

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SIDNEY M. STEWART and GENERAL SERVICES ADMINISTRATION,
EMPLOYEE & LABOR RELATIONS BOARD, Washington, D.C.

*Docket No. 96-2212; Submitted on the Record;
Issued September 4, 1998*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether appellant has established that he sustained a herniated L4-5 disc, causally related to either his April 29, 1988 or his June 22, 1989 employment injuries; (2) whether appellant is entitled to a schedule award for permanent impairment as a result of his employment-related soft tissue lumbosacral muscular strain injury or his lumbar subluxation injury on April 29, 1988 and June 22, 1989 respectively; and (3) whether appellant has established that he was disabled for the periods March 10 to March 16 and October 9, 1992 to January 31, 1993 due to his accepted employment-related conditions.

This is the third appeal before the Board in this case. The facts and circumstances are set out in the prior decisions and are hereby incorporated by reference.¹ In the most recent appeal, the Board affirmed the decisions of the Office of Workers' Compensation Programs dated December 30, November 2, August 27 and July 22, 1993 finding that appellant had not established his entitlement to a schedule award and finding that appellant had not established disability for the periods in question.

On January 29, 1996 appellant requested reconsideration by the Office of its prior decisions. In support of his request appellant submitted a January 4, 1996 report from Dr. Henry A. Saiontz, a Board-certified neurosurgeon, which discussed appellant's degenerative disc disease condition, and which stated that his disc disease would further deteriorate. The report mentioned that appellant stated that he initially injured himself lifting a motor in 1988. The report did not, however, explain how appellant's accepted conditions of lumbosacral muscular strain or lumbar subluxation resulted in his current degenerative disc disease, including disc herniation, or how lifting a motor in 1988 contributed to these conditions. The report also did not address permanent impairment for schedule award purposes or address appellant's disability for the periods claimed.

¹ Docket No. 92-1596 (issued April 20, 1993); Docket No. 94-994 (issued December 8, 1995).

By decision dated February 6, 1996, the Office denied modification of its prior decisions finding that the evidence submitted in support was insufficient to warrant modification. The Office noted that none of appellant's physicians had explained the relationship between his current herniated disc problems and his accepted employment injuries.

On February 7, 1996 the Office received appellant's request for reconsideration, accompanied by a duplicate of Dr. Saiontz's January 4, 1996 report and an October 16, 1995 report of a lumbar spine MRI scan. The MRI scan merely documented the presence of an L4-5 disc herniation. No opinion on causal relation was included.

By decision dated February 21, 1996, the Office denied appellant's request for reconsideration finding that the evidence submitted was not new or relevant and failed to raise substantive legal questions, such that a review on its merits was indicated.

On March 19, 1996 the Office received another request for reconsideration from appellant. In support of his request, appellant submitted a March 1, 1996 report from Dr. Daniele Rigamonti, a Board-certified neurosurgeon. Dr. Rigamonti stated that a computerized tomography (CT) scan taken November 7, 1988 showed a small bulging disc at L4-5, and that an MRI taken October 16, 1995 showed a left-sided disc herniation at L4-5. She opined that the L4-5 bulging disc deteriorated into the L4-5 herniated disc over time. She further opined that the injury of April 29, 1988 lifting a motor caused the 1995 herniated disc, but she failed to provide a rationalized explanation as to how lifting the motor in April 1988 caused the 1995 apparent condition, particularly in light of the radiologist's interpretation of his own November 1988 CT scan results as showing no evidence of bulging or herniated disc. Dr. Rigamonti also did not explain how the accepted injury sustained April 29, 1988, the soft-tissue lumbosacral muscular strain, caused either a bulging L4-5 disc she diagnosed in November 1988 or a herniated L4-5 disc diagnosed in 1995. She further did not address permanent impairment or appellant's disability for the periods in question.

By decision dated April 3, 1996, the Office denied modification of the prior decision finding that the evidence submitted was not sufficient to warrant modification. The Office found that Dr. Rigamonti's report failed to provide a rationalized explanation for her opinion that the L4-5 herniated disc was related to the April 1988 lifting incident.

