

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JESSE R. TOLBERT and DEPARTMENT OF THE ARMY,
NAVAL WEAPONS SUPPORT CENTER, Crane, Ind.

*Docket No. 97-771; Submitted on the Record;
Issued October 28, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
MICHAEL E. GROOM

The issue is whether appellant sustained a recurrence of disability as of August 16, 1995 causally related to his accepted June 22, 1990 lower back injury.

On June 22, 1990 appellant, a 34-year-old warehouse worker, experienced pain in his lower back while lifting heavy lids. Appellant filed a Form CA-1 claim for benefits based on traumatic injury to his lower back on June 25, 1990.

Appellant was examined and treated by Dr. Francis J. Kelly, a Board-certified orthopedic surgeon, who referred appellant for a magnetic resonance imaging (MRI) scan on June 25, 1990, which indicated appellant had a herniated disc at L4-5. This diagnosis was confirmed by a lumbar myelogram and computerized axial tomography (CT) scan on July 18, 1990 and Dr. Kelly performed a lumbar laminectomy on July 20, 1990. The Office of Workers' Compensation Programs accepted appellant's claim for herniated disc by letter dated July 31, 1990, and in a report dated February 25, 1991, Dr. Kelly stated that he released appellant to return to work on October 1, 1990.

On August 16, 1995 appellant filed a CA-2 claim for recurrence of disability, alleging that on August 16, 1995 he experienced an exacerbation of his lower back pain, which he indicated was caused or aggravated by his June 22, 1990 employment injury. Appellant stated that when he was released to return to work in October 1991 he had a weight lifting restriction of 70 pounds and had to wear tennis shoes because his regular boots caused him to have back pain. Appellant also stated that he recently had begun to experience the same symptoms he felt when he first injured his back; *i.e.*, loss of feeling in his feet and legs, low back pain which took 10 to 15 minutes to subside, and an inability to stand erect.

Appellant subsequently submitted several reports from Dr. Robert Manolakas, Board-certified in physical medicine and rehabilitation, who initially examined appellant on September 21, 1995. In a report dated September 21, 1995, Dr. Manolakas stated that appellant had experienced intermittent bouts of severe low back pain and increasing weakness and numbness in both legs, and noted that appellant had apparently been unable to return to work in a

modified position. Dr. Manolakas stated that it was his impression that appellant suffered from ongoing radiculopathy with probable nerve root damage that may be ongoing in nature, accompanied by severe low back pain of an intermittent nature, which was disabling. Dr. Manolakas advised that appellant's ability to return to his manual labor job might not be possible at that time, and scheduled appellant for more diagnostic tests. In a progress report dated September 29, 1995, Dr. Manolakas stated that appellant seemed to have suffered an exacerbation from "a kind of twisting movement at work" which "reexacerbated" his problem. Dr. Manolakas also submitted progress reports dated October 6, October 9, October 16 and October 21, 1995.

Appellant also submitted two medical reports from Dr. Daniel C. Elby, an osteopath, dated August 16 and September 8, 1995. In his August 16, 1995 report, Dr. Elby stated that appellant had been having progressive pain since 1990 and advised that appellant had a recurrence of low back pain at the same level with continued pain down the left lower leg with new occurrence of pain down the right leg. Dr. Elby stated that this could represent degenerative changes of the low back or another herniated disc at the same level or a different level. In his September 8, 1995 report, Dr. Elby stated that appellant reported left lower extremity pain and numbness which he felt was very similar to the numbness he experienced in 1990. Dr. Elby diagnosed a recurrence of low back pain which seemed to be worsening and stated that "One way of seeing if this is a recurrence of the previous injury is to do an MRI with contrast or myelogram and post myelogram and post myelogram CT scan to see if this is a recurrence. I do think the MRI is the best way to go at this point to see if he indeed has recurrence of disc herniation at the same level."

By letter dated February 5, 1996, the Office advised appellant that he needed to submit additional evidence to clarify whether he was claiming recurrence of his original injury or a new injury. The Office noted that Dr. Manolakas' September 29, 1995 report indicated that appellant seemed to have suffered a twisting injury which reexacerbated his problem. The Office advised that, if this was the case, appellant had suffered a new injury and needed to file a new Form CA-1 claim for traumatic injury or Form CA-2 claim for occupational disease based on a new set of employment factors. The Office requested that appellant provide a comprehensive medical report, supported by medical reasons, regarding what caused his conditions and whether the doctor believed that factors or incidents in his federal employment contributed to his conditions, and, specifically, a well-reasoned medical opinion regarding the causal relationship between his current condition and the work-related condition; *i.e.*, whether his current condition was caused or aggravated by the accepted June 22, 1990 employment injury. The Office informed the employee that he had 30 days to submit the requested information. Appellant did not submit any additional medical evidence in response to this request.

In a decision dated May 2, 1996, the Office denied appellant's recurrence claim, finding that appellant failed to submit sufficient evidence to establish that his claimed condition or disability was caused or aggravated by the accepted June 22, 1990 employment injury. The Office noted that, due to Dr. Manolakas' statement that appellant seemed to have suffered a twisting injury at work which may have "reexacerbated" his problem, it had requested that appellant submit additional medical evidence to clarify whether his claim was a recurrence or a new injury, but that he had failed to submit any evidence to support either type of claim.

