U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WALTER W. JOHNSON and U.S. POSTAL SERVICE,
POST OFFICE, Laguna Niguel, CA

Docket No. 99-820; Submitted on the Record;
Issued January 22, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issue is whether appellant has established that he sustained a recurrence of disability on June 12, 1997, causally related to his accepted employment injury.

On October 10, 1990 appellant, then a 39-year-old letter carrier, filed an occupational disease claim alleging that he sustained a back condition due to factors of his federal employment. The Office of Workers' Compensation Programs accepted appellant's claim for lumbar subluxation, a herniated disc at L3-4 and a bulging disc at L4-5. He returned to work as a modified letter carrier and on August 17, 1994, sustained a recurrence of disability which was accepted by the Office. Appellant stopped work until September 2, 1994, when he again returned to limited duty.

On March 18, 1997 appellant filed a notice of recurrence of disability for October 25 through December 30, 1996, when he returned to limited duty. In a decision dated May 29, 1997, the Office denied appellant's claim on the grounds that his condition was due to a new injury and was not a recurrence of the accepted condition.

On June 20, 1997 appellant filed a claim for a recurrence of disability beginning June 12, 1997. He returned to full-time limited duty on July 1, 1997, but continued to miss work intermittently. On September 25, 1997 appellant's treating physician reduced appellant's schedule to six hours a day.

By decision dated July 25, 1997, the Office denied appellant's claim on the grounds that the evidence failed to establish that his claimed June 12, 1997 recurrence of disability was due to his accepted employment injury. He requested an oral hearing, which was held on March 17, 1998. In a decision dated May 21, 1998, an Office hearing representative affirmed the Office's July 25, 1997 decision denying benefits.[1]

[1] At the hearing appellant's counsel attempted to raise the issue of appellant's October 25, 1996 claim for

By letter dated June 29, 1998, appellant, through counsel, requested reconsideration of the Office's denial of his claim for a June 12, 1997 recurrence of disability. In a merit decision dated September 29, 1998, the Office denied modification of its May 21, 1998 decision.

The Board has duly reviewed the case record and finds that this case is not in posture for decision.

Where an employee, who is disabled from the job he or she held when injured on the account of employment-related residuals, returns to a limited- or light-duty position or the medical evidence establishes that the employee can perform the requirements of such a 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 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 and extent of the limited or light-duty job requirements.[2]

In this case, the Office accepted that appellant sustained lumbar subluxations, a herniated disc at L3-4 and a bulging lumbar disc at L4-5. He subsequently returned to work in a limited-duty capacity. There is no evidence in the record establishing any change in the nature and extent of appellant's limited-duty position as a cause of his claimed disability for the period June 12 to July 1, 1997, the day he was released to return to full-time limited duty.[3]

Relevant to his claim for a June 12, 1997 recurrence of disability, appellant submitted a medical report dated June 13, 1997 from his treating physician, Dr. Gus G. Gialamas, an orthopedic surgeon, who stated that appellant had crawled into his office that day complaining of a pulsating pain in his lower back, which appellant stated had occurred the previous day while he was in Nevada on vacation. Appellant reported that he took an anti-spasmodic and drove back to the Los Angeles area on June 13, 1997. He denied any other recent trauma, but stated that he had been sitting frequently on airplanes, having been on a recent vacation to New York.

Dr. Gialamas performed a physical examination, diagnosed "acute chronic musculoligamentous lumbosacral strain" and prescribed physical therapy and medication. The remainder of his report attempts to clarify an earlier report submitted in support of appellant's October 25, 1996 claim for recurrence of disability. The report is not, however, sufficient to support appellant's claim for a recurrence of disability because Dr. Gialamas did not discuss the cause of the diagnosed musculoligamentous strain and its relationship, if any, to the accepted 1990 employment injury.

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recurrence, which had been denied by decision of the Office dated May 29, 1997. In the decision dated May 21, 1998, however, the hearing representative noted that as appellant's request for a hearing on the issue of his October 25, 1996 recurrence was not within 30 days of the Office's May 29, 1997 decision, the request was untimely and the issue would not be included in the decision.

[2] *Terry R. Hedman*, 38 ECAB 222 (1986).

[3] On the work release, Dr. Gialamas listed the restrictions appellant was to work under and noted that appellant should consider shortening his workday to six hours.

The record also contains a July 10, 1997 report from appellant's treating chiropractor, Dr. David Ahrens, who noted that appellant demonstrated muscle spasm on physical examination and diagnosed lumbar intervertebral disc syndrome and degenerative disc disease of the lumbar spine. While he checked a box indicating that appellant should remain off work, he did not discuss appellant's ability to work for the period of his claimed recurrence, June 12 to July 1, 1997.

In a report dated July 31, 1997, Dr. Gialamas noted that appellant's symptoms persisted but that he reported getting great relief from a recent epidural steroid injection. He added that appellant did not think he could go back to full-time work, but was looking for a reduced workday. Dr. Gialamas noted his findings on physical examination and diagnosed mechanical lumbar pain, without neurologic deficits noted and a history of sciatica, chronic type. Dr. Gialamas stated that he had asked appellant to complete his trial of lumbar injections before passing judgment on the level of work he could expect to perform. He did not address appellant's period of disability beginning June 12, 1997.

