

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BARRY C. PETERSON and U.S. POSTAL SERVICE,
BULK MAIL CENTER, St. Paul, MN

*Docket No. 98-2547; Submitted on the Record;
Issued October 16, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
VALERIE D. EVANS-HARRELL

The issue is whether appellant has established that he sustained recurrences of disability for work on October 4, 7, 18, November 13, 14, 15, 25 and December 12, 1996 causally related to his July 7, 1987 employment injury.

The Office of Workers' Compensation Programs accepted that appellant's July 7, 1987 employment injury, incurred by bending to remove water from a mop wringer, resulted in a herniated disc at L5-S1 and a hemilaminectomy and discectomy for treatment of this condition. The Office paid appellant compensation for temporary total disability from July 17, 1987 when he stopped work, until he returned to work for four hours per day of light duty on March 12, 1990. On October 24, 1990 appellant began working six hours per day, with the Office paying him compensation for two hours per day.

In a report dated November 19, 1991, appellant's attending physician, Dr. Matthew Monsein, stated that appellant brought him "a list of the hours he missed at work due to increased back and leg pain." Dr. Monsein then stated, "I have completed the necessary forms indicating that [appellant] did miss the listed hours, but would suggest that in the future, as a way of saving time and cutting costs, we establish a protocol such that [appellant] is given permission to miss work secondary to his low back condition as long as the time lost is less than 12 hours or fewer within a 30-day period, it would not be necessary [that] he come in and see me and have me sign off on these hours. Hopefully, the workers' compensation carrier will accept this. I believe this would simplify things, certainly from my end and make life more efficient for all of us." In a report dated July 16, 1992, Dr. Monsein stated that appellant was doing quite well and had missed only 30 hours of work from February to July 1992, but had "missed two days (July 10 and July 15, 1992) because of what he describes as severe incapacitating back and left leg pain." Dr. Monsein noted that appellant indicated he tried to see the doctor immediately after the onset of the significant pain on July 10, 1992, but was unable to get an appointment until July 16, 1992. Dr. Monsein then stated, "I would expect that in the future he would continue to

experience occasional intermittent aggravations. I would hope that I would not have to see him frequently, but I am certainly willing to document these episodes if necessary.”

By decision dated January 29, 1993, the Office found that appellant had not established that he was totally disabled for work during intermittent periods from June 25 to November 22, 1991. The Office found that appellant had not presented medical evidence of probative value to support the claimed dates of total disability and that a blanket authorization for time off without seeing a doctor, as proposed in Dr. Monsein’s November 19, 1991 report, could not be sanctioned. Appellant requested a hearing, which was held on March 29, 1994. By decision dated June 30, 1994 and finalized July 7, 1994, an Office hearing representative found that appellant was entitled to compensation for temporary total disability only on those days he was seen by a doctor and that Dr. Monsein’s November 19, 1991 report was of no probative value as it showed no examination and no objective signs of disability.

In a report dated August 9, 1995, Dr. Monsein stated, “I can tell you that I do n[o]t think whether he works six or eight hours he will be causing any further harm to himself and I have no objection to him working eight hours per day. As I indicated to you and will continue to indicate, the patient is limited to six hours a day primarily because of his subjective complaints of pain.” On October 16, 1995 appellant returned to work for eight hours per day of light duty. In a report dated April 2, 1996, Dr. Monsein stated that appellant told him it was “rare for him to work a full eight-hour day and he estimates that in the past three months appellant has missed approximately one month secondary to his chronic pain complaints.” Dr. Monsein diagnosed myofascial pain syndrome and status post laminectomy with residual radiculopathy and noted that appellant’s course really had not shown any change over the past four years. He recommended that appellant be permanently restricted to working six hours per day. Appellant began working six hours per day of light duty on April 2, 1996 and the Office, by decision dated August 20, 1996, found that his position as a light-duty custodian for six hours per day represented his wage-earning capacity.

In a report dated August 19, 1996, Dr. Monsein stated that appellant was “experiencing a significant amount of anxiety and stress” and felt that his employer was harassing him, but that he “also has very real and objective medical impairment to both his shoulders as well as his low back.”¹ He stated that appellant’s examination remained the same, with marked decreased range of motion of his lumbar spine in all directions, an absent left Achilles reflex, a positive straight leg raising test on the left and “some touch-me-not behavior noted to palpation of the muscles in the back.” Dr. Monsein noted that he “gave the patient an out-of-work slip for the days that he missed, specifically August 7, 9, 12, 16, 19 and half of August 8.” In a note dated September 9, 1996, he noted that appellant also missed work on August 20, 21, 22, 23, 26, 28, 29, 30 and September 4 and 5, 1996 due to low back pain complaints. In a report dated September 10, 1996, Dr. Monsein stated that appellant’s physical examination on that date was unchanged and that he last saw him about one month earlier. In a report dated September 24, 1996, Dr. Monsein stated that “a patient’s ability to tolerate work is a subjective issue,” and: “I would have no objection to [appellant] working eight hours a day and I do not feel that if he works eight hours a day it is going to make his underlying condition worse. On the other hand, when the patient

¹ The shoulder condition is related to a nonwork automobile accident.

comes into my office stating that he is not able to tolerate the eight hour per day activities and he is emphatic about this, then my options are either to disregard his opinions or to support the patient's perspective." On October 30, 1996 the Office paid appellant compensation for 129.75 hours he missed from work from August 7 to September 27, 1996. This compensation was in addition to the compensation appellant was receiving for two hours per day pursuant to the Office's August 20, 1996 loss of wage-earning capacity determination.