By letter to the Office dated September 11, 1996, appellant requested reconsideration of the Office's previous decision, and noted that he was scheduled to undergo surgery on October 3, 1996. Accompanying the letter was a June 12, 1996 report from Dr. John O. Grimm, a Board-certified orthopedic surgeon, and an August 29, 1996 report from Dr. R Steinbarger, a Board-certified orthopedic surgeon. Dr. Grimm stated that appellant related that his 1990 surgery helped reduce his back pain initially but that he had experienced increasing low back pain since that time. Dr. Grimm stated that appellant also related that he was off for approximately three months last year with exacerbation of his pain. In a follow-up report dated September 11, 1996, Dr. Grimm recommended that appellant undergo additional surgery, a post-laminectomy fusion. In his August 29, 1996 report, Dr. Steinbarger stated that after appellant's 1990 operation he had continuing numbness in his left foot, missed several months of work and gradually returned to work, but had continuing problems with pain in his low back. Dr. Steinbarger recommended that appellant needed to have a formal, independent medical evaluation of his situation, and that this "obviously" was a continuation of his original workmen's compensation problem, not a recent problem.

In a decision dated October 24, 1996, the Office denied appellant's request for reconsideration, finding that the evidence submitted was not sufficient to warrant modification. In a memorandum accompanying the decision, the Office found that the medical evidence appellant submitted did not provide a well-rationalized, probative medical opinion indicating a causal relationship between his accepted June 22, 1990 employment injury and his current condition or a complete and accurate history of appellant's current condition.

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

An individual who claims a recurrence of disability resulting from an accepted employment injury has the burden of establishing that the disability is related to the accepted injury. This burden requires furnishing medical evidence from a 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 who supports that conclusion with sound medical reasoning.¹

In the present case, appellant has submitted medical reports from four physicians which support his claim that he suffered a recurrence of his accepted June 22, 1990 low back injury. Dr. Manolakas stated in his September 21, 1995 report that appellant had experienced intermittent bouts of severe low back pain and increasing weakness and numbness in his legs, and noted that appellant had apparently been unable to return to work in a modified position. Dr. Manolakas characterized appellant's condition as ongoing radiculopathy with probable nerve root damage accompanied by severe low back pain of an intermittent nature, which was disabling, and noted in his September 29, 1995 report that appellant had reexacerbated his problem by a twisting movement at work. The Board finds that the Office erred in finding that this statement constituted grounds for a new injury, as Dr. Manolakas specifically characterized this as a "reexacerbation" of appellant's 1990 injury, and scheduled appellant for more diagnostic tests to determine the precise nature of his problem.

¹ *Dennis E. Twardzik*, 34 ECAB 536 (1983); *Max Grossman*, 8 ECAB 508 (1956); 20 C.F.R. § 10.121(a).

In addition, Dr. Elby stated in his August 16, 1995 report that appellant had been having progressive pain since 1990, and advised that appellant had a recurrence of low back pain at the same level with continued pain down the left lower leg with new occurrence of pain down the right leg, which suggested either degenerative changes of the low back or another herniated disc at the same level or a different level. Dr. Elby advised in his September 8, 1995 report that appellant reported left lower extremity pain and numbness which he felt was very similar to the numbness he experienced in 1990, and diagnosed a recurrence of low back pain which seemed to be worsening. Dr. Elby, as did Dr. Manolakas, recommended further diagnostic tests, such as an MRI or CT scan, to definitively determine whether appellant had sustained a recurrence of his recurrence of disc herniation at the same level.

Finally, Drs. Grimm and Steinbarger also suggested that appellant had experienced continuing, intermittent low back pain in the same area since his 1990 surgery, and Dr. Steinbarger specifically recommended a formal, independent medical evaluation of his situation, and opined that this “obviously” was a continuation of his original workmen’s compensation problem, not a recent problem.

The Board finds that the evidence submitted by appellant, which contains a history of the development of the condition and four medical opinions indicating that the condition found was consistent with the history of development, given the absence of any opposing medical evidence, is sufficient to require further development of the record.² All four physicians of record indicated that appellant had experienced ongoing or continuing problems with his lower back involving pain and numbness occurring in the same area he had injured in 1990, and that he needed more diagnostic tests to conclusively determine whether this was a recurrence of his June 22, 1990 employment injury. Although the medical evidence submitted by appellant is not sufficient to meet appellant’s burden of proof, the medical evidence of record raises an uncontroverted inference of causal relationship between appellant’s current low back condition or disability and his accepted 1990 employment injury, and is sufficient to require further development of the case record by the Office.

When an employee initially submits supportive factual and/or medical evidence, as in this case, which is not sufficient to carry the burden of proof, the Office must inform the claimant of the defects in proof and grant at least 30 calendar days for the claimant to submit the evidence required to meet the burden of proof.³ The Office may undertake to develop either factual or medical evidence for determination of the claim.⁴ It is well established that proceedings under the Act⁵ are not adversarial in nature,⁶ and while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the

² *John J. Carlone*, 41 ECAB 354 (1989).

³ 20 C.F.R. § 10.110(b).

⁴ *Id.*

⁵ 5 U.S.C. §§ 8101-8193.

⁶ *See, e.g., Walter Fundiger, Jr.*, 37 ECAB 200 (1985); *Michael Gallo*, 29 ECAB 159 (1978).

evidence.⁷ The Office has an obligation to see that justice is done.⁸ When an uncontroverted inference of causal relationship is raised, the Office is obligated to request further information from an employee's attending physician.⁹

On remand, therefore, the Office should further develop the medical evidence as appropriate to determine whether appellant's current low back condition is causally related to his June 22, 1990 employment injury. After such development of the case record as the Office deems necessary, a *de novo* decision shall be issued.

The decision of the Office of Workers' Compensation Programs dated May 2, 1996 is set aside and the case is remanded for further action in accordance with this decision.

Dated, Washington, D.C.
October 28, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

Michael E. Groom
Alternate Member

⁷ *Dorothy L. Sidwell*, 36 ECAB 699 (1985).

⁸ *William J. Cantrell*, 34 ECAB 1233 (1983).

⁹ *See Rebel L. Cantrell*, 44 ECAB 660 (1993).