U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TODD PERRY and U.S. POSTAL SERVICE,
POST OFFICE, Silver Spring, Md.

Docket No. 95-2058; Submitted on the Record;
Issued April 10, 1998

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant has met his burden of proof of establishing that he sustained a recurrence of disability on June 9, 1992 causally related to his accepted injury.

On October 24, 1990 appellant, then a 30-year-old letter carrier, filed a claim for compensation alleging that he injured his back that day while in the performance of duty.

Appellant returned to limited duty on November 7, 1990 and was advised that he could return to regular duty with no restrictions on April 15, 1991.

On September 14, 1992 appellant filed a Form CA-2a alleging that he had sustained a recurrence of disability on June 9, 1992 noting that he had intermittent back pain since his return to full duty in May 1991 and had established a regular medical history of treatment since that time. In describing his June 9, 1992 recurrence, appellant stated:

> "During work on June 9, 1992, I experienced more than usual discomfort in my lower back. Later that evening while bending down from the waist a sharp pain was experienced forcing me to my knees."

The employing establishment submitted a September 22, 1992 cover letter to appellant's claim, stating that appellant requested sick leave on June 10, 1992 based on a recurrence of disability on June 9, 1992 and remained off work since then using both sick and annual leave until exhausted. The employing establishment noted that appellant informed them that he had undergone back surgery on August 24, 1992. The employing establishment also referred to an attached note from a supervisor stating that appellant telephoned on June 10, 1992 to request sick leave due to injuries associated with moving a couch at home on June 9, 1992.

On October 27, 1992 the Office of Workers' Compensation Programs notified appellant that his description of the June 9, 1992 accident appeared to be a new injury rather than a recurrence of disability and also that it appeared that his injury was not occasioned by his

employment as he stated that he injured his back while moving a couch at home. The Office asked appellant to consider filing a claim for a new injury if appellant believed that it occurred in the performance of duty.

In a letter dated May 23, 1993, appellant stated that he wished "to appeal and reopen" his claim.

On June 8, 1993 the Office replied to appellant indicating that he had not submitted sufficient information to support his assertion that his June 9, 1992 injury was a recurrence of disability. Specifically, the Office noted that a February 7, 1992 medical report from Dr. Ulla Fortune, a Board-certified orthopedic surgeon, indicated that he "was asymptomatic" at that time and that a June 16, 1992 medical report indicated that he had injured his back while moving a couch at home. The Office allowed appellant 30 days to provide substantial documentation which supports your claim, with rationale addressing that you had no symptoms (documented in your physician's February 1993 report) until after you moved a couch at home.

On June 14 and July 5, 1993 appellant submitted narratives noting the intermittent symptomatic nature of the accepted injury and asserted that his treating physician concurred in his assessment that his June 1992 injury was causally related to his accepted injury.

On July 9, 1993 the Office issued a decision denying benefits on the grounds that appellant failed to establish that his claimed medical condition was causally related to his accepted injury. The Office noted Dr. Fortune's June 16, 1992 medical report wherein she cited appellant's description of the June 9, 1992 accident as a result of his efforts to move a couch. The Office contrasted this report with medical evaluations dated April 1991 and February 1992 wherein Dr. Fortune found that appellant was asymptomatic and able to perform full duty. On this basis, the Office concluded that appellant's back pain was not related to the accepted injury and denied the claim.

On July 19, 1993 appellant requested an oral hearing of the Office decision denying benefits, which was held in Washington, D.C. on March 23, 1994. Appellant testified that he did not injure his back upon the event of moving a couch, rather he injured his back when he bent at the waist preparatory to an attempt to move the couch. He further testified that he was in intermittent pain and discomfort from the time he returned to full duty in February 1991. Appellant testified that although the pain was severe, his medical instructions were to contact his doctor only after five consecutive days of pain. He noted that from May to a period several months later, he worked four consecutive days only twice and five days only once, a pattern brought on by his back pain.

In a decision issued June 28 and finalized on June 29, 1994, the hearing representative found that appellant's injury on June 9, 1992 occurred when appellant "merely bent over in preparation to move the couch," rather than as a consequence of moving the couch. However, he affirmed the Office's denial of benefits on the grounds that the medical evidence failed to support appellant's allegation that his June 9, 1992 injury was causally related to his accepted injury. The hearing representative found that the medical evidence was unpersuasive in that Dr. Fortune did not provide rationalized medical opinion evidence to support her conclusion that appellant's June 9, 1992 injury was causally related to his accepted injury. Further the hearing

representative found that appellant's asymptomatic physical examinations between the time of his accepted injury and the June 9, 1992 injury established that the June 1992 injury was not causally related to the accepted injury.

