United States Department of Labor
Employees' Compensation Appeals Board

L.P., Appellant	)	
and	)	**Docket No. 10-1390**
	)	**Issued: March 9, 2011**
U.S. POSTAL SERVICE, GENERAL MAIL FACILITY, San Antonio, TX, Employer	)	

Appearances:
R. Bobby Devadoss, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 27, 2010 appellant, through his attorney, filed a timely appeal from an April 2, 2010 merit decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant met his burden to establish that he sustained a recurrence of disability causally related to his accepted April 29, 1985 employment injury.

FACTUAL HISTORY

On April 29, 1985 appellant, then a 29-year-old distribution clerk, was injured while lifting and throwing sacks of mail. He stopped working on May 3, 1985, returned on May 10, 1985 and thereafter missed work intermittently until resigning on September 12, 2005. The Office accepted appellant's claim for low back strain and left sciatica. Appellant received compensation benefits for temporary total disability beginning September 12, 2005.

In May 3 and 10, 1985 duty status reports, Dr. Lisa Verges, a family medicine specialist, noted that appellant twisted his left groin on April 29, 1985 after throwing a 50-pound sack. She diagnosed a back strain with a possible partially-slipped disc. Dr. Verges placed appellant on light duty. In a May 21, 1985 report, Dr. Uwe R. Pontius, a Board-certified orthopedic surgeon, noted that appellant complained of lower back and left leg pain due to the April 29, 1985 incident. Appellant had a lower back injury six months earlier when lifting a drawer. Prior x-rays showed no bony abnormality and suggested early osteoarthritis changes. Dr. Pontius diagnosed an L4-5 annular tear, intermittent L5 radiculopathy and S1 root swelling. On June 6, 1985 he noted improvement and recommended light duty.

Reports dated January 2 and February 24, 1986, Dr. Jacob E. Tauber, a Board-certified orthopedic surgeon, stated that appellant had low back pain and numbness radiating to the left leg. X-rays of the lumbosacral spine were negative. Dr. Tauber noted that appellant was totally disabled since September 12, 1985. He noted findings on examination and diagnosed left sciatica. An April 23, 1986 computed axial tomography (CAT) scan, nerve conduction studies and an electromyogram (EMG) of the low back and lower extremities were reported normal while a February 23, 1987 magnetic resonance imaging (MRI) scan of the lumbar spine demonstrated mild degenerative changes at the L4-5 and L5-S1. In a March 2, 1987 report, Dr. Tauber noted decreased pain and full range of motion (ROM). In a May 12, 1987 report, Dr. Pontius stated that appellant was capable of "full work" with a 50-pound lifting restriction.

In a June 19, 1987 letter, the employing establishment offered appellant a job as a procurement clerk with 50-pound lifting, pushing and pulling restrictions. The modified position was found suitable by Dr. Pontius and the Office. Appellant accepted the offer and returned to duty on September 14, 1987.

In a January 11, 1989 report, Dr. Roberto A. Negron, a Board-certified neurosurgeon, noted that appellant complained of low back and leg pain. He noted that appellant had low back pain in 1982 that completely resolved by the time of the April 29, 1985 work injury. Dr. Negron examined him and did not observe any physical irregularities. Review of prior diagnostic tests revealed early osteoarthritis changes, specifically degenerative changes at the L4-5 and L5-S1 vertebral areas without evidence of root compression. An April 25, 1989 lumbar spine CT scan and a June 30, 1989 myelogram were both negative. In a July 3, 1989 progress note, Dr. Negron diagnosed low back syndrome of "undetermined" cause.

In a September 27, 1990 fitness-for-duty report, Dr. Alan W. Young, an osteopath and Board-certified physiatrist, noted that appellant reported bilateral lumbosacral paraspinal muscle, left gluteal muscle and left lower extremity pain. He noted the history of the April 1985 work injury and that a March 1987 MRI scan showed degenerative joint disease of the L4-5 and L5-S1 discs while a 1989 myelogram was negative. Dr. Young examined appellant and found limited side bending and rotation to the right and tight hamstrings in the right leg. He diagnosed chronic lumbosacral strain with no evidence of radiculopathy and advised that a two- to four-week work hardening program would help appellant to return to full duty with no restrictions on activities or promotion. Dr. Negron concurred with Dr. Young's work hardening recommendation in a January 3, 1991 report. He also opined that appellant could work as a procurement clerk.

On June 22, 1995 the employing establishment notified appellant that he was terminated effective July 7, 1995 because he failed to meet attendance requirements with over 623 hours of absences since February 8, 1995. It found unsubstantiated his assertion that his extended absence without leave was due to a superior's foul language.

Appellant submitted a July 12, 1995 report from Dr. Robert A. Partain III, a Board-certified neurological surgeon and associate of Dr. Negron, in which appellant complained of throbbing discomfort in the low back and left leg related to the April 29, 1985 injury. On examination Dr. Partain observed slightly limited forward flexion of the low back and tenderness over the left sciatic notch and recommended a lumbar spine MRI scan.

The Office notified appellant in an August 29, 1995 letter that his case was closed and that he could file a recurrence.

