dr. Hartwell stated that he could not exclude causality based on appellant's denial of other injuries. When the Office asked Dr. Hartwell for another supplemental opinion, it advised him that, if he believed there was a causal relation, he needed to explain how and why the herniated disc was related to the October 1, 1993 employment injury, but if he believed there was no causal relation, it needed to know "nothing more" than why he believed this to be the case. When Dr. Hartwell still supported causal relation, the Office invalidated his opinion on the basis that it was speculative and not based on the Office's statement of accepted facts.

² *Id.*

³ *Delia W. Paranich*, 33 ECAB 239 (1981); *see also Dennis Nelson*, 32 ECAB 1853 (1981); *Joseph Raimond*, 32 ECAB 221 (1980) (in these cases the Board disapproved of the Office's failure to use second opinions favorable to the employee's claims).

⁴ *Cardwell R. Gage*, 33 ECAB 988 (1982).

The Office's referral to a fourth second opinion specialist, Dr. Anapolle, was blatant in seeking a particular opinion. The Office asked Dr. Anapolle for his "opinion as to the medical feasibility of this [October 1, 1993] incident causing a herniation, even if nothing happened to cause it, as the claimant states." The Office finally obtained a medical opinion that the herniated disc at C5-6 was not related to appellant's October 1, 1993 employment injury, whereupon it declared a conflict of medical opinion. The statement of accepted facts sent to Dr. Kososky, the Board-certified neurologist chosen as the impartial medical specialist to resolve the conflict of medical opinion, contains an inaccuracy that appellant lost no time from work from October 1, 1993 to January 22, 1994. Appellant in fact used eight days of paid leave during this period, and indicated that this leave was due to pain and soreness related to his October 1, 1993 employment injury. Dr. Kososky negated a causal relation between appellant's herniated disc at C5-6 and his employment injury, leading to the Office's rescission of acceptance of this condition and its termination of appellant's compensation.

Section 8123 of the Federal Employees' Compensation Act authorizes the Office to require an employee who claims disability as a result of an employment injury to undergo such physical examinations as it deems necessary. The determination of the need for an examination, the type of examination, the choice of locale, and the choice of medical examiners are matters within the province and discretion of the Office. The only limitation on this authority is that of reasonableness.

From a careful perusal of the entire case record in the instant claim, the Board is persuaded that the referral of appellant to Drs. Drapkin, Hartwell, Anapolle and Kososky was for the purpose of obtaining an opinion that would lead to rescission of acceptance of this claim and termination of medical benefits. The Board finds such referrals under the specific conditions noted herein were improper, unreasonable and constituted a gross abuse of discretion. Accordingly, zero weight will be assigned to the reports of Drs. Drapkin, Hartwell, Anapolle and Kososky.

Accordingly, the decision of the Office of Workers' Compensation Programs dated September 29, 1997 is hereby reversed and the case returned to the Office for payment of appropriate compensation.

Dated, Washington, D.C.
May 24, 2000

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member