On January 18, 1995 appellant filed a request for reconsideration of the hearing representative's decision, and submitted new medical evidence in support of his claim. In a medical report dated January 18, 1995, Dr. Fortune stated that, although radiological tests were not performed at the time of appellant's June 9, 1992 injury, she believed that, based on "his clinical pain pattern, pain distribution and ultimately magnetic resonance imaging (MRI) scan and operative findings after injury (attempting to lift couch, June 10, 1992), in my opinion this consistent pattern represents an aggravation of his preexisting workmen's compensation injury."

In a medical report dated January 19, 1995, Dr. David R. Curfman, Board-certified in neurological surgery, stated that appellant's July 15, 1992 MRI scan revealed a large central pulposus at the L4-5 and L5-S1 levels which may cause appellant to have "unilateral or bilateral leg complaints intermittently or chronically due to the slightest motion or stress upon the spine."

By decision dated April 6, 1995, the Office reviewed the merits of appellant's case and denied modification of the June 29, 1994 decision on the grounds that the evidence submitted was insufficient to warrant modification. The Office found that Dr. Fortune's January 28, 1995 report did not contain medical rationale explaining the causal relationship between appellant's condition on and after June 9, 1992 and the October 24, 1990 injury and therefore is of little probative value.[1]

On April 26, 1995 appellant requested reconsideration and submitted additional evidence in support of his claim.

On April 27, 1995 the Office denied appellant's claim on the grounds that the evidence submitted in support of the claim was repetitious or irrelevant and insufficient to warrant review of the April 6, 1995 decision.

The Board finds that appellant has not met his burden of proof in establishing that the June 9, 1992 bending incident constituted a recurrence or a consequence of his October 24, 1990 accepted injury.

An individual who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which compensation is claimed is causally related to the accepted injury. This burden includes the necessity of furnishing medical evidence from a qualified physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.[2]

[1] The Office did not address Dr. Curfman's medical report in its April 6, 1995 decision.

[2] *Lourdes Davila*, 45 ECAB 139 (1993); *Louise G. Malloy*, 45 ECAB 613 (1994).

In this case, appellant had submitted various medical and treatment notes from his treating physician, Dr. Fortune, under whose care he has been since November 29, 1990 when she placed him on light duty for 60 days after his injury on October 24, 1990. In a treatment note dated March 5, 1991, Dr. Fortune returned appellant to full duty and on February 7, 1992 she released appellant from a restriction against overtime as a further reflection of his full-duty status. Dr. Fortune's treatment notes after June 9, 1992 do not identify the June bending incident as causally related to his accepted injury. In the June 16, 1992 treatment note, he indicated that appellant was five days after an injury, but does not attribute any causality to his accepted injury. In an October 28, 1992 treatment note, Dr. Fortune stated that appellant had had a weak left leg since his surgery, but makes no reference to his June 9, 1992 injury or associated diagnosis. Although Dr. Fortune stated that appellant's pain pattern and distribution, MRI results and other operative findings after his June 1992 incident support an aggravation of the accepted injury, he fails to define these terms in the context of causation relating to the accepted injury and the alleged recurrence of disability.[3] Further, although Dr. Curfman's neurological evaluations stated that, by July 26, 1992, appellant had sustained a herniated nucleus pulposus at L4-5 and L5-S1, he failed to submit a rationalized medical opinion regarding the cause of the pulposus and thus provides no probative weight to appellant's burden of proof in this case.[4] Therefore, the Board finds that appellant has failed to support his claim that he had sustained a recurrence of disability or a consequential injury based on his October 24, 1990 accepted injury.

The basic rule respecting consequential injuries as expressed by Larson is that "when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributed to claimant's own intentional conduct."[5] The subsequent injury "is compensable if it is the direct and natural result of a compensable primary injury."[6] With respect to whether appellant had sustained a consequential injury on June 9, 1992, Dr. Fortune's January 28, 1995 medical report provides some support for appellant's claim, however, it is of diminished probative value as her opinion is unsupported by any medical rationale explaining the physiological process by which appellant's June 9, 1992 injury would be causally related to his prior employment injury. Furthermore, Dr. Fortune's report fails to provide a rational basis to overcome her earlier conclusion that appellant was "asymptomatic" from his work-related injury and, indeed, could return to full-time regular duty prior to the June 9, 1992 incident. Appellant has not submitted sufficient evidence to establish that his June 9, 1992 injury was the "direct and natural result" of his accepted October 24, 1990 employment injury.

The decisions of the Office of Workers' Compensation Programs dated April 27 and 6, 1995 and June 29, 1994 are hereby affirmed.

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[3] *Merlind K. Cannon*, 46 ECAB 581 (1995); *William C. Thomas*, 45 ECAB 591 (1994).

[4] *Jeannine E. Swanson* , 45 ECAB 325 (1994).

[5] A. Larson, *The Law of Workmen's Compensation*, section 13.00.

[6] *Id*. at § 13.11.

Dated, Washington, D.C.
April 10, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member