In a May 13, 2009 letter, appellant asked to reopen his case, stating that he never recovered from his injury on March 21, 1986 and his condition worsened. The Office informed him on June 4, 2009 that additional evidence was needed to reopen his case, including medical records since 1995. Appellant submitted a June 17, 2009 request to authorize medical treatment and change his physician of record. The Office denied his request as his case was retired.

From July 7 to August 10, 2009 counsel, requested a change in appellant's physician, a medical evaluation to develop the recurrence of total disability claim and expansion of the conditions accepted as related to the April 29, 1985 injury.

By decision dated September 17, 2009, the Office denied appellant's claim, finding that the evidence was insufficient to establish that a recurrence of disability resulted from the April 29, 1985 injury.

The Office received a September 14, 2009 statement from appellant asserting that he was subjected to constant pain and depression for 24 years and was forced to resign from his procurement clerk position due to discriminatory treatment by his managers. Appellant requested that the Office authorize a medical evaluation.

Appellant requested reconsideration on February 2, 2010 and submitted several medical records. In a November 6, 2009 report, Dr. Frank K. Kuwamura, III, a Board-certified orthopedic surgeon, noted appellant's complaints of low back pain radiating to his left buttock, thigh and calf. He noted a history of orthopedic issues while in military service in 1979 and lumbar spine issues after a 1985 evaluation conducted by employing establishment physicians. Dr. Kuwamura examined appellant and observed pain of the lumbosacral junction, left sciatic notch tenderness and decreased sensation of the left buttock and lateral aspect of the thigh and calf to light touch. X-rays showed mild space narrowing at the L4-5 and some mild facet disease. Dr. Kuwamura diagnosed symptomatic low back pain.

In a November 9, 2009 report, Dr. Paul M. Sherman, a Board-certified radiologist, commented that appellant's lumbar spine MRI scan displayed mild Modic type II endplate change at the L4-5, mild disc bulging and mild facet degenerative change. He assessed mild spondylosis without disc protrusion or nerve root impingement. In a November 16, 2009 report, Dr. Kuwamura interpreted the MRI scan as indicating mild foraminal stenosis.

In a January 14, 2010 report, Dr. John W. Ellis, a Board-certified family practitioner, noted appellant's history and his current complaints of left leg and midline back pain. He stated that appellant began working for the employing establishment in 1982, had no back or radicular symptoms until his April 29, 1985 injury and resigned in 1995 "because of continued back and left leg pain." Appellant was a Habitat for Humanity staff member between 1999 and 2001, but stopped due to severe back pain and left leg weakness.[1] On examination, Dr. Ellis noted tightness of the thoracic and lumbar paraspinous muscles, tenderness of the left sacral foramina and iliolumbar ligaments, an indentation of the left iliolumbar ligament consistent with tissue tear and loss and a positive left straight leg raise test. He further observed weakness on dorsiflexion and plantar flexion and decreased sensation to light touch and pin prick on the dorsal and lateral aspects of the left foot. Dr. Ellis diagnosed muscle tendon unit strain of the back, left iliolumbar and sacroiliac ligament strains, deranged discs, left L5 and S1 spinal nerve root impairment and left lumbosacral plexus impairment. He attributed appellant's condition to the April 29, 1985 injury, which caused significant straining and tearing of the left iliolumbar and sacroiliac ligaments, disc bulging and impingement of the L5 and S1 nerve roots. Dr. Ellis further explained that, because the lumbar discs were compromised by this injury, they provided less support, which led to bone hypertrophy and spondylosis over time. He opined that the "original" and "sole" injury to appellant's back on April 29, 1985 contributed to appellant's total disability between 1995 and 1999 and permanent total disability since 2001 and that appellant would still be able to work "but for" the April 29, 1985 injury.

By decision dated April 2, 2010, the Office denied modification of its September 17, 2009 decision.

LEGAL PRECEDENT

A recurrence of disability means "an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness." It can also mean "an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction in force) or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations."[2]

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 or she 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 or she cannot perform such light duty. As part of this burden, the

[1] Dr. Ellis' report mentioned that appellant sustained numerous preemployment injuries while serving in the military, including injuries to the metacarpophalangeal joint of the right ring finger, left hand and elbow, left knee and right toe. None of these are at issue in this case.

[2] *J.F.,* 58 ECAB 124 (2006); 20 C.F.R. § 10.5(x).

