

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL J. GARRISON and DEPARTMENT OF THE ARMY,
COMMUNICATIONS COMMAND, Warrenton, Va.

*Docket No. 95-1668; Submitted on the Record;
Issued January 21, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether appellant has met his burden of proof to establish his claim for disability from January 18 to February 11, 1994 and from April 11 to May 31, 1994, due to his employment-related back condition.

The Board has duly considered the record in the present appeal and finds that appellant has not met his burden of proof to establish disability for the periods January 18 to February 11, 1994 or April 11 to May 31, 1994, due to his employment-related back condition.

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 and extent of the light-duty job requirements.¹ Once the work-connected character of any condition is established, "the subsequent progression of that condition remains compensable *so long as the worsening is not shown to have been produced by an independent nonindustrial cause.*"² (Emphasis added.)

¹ *Terry R. Hedman*, 38 ECAB 222 (1986). The term "disability" as used in the Federal Employees' Compensation Act, means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury. *Patricia A. Keller*, 45 ECAB 278 (1993); *Richard T. DeVito*, 39 ECAB 668 (1988); *Frazier V. Nichol*, 37 ECAB 528 (1986); *Elden H. Tietze*, 2 ECAB 38 (1948); 20 C.F.R. § 10.5(17). Disability is thus not synonymous with physical impairment which may or may not result in an incapacity to earn wages; see *Fred Foster*, 1 ECAB 21 (1947). Whether a particular injury causes an employee disability for employment is a medical issue which must be resolved by competent medical evidence; see *Debra A. Kirk-Littleton*, 41 ECAB 703 (1990).

² *Larson, The Law of Workers' Compensation* § 13.11(a); see also *Robert W. Meeson*, 44 ECAB 834 (1993)

Appellant, a 32-year-old automobile worker, sustained a back injury from lifting at work on August 22, 1989, accepted for a lumbar sprain and a herniated disc at L4-5 with resulting surgery.³ Appellant worked from January 4 until March 13, 1990, when he stopped work on account of residual complaints of pain. Based on numbness at the L5 distribution and positive straight leg raising, appellant was diagnosed as having post-laminectomy syndrome and his physicians recommended that he return to light-duty work. On account of a lack of light-duty jobs available, appellant was removed from the employing establishment's rolls June 30, 1990. Appellant was assigned as a vocational rehabilitation counselor. Appellant obtained work restrictions from Dr. Robert Rutkowski, a Board-certified orthopedic surgeon.⁴ Dr. Rutkowski restricted appellant from lifting more than 10 to 20 pounds and restricted appellant's activities, such as sitting, to two hours at a time. Between January and September 1992, appellant underwent computer training for an anticipated job in customer service.⁵ Prior to starting back to work on January 11, 1993, appellant was evaluated by Dr. Rutkowski, who recommended a functional capacity evaluation. Appellant, however, returned to work effective January 11, 1993 without such an evaluation and was assigned to duties as a vehicle registrations clerk which the Office found subsequently represented his wage-earning capacity.⁶

Appellant stopped work for two days in November 1993 on account of recurrent back pain with bilateral leg radiculopathy. The medical evidence indicates that he returned to Dr. Rutkowski, who noted that appellant had post-lumbar laminectomy syndrome, but that he could continue to work. Appellant was referred for an epidural block treatment provided by Dr. Randall J. Peck, an anesthesiologist and an evaluation by Dr. George Stergis, a Board-certified neurologist. Both Drs. Peck and Stergis reported a history of a flare-up of symptoms with a clicking or popping sound in the low back and pain which radiated into the right leg and occasionally the left. Dr. Stergis reported a questionable diminished pinprick appreciation along

(where the Board determined that striking a deer in an automobile accident constituted an independent intervening cause which broke the chain of causation with respect to a claimant's prior employment back injury); *Anthony S. Wax*, 7 ECAB 330 (1954).

³ Upon diagnostic studies which showed a herniated disc at the L4-5 midline level, Dr. Jack Perlmutter, a Board-certified orthopedic surgeon, performed a lumbar laminectomy in mid-October 1989. Upon review of the medical record by Dr. Normal Horwitz, a Board-certified neurologist, the Office of Workers' Compensation Programs accepted appellant's claim for a herniated disc and authorized appropriate medical expenses. Dr. Perlmutter released appellant to work on January 3, 1990.

⁴ Dr. Rutkowski was an associate of Dr. Perlmutter, the initial treating orthopedic surgeon.

⁵ On August 23, 1992 appellant reported to the vocational rehabilitation counselor, that he hit a tree while riding in a mud vehicle going 40 miles per hour. Appellant was treated on September 1, 1992 by Dr. Rutkowski, who reported that appellant injured a rib while working on an "RV" and that he was treated at the emergency room where he was diagnosed with a fracture of the 7th rib on the left.

⁶ The record is not clear with respect to whether the position effective January 11, 1993 was a temporary or permanent position. The Office calculated appellant's loss of wage-earning capacity and upon determining on October 18, 1993 that the vehicle registration clerk position fairly and reasonably represented his wage-earning capacity, appellant was placed on the periodic rolls for continued wage-loss compensation based on his lower salaried position.

the lateral aspect of the left foot only with the diagnosis of post-laminectomy syndrome. Dr. Rutkowski followed up by evaluating appellant further on December 14, 1993 and noting that appellant had returned to work.