By letter dated April 30, 1996, appellant again requested reconsideration of his claim. In support he submitted an April 23, 1996 report from Dr. Rigamonti which stated that an MRI scan ordered by Dr. Foreman in 1988 showed a bulge at L4-5, that a subsequent CT scan in November 1988 showed a small bulge at L4-5, and that an MRI taken on November 21, 1989 showed a herniated disc at L4-5. Dr. Foreman's MRI, however, is not included in the case record, the November 1988 CT scan was reported by the radiologist as showing no bulge or herniation, and the November 1989 MRI scan is not included in the case record. Dr. Rigamonti stated that appellant "aggravated symptoms on June 22, 1989 causing shooting pain that runs from his buttock down the left leg causing the small bulge at L4-5 discs [sic] to become a herniated disc at L4-5." She further opined that appellant had a 5 percent left lower extremity impairment due to the nerve affecting the lower extremity and a 10 percent impairment based on pain, loss of function and endurance. However, Dr. Rigamonti failed to explain how the lifting incident of April 1988 caused a bulging or herniated L4-5 disc not diagnosed by radiologic

report submitted to the record until January 10, 1991 or how the accepted conditions of lumbosacral strain and lumbar subluxation caused a bulging or herniated L4-5 disc not documented by radiologic report until January 10, 1991. Further, Dr. Rigamonti does not provide rationale explaining why the accepted subluxation injury of June 1989 caused pain shooting down appellant's left leg, or how such shooting pain caused the L4-5 disc bulge to become herniated. Finally, although Dr. Rigamonti gives an opinion on permanent impairment, she does not explain how this impairment is related to appellant's accepted conditions of soft tissue lumbosacral muscular strain or lumbar subluxation, and she does not address the periods of disability is question.

By decision dated May 13, 1996, the Office denied modification of the prior decision finding that the evidence submitted was insufficient to warrant modification. The Office noted that the record supported that appellant's L4-5 disc became herniated in January 1991 after shoveling snow at his home, that Dr. Rigamonti's opinions were therefore not based on an accurate history of injury, that the report lacked rationale explaining how and why the lifting incident of April 1988 or June 1989 caused a bulging or herniated L4-5 disc diagnosed more than a year after the fact, that there was no medical explanation of how the accepted conditions of lumbosacral muscular strain or lumbar subluxation caused left lower extremity impairment, and that Dr. Rigamonti did not address appellant's disability for the periods March 10 to March 16, October 9, 1992 to January 31, 1993.

By letter dated June 4, 1996, appellant requested reconsideration and in support he submitted two statements from neighbors which addressed his injuries on January 5, 1991 at his home. Both witnesses stated that appellant was not shoveling snow but merely came out of his house and slipped on the snow and fell "after suffering back pains." Thereafter one witness took appellant to the chiropractor for treatment, and indicated that appellant fell again after leaving the chiropractor's office, after which he was taken to the emergency room.

By decision dated July 2, 1996, the Office denied appellant's request for a review of his case on its merits, finding that the primary issue in the case was causal relationship which was medical in nature, and that since neither witness statement was from a doctor, they were not medical evidence.

The Board finds that appellant has not established that he sustained a herniated L4-5 disc, causally related to either his April 29, 1988 or his June 22, 1989 employment injuries.

Appellant has the burden of establishing by the weight of reliable, probative and substantial evidence that the injury claimed was caused or aggravated by his federal employment. As part of this burden, appellant must submit a rationalized medical opinion, based upon a complete and accurate factual and medical background, showing a causal relationship between the injury claimed and factors of his federal employment.² Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. Such an opinion of the physician must be based on a

² *Steven R. Piper*, 39 ECAB 312 (1987); *see* 20 C.F.R. § 10.110(a).

complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by appellant.³ Causal relationship is a medical issue that can be established only by medical evidence.⁴ The Board notes that the fact that a condition manifests itself or worsens during a period of employment does not raise an inference of an employment relationship.⁵

In this case, none of the medical reports submitted by appellant address the development of his herniated disc condition in relation to the lifting injury of April 1988 or in relation to the bending injury of June 1989. The reports primarily relate the development of the herniated disc to a previously diagnosed bulging disc at L4-5, which had not been accepted by the Office as being related to either the 1988 lifting incident or the 1989 bending incident. Further, the medical reports generally diagnosed a bulging L4-5 disc and a herniated L4-5 disc without being supported by objective evidence in the form of radiographic reports documenting the presence of such a bulge or herniation, and hence are of diminished probative value on the issue of the presence of that pathology. Additionally, the reports omit mention of appellant's January 5, 1991 injury at his home, whether from shoveling snow or from falling, which could constitute an intervening cause of the subsequently diagnosed herniated L4-5 disc. Because the medical reports submitted omit discussion of how the 1988 lifting incident or the 1989 bending incident caused pathology at L4-5 which was not diagnosed objectively for an extended period after the alleged injury and because these reports are not supported by contemporaneous objective radiologic evidence supporting their diagnoses, and because the reports omit mention and discussion of the effect of appellant's January 5, 1991 injury, they are insufficient to establish that either the 1988 or 1989 incidents caused such a pathology. Accordingly, appellant has not established that he sustained an L4-5 herniated disc causally related to the accepted employment incidents.

Additionally, the Board finds that appellant is not entitled to a schedule award for permanent impairment as a result of his employment-related soft tissue lumbosacral muscular strain injury or his lumbar subluxation injury on April 29, 1988 and June 22, 1989 respectively.

