

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MANUEL M. FIGUERAS and U.S. POSTAL SERVICE,
GENERAL MAIL FACILITY, New York, NY

*Docket No. 03-1970; Submitted on the Record;
Issued January 27, 2004*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant met his burden of proof to establish that he sustained a recurrence of disability on and after February 10, 2003 due to his accepted February 27, 2002 employment injury.

On February 27, 2002 appellant, a 60-year-old carrier, filed a traumatic injury claim alleging that he injured his back while reaching for a package inside a container. The Office of Workers' Compensation Programs accepted the claim for acute lumbosacral radiculopathy. Appellant stopped work on February 28, 2002 and returned to light-duty work on November 15, 2002.

Appellant filed a recurrence claim beginning January 31, 2003 due to his accepted February 27, 2002 employment injury. Appellant stopped work on February 3, 2003 and returned to work on February 10, 2003. The Office accepted appellant's January 31, 2003 recurrence claim on April 22, 2003.

In a February 27, 2003 report, Dr. Monica Mehta, an attending Board-certified physiatrist, diagnosed aggravation of acute lumbosacral radiculopathy. She instructed appellant "to refrain from work at least until March 1, 2003." The physician indicated that she had treated appellant "for a work-related injury and is presently under my care for the same."

Dr. Mehta, in a March 17, 2003 report, noted that appellant had sustained an employment injury on February 27, 2002 and that recent magnetic resonance imaging (MRI) scan tests revealed a lumbar disc bulge and spinal canal stenosis. She stated that appellant's "condition has worsened" over the past few months and that even though he was performing light-duty work she advised him to "refrain from work until further notice." Physical findings included lumbar spine flexion of 0 to 20 degrees, bilateral flexion of 0 to 10 degrees, diminished sensations at L5-S1, positive straight leg raising at 20 degrees, spasmodic quadratus lumborum and "sacroiliac joints are tender."

In a March 27, 2003 report, Dr. Hillel Karp, a Board-certified diagnostic radiologist, reviewed a March 26, 2003 MRI scan test. Dr. Karp diagnosed, based upon the MRI scan test, herniated discs at L2-3, L3-4 and L5-S1.

On May 1, 2003 appellant filed a claim for a recurrence of disability noting a recurrence on February 10, 2003 and indicating that he stopped work on February 12, 2003. On June 10, 2003 appellant filed a recurrence claim noting that he stopped work on February 18, 2003.

Dr. Mehta concluded that appellant was totally disabled due to his lumbosacral radiculopathy on a June 25, 2003 work capacity evaluation.

In a June 27, 2003 report, Dr. Mehta noted that appellant had multiple disc herniations and was totally disabled for working.

By decision dated July 15, 2003, the Office denied appellant's recurrence claims.¹

The Board finds that this case is not in posture for a decision.

The Board has held that, 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 of record 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 extend of the injury-related condition or a change in the nature and extent of the light-duty job requirements.² The Office's procedures require that in cases where recurrent disability for work is claimed within 90 days or less from the first return to duty, the attending physician should describe the duties which the employee cannot perform and the demonstrated objective medical findings that form the basis for the renewed disability for work.³

In this case appellant returned to limited duty on November 15, 2002 and stopped work on February 3, 2003. The Office accepted appellant's recurrence claim beginning that date. He returned to his limited-duty position on February 10, 2003 and subsequently filed claims for recurrence of disability beginning February 12, 2003.

Appellant has submitted various reports from Dr. Mehta. In her March 17, 2003 report, she opined that appellant's condition had deteriorated and that he should refrain from working even his light-duty position. She reported a lumbar spine flexion of 0 to 20 degrees, bilateral flexion of 0 to 10 degrees, diminished sensations at L5-S1, positive straight leg raising at 20 degrees, spasmodic quadratus lumborum and "sacroiliac joints are tender." Dr. Mehta attributed

¹ Subsequent to the issuance of this decision, appellant submitted medical evidence. The Board may not consider evidence for the first time on appeal that was not before the Office at the time it issued its final decision in the case. 20 C.F.R. § 501.2(c).

² *Donald T. Pippin*, 54 ECAB ____ (Docket No. 03-205, issued June 19, 2003).

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.6(a)(b) (January 1995).

appellant's disability to his lumbosacral radiculopathy in a June 25, 2003 work capacity evaluation. On June 27, 2003 she reiterated that he was totally disabled due to multiple disc herniations.

Proceedings under the Federal Employees' Compensation Act are not adversary in nature, nor is the Office a disinterested arbiter.⁴ 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.⁵ This holds true in recurrence claims (as well as in initial traumatic and occupational claims). In the instant case, although none of appellant's physicians' reports contain rationale sufficient to completely discharge appellant's burden of proving by the weight of reliable, substantial and probative evidence that he sustained a recurrence of total disability commencing on the dates he alleged, February 12 and 18, 2002 causally related to his February 27, 2002 accepted condition, they constitute substantial evidence in support of appellant's claim and raise an inference of causal relationship between his recurrence of disability and his original occupational injury, that is sufficient to require further development of the case record by the Office.⁶ Additionally, there is no contrary medical evidence in the record.

Therefore, the case must be remanded for further development including a referral of appellant, together with a statement of accepted facts, specific questions to be addressed and the relevant case record for a rationalized second medical opinion as to whether appellant sustained a change in the nature and extent of his injury-related conditions, and was, therefore, totally disabled due to his accepted acute lumbosacral radiculopathy. The Office should also determine whether the herniated discs as shown on the March 26, 2003 MRI scan test are employment related.

On remand the Office should compile a statement of accepted facts and refer appellant, together with the complete case record and questions to be answered, to a Board-certified specialist for a detailed opinion regarding whether appellant sustained a recurrence of disability on February 12, 2003. After such development as the Office deems necessary, a *de novo* decision shall be issued.

⁴ *Horace L. Fuller*, 53 ECAB ____ (Docket No. 02-1181, issued September 6, 2002)

⁵ *James P. Bailey*, 53 ECAB ____ (Docket No. 01-1993, issued April 11, 2002); *William J. Cantrell*, 34 ECAB 1223 (1983).

⁶ *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978). (if medical evidence establishes that residuals of an employment-related impairment are such that they prevent an employee from continuing in the employment, he is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity).

The decision of the Office of Workers' Compensation Programs dated July 15, 2003 is hereby set aside the case remanded for further proceedings consistent with the above opinion

Dated, Washington, DC
January 27, 2004

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member