

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of KEVIN THOMPSON and U.S. POSTAL SERVICE,  
D.V.D. POSTAL FACILITY, Kearny, N.J.

*Docket No. 96-2221; Submitted on the Record;  
Issued August 27, 1998*

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DECISION and ORDER

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

The issue is whether appellant met his burden of proof to establish a recurrence of total disability, from August 10 to December 1994, due to his employment-related back injury.

On May 18, 1992 appellant, then a 29-year-old postal clerk, filed a claim for a low back injury sustained on that date when the back of his chair broke off, causing him to fall on the floor. Appellant's claim was accepted for lumbosacral strain, as diagnosed by his treating physician, Dr. Ronald J. Potash, a Board-certified surgeon. Electrodiagnostic studies performed on July 10, 1992 and a computerized tomography (CT) scan performed on August 4, 1992 were interpreted as normal. In a report dated August 10, 1992, Dr. Arthur T. Canario, an orthopedic surgeon, to whom appellant had been referred by the employing establishment, noted the normal test results and concluded that appellant did not have a herniated disc or radiculopathy and could return to work. Appellant returned to light duty on September 21, 1992. Appellant's progress continued to be followed by Dr. Potash and his associate, Dr. David M. Myers, a Board-certified orthopedic surgeon, until he was discharged from their treatment on August 19, 1993. Drs. Potash and Myers noted that appellant continued to have significant pain and limitations, and the discharge diagnosis was "residuals of acute lumbosacral sprain with chronic myositis," causally related to the May 18, 1992 employment injury.

Appellant subsequently came under the care of Dr. Arthur Taubman, a general practitioner specializing in orthopedic surgery. In his initial consultation report dated October 6, 1993, Dr. Taubman noted appellant's history of employment-related injury, as well as his denial of any previous injuries to his lower back. Dr. Taubman further noted that physical examination revealed muscle spasms and limited range of motion, and that magnetic resonance imaging (MRI) scan performed on October 4, 1993 revealed a posterior central herniation of the lumbar spine at L5-S1. Dr. Taubman concluded that the history and physical findings indicated a direct causal relationship between appellant's condition and his May 18, 1992 employment accident.

On August 11, 1994 appellant filed a claim for a recurrence of total disability, stating that he stopped work on August 9, 1994 due to increased back pain in the area of the original injury.

By letter dated August 22, 1994, the Office of Workers' Compensation Programs requested that appellant supply certain additional factual and medical documentation.

In response to the Office's request, appellant submitted several follow-up attending physician's reports, Form CA-20a, dating from October 6 through December 16, 1994, in which Dr. Taubman consistently diagnosed a herniated lumbar disc due to the May 18, 1992 employment injury.

In a decision dated January 30, 1995, the Office denied appellant's claim for a recurrence of total disability and declined to accept appellant's herniated disc as an additional condition related to the May 18, 1992 employment injury. The Office specifically found that while the October 4, 1993 MRI report revealed a herniated disc, in view of appellant's well-documented hobby of lifting weights, and the negative testing at the time of the injury, the medical evidence was insufficiently rationalized to support a finding that appellant's herniated disc and resulting disability were causally related to the May 18, 1992 employment injury.

On March 1, 1995 appellant requested a hearing before an Office representative. At the hearing held on September 7, 1995 appellant testified that after his return to work in September 1992 his pain gradually increased until on August 10, 1994 he could not take it any more and stopped work until December 1994. Appellant also testified that he lifted weights as a hobby and that prior to his injury he had lifted free weights, but that afterwards he only used a Soloflex machine as part of his back therapy. Appellant asserted that he had not injured his back lifting weights or otherwise since his original employment injury.

In support of his claim, appellant submitted additional medical reports from Dr. Taubman dated January 13 and October 3, 1995. In these reports, Dr. Taubman stated that appellant's herniated lumbar disc was attributable to his injuries sustained on May 18, 1992 and that there was a direct causal relationship between appellant's condition and the accident. He further noted that appellant had repeatedly complained of low back pain, and that he had examined him on numerous occasions and had found his physical examination results to be consistent with his subjective complaints. Appellant also submitted an April 19, 1995 report from Dr. J. Kenneth Burger, an osteopath, who diagnosed lumbosacral strain with radicular symptoms causally related to the May 18, 1992 employment incident.

In a decision dated November 20, 1995, the Office hearing representative denied appellant's claim on the grounds that Dr. Taubman's reports lacked sufficient explanation and rationale for his opinion that appellant's herniated disc was directly related to his May 18, 1992 employment injury. The hearing representative specifically noted that Dr. Taubman did not seem aware of appellant's weight lifting hobby and thus did not eliminate this as a possible cause of appellant's back condition and further did not comment on why the initial CT scan and electrodiagnostic testing, taken at the time of the original injury, did not reveal the herniated disc if it had in fact been caused by the original employment accident.