Appellant obtained further treatment following an incident occurring at home on January 15, 1994. Appellant reported that as a result of an altercation with another person, he fell down four stairs on his rear porch. Upon a return evaluation on January 18, 1994, Dr. Rutkowski diagnosed a possible hip fracture based on x-rays and he provided appellant with crutches and a recommendation for no work for one week. He subsequently reported that a bone scan showed no fractures, but that appellant's leg pain "could be related to his back." Dr. Rutkowski referred appellant for physical therapy treatment, along with a referral back to Dr. Stergis, who evaluated him on February 3, 1994 and noted bilateral leg and back pain, aggravated by the recent incident when he was thrown down some stairs. Dr. Stergis recommended total disability for seven days. In a follow-up report dated February 8, 1994, Dr. Rutkowski noted that he had reviewed Dr. Stergis' report, and that appellant could return to work the next Monday. In a February 10, 1994 report, Dr. Stergis noted no new neurologic findings and he recommended continued use of Elavil.

In response to appellant's claim for wage-loss compensation for the month off from January 18 until February 11, 1994, the Office advised appellant of his burden of proof and requested by separate letter addressed to Dr. Rutkowski, a medical opinion addressing causal relationship. In a March 8, 1994 report, Dr. Rutkowski stated it was unclear to him the degree of symptomatology due to the fall on January 15, 1994 versus his underlying condition of post-laminectomy syndrome and that because a bone scan showed no fractures, he was referred to Dr. Stergis who felt the continued symptoms were due to the post-laminectomy syndrome. He stated that he felt the contusion suffered from falling down the stairs had resolved and that the fall did not result in further impairment to the back.

Appellant stopped work on April 11, 1994 and submitted a claim for compensation, attached with a disability note from Dr. Stergis, recommending one week off from work, with the stated diagnosis of "nerve injury/damage after back surgery." Following electrodiagnostic studies which suggested an L5 axonal injury and nerve root impairment at the L5 level, a magnetic resonance imaging (MRI) scan of the lumbar spine was performed. The radiologist interpreted the MRI scan as showing a defect of either a herniated disc at L5-S1 or scar tissue from the prior surgery which was less likely. Dr. Stergis diagnosed a herniated disc at L5-S1 and referred appellant for epidural block treatment, with a recommendation for total disability through May 31, 1994. Following further epidural block treatment on May 6, 1994, appellant was reevaluated by Dr. Rutkowski, who noted Dr. Stergis' assessment of a herniated disc and noted that appellant was off work until June 1, 1994, pursuant to Dr. Stergis' recommendation.

In response to two separate requests from the Office, Dr. Rutkowski initially indicated in a June 8, 1994 report, that appellant recovered from his fall at home in approximately three weeks, but then he noted later in a June 28, 1994 report that the date of recovery was uncertain, with no current complaints of pain to indicate further residuals. He stated that he did not know when appellant herniated his L5-S1 level and that it could have happened at the time he fell at home, but that now he had recovered. Dr. Rutkowski noted that he was unable to comment on

whether appellant's disability from work was due to his employment-related condition, as he was unclear on January 18, 1994 of the source of appellant's complaints.

By decision dated August 16, 1994, the Office denied appellant's claim for disability for the period after January 18, 1994 on the grounds that causal relationship was not established. Upon request for reconsideration, appellant submitted a September 9, 1994 report by Dr. Rutkowski, who related appellant's post-laminectomy syndrome to his prior surgery in October 1989 and noted that the referrals to Dr. Stergis for epidural block treatment were for this employment-related condition. He also submitted evidence that showed the Office was refusing to pay for further epidural block treatment. By decision dated February 8, 1995, the Office reviewed the merits of appellant's claim and denied modification of the prior Office decision.

The Board notes that appellant submitted no medical evidence to establish his claim for disability for the month in January and February 1994, followed by the one and one-half months' absence from work from mid-April until June 1, 1994. Dr. Rutkowski's report in January 1994 is speculative with respect to the relationship of continued leg pain to appellant's back condition. He noted that the leg pain "could be related to his back." The Board has held that an opinion which is speculative is insufficient to establish causal relationship.⁷ In subsequent reports, Dr. Rutkowski noted that he was not certain whether appellant's condition for which he was off work in 1994 was due to the employment-related condition. While he discussed the relationship between a lumbar laminectomy syndrome and appellant's prior surgery, he did not address appellant's sedentary job requirements and explain how appellant's condition worsened to prevent him from being able to continue to perform the duties of his job. With respect to Dr. Stergis, the Board-certified neurologist who had evaluated appellant one and one-half months' prior to his fall at home, he provided no opinion relating the findings of the MRI scan in the spring of 1994 to appellant's employment-related condition. When he first evaluated appellant in December 1994, he reported a history of aggravated symptoms with a history of a popping sound in the fall of 1994. In view of this history of aggravated symptoms, both in the fall of 1989 and after the fall at home in mid-January 1994, a report from a physician explaining these aggravations and addressing the diagnostic studies is necessary to establish a causal relationship between appellant's prior injury and his condition with disability, for separate periods after January 18, 1994. Appellant has not submitted such a report and thus, has not met his burden of proof to establish disability on and after January 18, 1994 due to his employment-related condition.

⁷ *Thomas D. Petrylak*, 39 ECAB 276 (1987).

The decisions of the Office of Workers' Compensation Programs dated February 8, 1995 and August 16, 1994 are hereby affirmed.

Dated, Washington, D.C.
January 21, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member