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 light-duty job requirements.[3] To establish a change in the nature and extent of the injury-related condition, there must be probative medical evidence of record. The evidence must include a medical opinion, based on a complete and accurate factual and medical history, and supported by sound medical reasoning, that the disabling condition is causally related to employment factors.[4] Where no rationale is present, the medical evidence is of diminished probative value.[5] While the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, the opinion must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty.[6]

ANALYSIS

The Office accepted that appellant sustained an injury in the performance of duty on April 29, 1985 and paid temporary total disability benefits. Appellant accepted an offer of modified duty as a procurement clerk and returned to work on September 14, 1987. He remained at the employing establishment until 1995, when he resigned due to increased back and left leg pain stemming from the April 29, 1985 injury and after the employing establishment began a removal action. The record does not contain any substantive allegation that the nature and extent of appellant's light-duty job requirements changed or that appropriate light duty would not have remained available had he not resigned.[7]

Regarding whether there was a change in his injury-related condition, appellant submitted Dr. Ellis' January 14, 2010 report, in which Dr. Ellis found that the April 29, 1985 injury resulted in appellant's temporary total disability between 1995 and 1999 and permanent total disability since 2001. Dr. Ellis responded that the accepted injury caused not only left iliolumbar and sacroiliac ligament strain and tear, disc bulging and L5 and S1 nerve root impingement but also brought about protracted bone hypertrophy and spondylosis. He failed to provide a full history or account for the gap in medical treatment between July 12, 1995 and November 6, 2009. Medical evidence of bridging symptoms between the claimed recurrence and the accepted injury must support the physician's conclusion of a causal relationship.[8] Dr. Ellis' failure to discuss appellant's lack of medical treatment for 14 years after leaving the employing establishment calls into question the completeness of his knowledge of the facts and

[3] *Albert C. Brown*, 52 ECAB 152, 154-55 (2000); *Terry R. Hedman*, 38 ECAB 222 (1986).

[4] *Mary A. Ceglia*, 55 ECAB 626, 629 (2004).

[5] *Id.*; *Robert H. St. Onge*, 43 ECAB 1169 (1992).

[6] *Ricky S. Storms*, 52 ECAB 349 (2001).

[7] To the extent that appellant was terminated by the employer due to misconduct, this does not provide a basis for the payment of compensation. Office regulations indicate that there is no recurrence of disability when withdrawal of light duty occurs for reasons of misconduct, nonperformance of job duties or a reduction in force. *Richard A. Neidert*, 57 ECAB 474 (2006); 20 C.F.R. § 10.5(x).

[8] *Id.* The Board has consistently affirmed denial of recurrence of disability in the absence of documented evidence of bridging symptoms for a lengthy duration. *See, e.g.*, *Leslie S. Pope*, 37 ECAB 798 (1986) (nine months); *Leon Harris Ford*, 31 ECAB 514 (1980) (10 years); *Ned Clark*, 8 ECAB 219 (1955) (11 years).

medical history as well as his rationale for finding temporary total disability 1995 and 1999 and permanent total disability since 2001.[9] While he concluded in 2010 that the April 29, 1985 injury caused left iliolumbar and sacroiliac ligament straining and tearing, disc bulging, L5 and S1 nerve root impingement, bone hypertrophy and spondylosis, reports from Drs. Pontius and Tauber in 1985 and 1986 pointed out that diagnostic tests revealed, at most, mild osteoarthritis changes.[10] Dr. Ellis did not offer a sufficiently reasoned opinion explaining how appellant had a spontaneous change in the accepted low back strain sciatica that caused his disability and nonaccepted conditions.[11]

The remaining medical reports of record are insufficient to meet appellant's burden of proof because they offer no explanation as to how his claimed recurrence arose from the April 29, 1985 injury.[12]

Appellant argues on appeal that Dr. Ellis' opinion was based on a complete factual and medical background, made with reasonable certainty and supported by medical rationale explaining causal relationship. In the alternative, he argues that, if Dr. Ellis' opinion was inadequate to meet his burden of proof, it was nonetheless sufficient to justify further development of the record since no opposing medical evidence was presented.[13] As stated above, Dr. Ellis' failure to address appellant's lack of bridging symptoms between July 12, 1995 and November 6, 2009 and the lack of medical rationale limits the probative value of his opinion.

CONCLUSION

The Board finds that appellant did not establish that he sustained a recurrence of disability causally related to his accepted April 29, 1985 employment injury.

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[9] Dr. Ellis also pointed out that appellant did not sustain a back injury before or after April 29, 1985, which conflicts with reports dated May 21, 1985 and January 11, 1989 from Dr. Pontius and Dr. Negron finding that appellant had a prior history of low back injuries. *See M.W.*, 57 ECAB 710 (2006); *James A. Wyrick*, 31 ECAB 1805 (1980) (medical opinions based on an incomplete or inaccurate history are of diminished probative value).

[10] *See also Conard Hightower*, 54 ECAB 796 (2003) (contemporaneous evidence is entitled to greater probative value than later evidence).

[11] *See T.M.*, 60 ECAB ___ (Docket No. 08-975, issued February 6, 2009) (for conditions not accepted by the Office as being due to an employment injury, the claimant bears the burden of proof to establish that the condition is causally related to the employment injury through the submission of rationalized medical evidence).

[12] *See J.F.*, 61 ECAB ___ (Docket No. 09-1061, issued November 17, 2009) (medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

[13] Appellant cites *Rebel L. Cantrell*, 44 ECAB 660 (1993) and *John J. Carlone*, 41 ECAB 354 (1989), decisions in which the Board found an uncontroverted inference of causal relationship warranting remand for further development of the record. Neither decision involved an unexplained gap in medical treatment for an extensive period.

ORDER

IT IS HEREBY ORDERED THAT the April 2, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 9, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board