In a November 17, 1997 report, Dr. Gialamas reported that appellant was working only six hours a day, but continued to have back pain despite the shortened day. He noted his findings on physical examination and his plan for appellant's treatment and stated:

> "[Appellant] had a previous disc degeneration at the L3-4 level, which was verified by [a] magnetic resonance imaging [MRI] scan, as well as an L5-S1 disc protrusion. In the meantime, over the past several years, [he] developed a new paracentral disc at L2-3 and at L4-5. Although these are only measured at approximately 3 [to] 4 mm, the discs do efface the ventral thecal sac. Because of [appellant's] disc degeneration, which was a verifiable work injury in 1990, this put his lumbar spine at risk to develop future degeneration at the levels above and below the previous level of disc protrusions. Therefore, I believe [his] new disc protrusions at L2-3 and L4-5 have a causal relationship to the 1990 injury."

While Dr. Gialamas' report does not address the period of disability experienced by appellant beginning June 12, 1997, after driving to Nevada, it is nonetheless supportive of a finding that appellant's condition at the time of his November 17, 1997 examination represented a worsening of appellant's accepted employment-related condition.

Appellant also submitted several reports from Dr. John B. Dorsey, a Board-certified orthopedic surgeon, from whom he sought a second opinion. In a March 4, 1998 report he

discussed appellant's history of injury and reviewed the medical evidence of record and findings on examination. Dr. Dorsey diagnosed multilevel degenerative disc disease and stated:

> "[Appellant] has developed multilevel degenerative disc disease secondary to his work activities as a postal carrier, beginning with an initial injury occurring on August 18, 1990. The progression of [his] symptomology correlates well with the MRI [scan] findings in 1990 and 1996 and best explains his current medical condition.
>
> "[Appellant's] current medical condition is one of degenerative disc disease at multiple levels which precludes him from performing heavy work.
>
> "The cause of [his] lower back condition is the initial insult occurring on August 18, 1990 and the continuous trauma incurred as a result of his working as a postal carrier in the subsequent years."

In a supplemental report dated April 7, 1998, Dr. Dorsey stated that as he had indicated in his prior report dated March 4, 1998, appellant's August 18, 1990 employment-related back injury predisposed him to subsequent injuries in that the initial injury weakened the spine, thus compromising him and causing him to be more susceptible to future recurrences and traumatic episodes caused by cumulative trauma. In a second supplemental report dated June 3, 1998, Dr. Dorsey concluded that appellant's limited-duty work activities, which included repetitive bending as well as getting in and out of his automobile on a frequent basis, aggravated appellant's lower back condition to the point that he incurred increased disability and required additional treatment. He further clarified his opinion:

> "It is common knowledge that once a person has a disc injury such as the one that was incurred by [appellant] in 1990 that this condition will progress with repetitive activities such as those being performed by the patient in his light[-]duty situation while employed by the [employing establishment].
>
> "As I have tried to explain in my prior report, once a disc has been injured and is protruding, this annulus is weakened and is susceptible to increased degenerative change based upon the nature of the work that was being performed by [appellant], namely getting in and out of his automobile on a repetitive basis as well as the repetitive bending required by his employer."

While Dr. Dorsey does not address the specific recurrence of disability experienced by appellant on June 12, 1997, his reports, like the November 17, 1997 report of Dr. Gialamas, provide a good explanation as to how appellant's condition represents a worsening of the accepted conditions.

Proceedings under the Federal Employees' Compensation Act are not adversarial in nature, nor is the Office a disinterested arbiter. While a 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.[4]

Although the medical evidence of record is insufficient to meet appellant's burden of establishing by the weight of the reliable, substantial and probative evidence that he sustained a recurrence of disability on June 12, 1997, causally related to his accepted back conditions, the Board finds that, taken together, the medical evidence raises an inference of causal relationship between appellant's 1997 recurrence of disability and his accepted employment injuries and is sufficient to require further development of the case record by the Office.[5] Additionally, the Board notes that the record contains no medical opinion contrary to appellant's claim and that the Office did not seek advice from an Office medical adviser or refer the case for a second opinion.

On remand, the Office should further develop the medical evidence by referring appellant and a complete statement of accepted facts to an appropriate Board-certified specialist for a rationalized medical opinion on the issue of whether appellant's June 12, 1997 recurrence of disability was causally related to his accepted employment injury. After such development of the case record as the Office deems necessary, the Office should issue an appropriate decision.

The decisions of the Office of Workers' Compensation Programs dated September 29 and May 21, 1998 are set aside and the case is remanded for further proceedings consistent with this decision.

Dated, Washington, DC
January 22, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Priscilla Anne Schwab

[4] *William J. Cantrell*, 34 ECAB 1223 (1983).

[5] *See John J. Carlone*, 41 ECAB 354 (1989).

Alternate Member