³ *Id.*

⁴ *Mary J. Briggs*, 37 ECAB 578 (1986); *Ausberto Guzman*, 25 ECAB 362 (1974).

⁵ *Paul D. Weiss*, 36 ECAB 720 (1985); *Hugh C. Dalton*, 36 ECAB 462 (1985).

Section 8107 provides that if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.⁶ The schedule award provisions of the Federal Employees' Compensation Act⁷ and its implementing federal regulations⁸ provide for payment of compensation for the permanent loss or loss of use of specified members, functions, and organs of the body. No schedule award is payable for a member, function, or organ of the body not specified in the Act or in the regulations.⁹ Because neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back,¹⁰ no claimant is entitled to such an award.¹¹ Therefore, appellant in this case is not entitled to such an award. However, if injury to the back results in permanent impairment of a schedule member, then a claimant may be entitled to an award for permanent impairment of that member.

In this case, appellant's accepted conditions were back conditions, lumbosacral strain and lumbar subluxation. However, none of the medical evidence submitted relates impairment of appellant's left lower extremity to either of his accepted conditions. In fact, the medical evidence of record relates appellant's left lower extremity impairment to a herniated L4-5 disc which has not been accepted as being causally related to either his 1988 lifting incident or to his 1989 bending incident. Consequently, appellant has not established that he sustained permanent impairment of his left lower extremity, causally related to his accepted employment injuries.

Further, the Board finds that appellant has not established that he was disabled for the periods March 10 to March 16 and October 9, 1992 to January 31, 1993 due to his accepted employment-related conditions.

⁶ 5 U.S.C. § 8107(a). It is thus the claimant's burden of establishing that she sustained a permanent impairment of a scheduled member or function as a result of her employment injury; *see Raymond E. Gwynn*, 35 ECAB 247 (1983) (addressing schedule awards for members of the body that sustained an employment-related permanent impairment); *Philip N.G. Barr*, 33 ECAB 948 (1982) (indicating that the Act provides that a schedule award be payable for a permanent impairment resulting from an employment injury).

⁷ 5 U.S.C. § 8107(a).

⁸ 20 C.F.R. § 10.304.

⁹ *William Edwin Muir*, 27 ECAB 579 (1976) (this principle applies equally to body members that are not enumerated in the schedule provision as it read before the 1974 amendment, and to organs that are not enumerated in the regulations promulgated pursuant to the 1974 amendment); *see also Ted W. Dietderich*, 40 ECAB 963 (1989); *Thomas E. Stubbs*, 40 ECAB 647 (1989); *Thomas E. Montgomery*, 28 ECAB 294 (1977).

¹⁰ The Act itself specifically excludes the back from the definition of "organ." 5 U.S.C. § 8101(19).

¹¹ *E.g., Timothy J. McGuire*, 34 ECAB 189 (1982).

As used in the Act,¹² the term “disability” means incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.¹³ Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages.¹⁴ An employee who has a physical impairment causally related to his federal employment, but who nonetheless has the capacity to earn the wages he was receiving at the time of injury, has no disability as that term is used in the Act and is not entitled to compensation for loss of wage-earning capacity.¹⁵ When, however, the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his employment, he is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity.¹⁶ Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn, not upon actual wages lost.¹⁷

In the present case, appellant has not submitted any evidence supporting that for the periods March 10 to March 16, 1992 and October 9, 1992 to January 31, 1993 he had physical impairment causally related to his accepted employment injuries of lumbosacral strain or lumbar subluxation which prevented him from earning the wages he was receiving at the time of his injuries. As none of the factual or medical evidence submitted addresses such disability for employment, appellant has not established that he is entitled to loss of wage-earning capacity benefits for the periods delineated.

¹² 5 U.S.C. §§ 8101-8193.

¹³ *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).

¹⁴ See *Fred Foster*, 1 ECAB 21 at 24-25 (1947) (finding that the Act provides for the payment of compensation in disability cases upon the basis of the impairment in the employee’s capacity to earn wages, and not upon physical impairment as such).

¹⁵ See *Gary L. Loser*, 38 ECAB 673 (1987) (although the evidence indicated that appellant had sustained a permanent impairment of his legs because of work-related thrombophlebitis, it did not demonstrate that his condition prevented him from returning to his work as a chemist or caused any incapacity to earn the wages he was receiving at the time of injury).

¹⁶ *Bobby W. Hornbuckle*, 38 ECAB 626 (1987).

¹⁷ *George W. Coleman*, 38 ECAB 782 (1987).

Accordingly, the decisions of the Office of Workers' Compensation Programs dated July 2, May 13, April 3, February 21 and February 6, 1996 are hereby affirmed.

Dated, Washington, D.C.
September 4, 1998

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member