On March 6, 1996 appellant, through counsel, requested reconsideration of the Office's prior decision and submitted an additional report from Dr. Taubman. In his February 22, 1996 report, Dr. Taubman stated that while appellant had not related any weight lifting activity to him, he had repeatedly denied any injury to his back other than the May 18, 1992 employment injury. The physician also explained the discrepancy between the earlier negative CT scan and negative electrodiagnostic testing and a subsequent positive MRI scan stating that the MRI scan is much

more sensitive and specific than the CT scans, and therefore more likely to give an accurate result. Dr. Taubman concluded that based on the positive MRI, appellant's denial of any previous injury to his lower back and his consistent complaints of pain and limited motion, appellant's condition was directly attributable to the 1992 employment injury.

By decision dated April 18, 1996, the Office reviewed the merits of appellant's claim and denied modification of the prior Office decisions on the grounds that Dr. Taubman failed to adequately establish a causal relationship between appellant's herniated disc and resulting disability from August 9 to December 1994 and his May 18, 1992 employment injury.

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

When 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 employee must show a change in the nature and extent of the injury-related condition or a change in the nature of the light-duty job requirements.<sup>1</sup>

In the present case, the Office has accepted that appellant sustained a lumbar strain as a result of a May 18, 1992 employment injury. On September 21, 1992 appellant returned to work in a light-duty capacity. Appellant stopped work again on August 10, 1994 and filed a notice of recurrence of disability. Appellant explained that when he returned to work he was still experiencing pain, but that he tried to deal with it as best he could and utilize good body mechanics. His pain gradually began to build in severity until one day, while lifting a tray of mail onto a conveyor belt, the pain became excruciating and he could not bear it any longer and stopped work. Appellant returned to work in December 1994. The Office denied appellant's claim for recurrence of disability by decisions dated November 20, 1995 and April 18, 1996.

In support of his August 11, 1994 claim for recurrence of disability, appellant submitted several reports from Dr. Taubman in which the physician concluded that appellant's herniated disc was causally related to appellant's May 18, 1992 employment injury. The physician did not seem aware, however, that appellant also lifted weights as a hobby, a possible alternative cause for appellant's back injury and did not explain how the herniated disc could be related to the employment injury in light of the fact that testing performed at the time of the original injury did not reveal a herniated disc. In support of his March 6, 1996 request for reconsideration, appellant submitted a February 22, 1996 report from Dr. Taubman in which the physician attempted to address these points. Dr. Taubman stated that although appellant had not in fact related to him that he lifted weights as a hobby, he did not find this to impact greatly on his medical conclusion as appellant had specifically denied any injury to his back, from any cause, other than the May 18, 1992 employment injury. In addition, Dr. Taubman attempted to explain how the CT scan and neurodiagnostic testing done at the time of the original injury could have failed to detect a herniated disc, by stating that these tests are much less sophisticated than the MRI scan which later revealed the herniation. Finally, Dr. Taubman concluded that appellant's

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<sup>1</sup> *Cynthia M. Judd*, 42 ECAB 246 (1990); *Terry R. Hedman*, 38 ECAB 222 (1986).

history and his subjective and objective findings support a causal connection between appellants original May 18, 1992 injury and the herniated disc later revealed by the MRI scan.

While Dr. Taubman's February 22, 1996 report is not sufficiently rationalized to meet appellant's burden of proof,<sup>2</sup> his opinion that appellant's condition is causally related to the accepted employment injury is sufficient to require that the Office further develop the case.<sup>3</sup> Additionally, the Board notes that in this case the record contains no medical opinion contrary to appellant's claim and further notes that the Office did not seek advice from an Office medical adviser or refer the case to an Office referral physician for a second opinion.

Therefore, upon remand the Office should refer appellant, together with a statement of accepted facts, questions to be answered and the complete case record, to an appropriate medical specialist for further evaluation. After such further development of the case record as the Office deems necessary, an appropriate merit decision shall be issued.

Consequently, the decisions of the Office of Workers' Compensation Programs dated April 18, 1996 and November 20, 1995 are hereby set aside and the case is remanded for further development in accordance with this decision.

Dated, Washington, D.C.  
August 27, 1998

Willie T.C. Thomas  
Alternate Member

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>2</sup> *Lourdes Davila*, 45 ECAB 139 (1993).

<sup>3</sup> *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978).