On December 12, 1996 appellant filed a claim for compensation for October 4, 7 and 18, November 13, 14, 15 and 25 and December 12, 1996. In a note dated December 12, 1996, Dr. Monsein stated that appellant missed work on those days because of back and leg pain. In a report dated December 12, 1996, Dr. Monsein noted that he had not seen appellant since September, that appellant stated that overall he had been doing a little bit better and that appellant reported that he missed work because the back and leg pain were too severe and he felt that he was unable to work on the dates claimed. Dr. Monsein stated that appellant's examination on December 12, 1996 was essentially unchanged.

By letter dated February 18, 1997, the Office advised appellant that the medical evidence was not sufficient to support his time off from work and that he needed to submit medical evidence supporting that he was examined on the days he was claiming, that he must demonstrate that his work-related condition had worsened during those claimed days, that objective findings must be discussed by his physician and that pain was not considered compensable. In a report dated March 18, 1997, Dr. Monsein stated that every time he examined appellant he continued to have objective medical findings, specifically decreased range of motion of the lumbar spine, an absent left Achilles reflex and a positive straight leg raising test.

By decision dated April 16, 1997, the Office found that appellant was not entitled to compensation during the dates claimed between October 4 and December 12, 1996, with the exception of two and one-half hours on December 12, 1996, the one date Dr. Monsein examined appellant during this period.

On April 16, 1997 the Office received a medical report dated March 16, 1997 from Dr. Robert H.N. Fielden, to whom the Office had referred appellant for a second opinion on November 27, 1996. In this report Dr. Fielden, after setting forth appellant's history and findings on examination and reviewing the prior medical evidence, concluded:

"Basically, from the facts that I have, this man apparently had a herniated disc at the lumbosacral level, which appeared to result from a work activity. This was removed, and there were no residual, objective findings resulting specifically from that. There is no evidence of any residual radiculopathy. This man's motion activities in the back are bizarre and fluctuating, with a lot of guarding and posturing and pain behavior. He has been through chronic pain rehab[ilitation] and he has been followed by Dr. Monsein from the pain clinic. Unfortunately, as is often the case with anybody dealing with chronic pain patients, they enlist and trap the person in the pain response and begin to dictate what they feel they can and can [no]t do. This is what he has done with Dr. Monsein and then he comes to him, after he has had some time off and wants the papers signed. I appreciate the fact there is a lot of pain aspects in this man

and there may be a lot of psychological distress, etc., but, from an orthopedic standpoint, he probably should have some modified custodian job, but I believe he can work eight hours a day and there is no specific physical or orthopedic reason why he could not do this. He should work with restrictions because of a lower back surgery and, of course, length of time that he has been under these restrictions. He is a very difficult person to get to function otherwise. Repetitive bending, overhead lifting, lifting over 30 pounds and no long periods of standing or sitting without change in position, are generic restrictions for a diskectomy. There is no other medical evidence of a disability, other than, he had some surgery and presumably some residual weakness in the lumbosacral area as a result of that, but no other objective evidence of any orthopedic problem. No future care is required. As far as when his symptoms will cease, of course, that is a question no one can answer. He will cease to complain of it when he gets no reward for having them.”

By letter dated May 6, 1997, appellant requested a hearing. On June 2, 1997 appellant accepted the employing establishment’s offer of a modified custodian position for eight hours per day. Appellant submitted an October 29, 1997 report from Dr. Monsein diagnosing chronic low back and left leg pain, failed back surgery syndrome and chronic radiculopathy. He stated, “While [appellant] has a significant amount of stress in his life, I do not feel that ‘psychological factors or emotional factors’ *per se* have prevented him from working.” At the hearing held on April 28, 1998, appellant submitted a report from Dr. Monsein dated April 7, 1998. In this report, he noted that approximately two days per month appellant experienced increased back pain to the point that he did not feel he was capable of performing his work activities, that typically appellant called the doctor’s office and left a message, but that it was impossible for the doctor to see a patient with this type of problem within 24 hours. Dr. Monsein stated, “It is my opinion that [appellant] has chronic sciatica and that intermittently it is not unexpected that he will indeed irritate that left sciatic nerve which will subsequently cause him to experience increased pain and discomfort.” Dr. Monsein stated:

“Pain by definition is subjective. There is no way that a physician can evaluate how much pain a person is or is not having. Patients who have migraine headaches for example are also difficult to objectively evaluate for pain but we know that this is a very painful condition. [Appellant] has a chronic back problem with chronic sciatic nerve root findings.

“My feeling is that this in and of itself should be sufficient to justify his position. When [appellant] is not working, he is not getting paid. I believe that the patient is motivated and committed to trying to work as much as possible. I really cannot put things any clearer and hopefully this will at least clarify my position.”

By decision dated July 13, 1998, an Office hearing representative found that the medical evidence did not support that appellant was disabled during the period from October 4 to December 12, 1996, or that any such disability was causally related to appellant’s July 7, 1987 employment injury. The Office hearing representative found that appellant “failed to supply

sufficient medical evidence supportive of a change in the nature and extent of the injury-related condition.”

The Board finds that appellant has not established that he sustained recurrences of disability for work on October 4, 7, 18, November 13, 14, 15, 25 and December 12, 1996 causally related to his July 7, 1987 employment injury.

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.²

Appellant’s attending physician, Dr. Monsein, generally supported appellant’s claim for total disability for work on October 4, 7, 18, November 13, 14, 15, 25 and December 12, 1996 causally related to his July 7, 1987 employment injury. He, however, did not examine appellant between September 10 and December 12, 1996. Generally, findings on examination are needed to justify a physician’s opinion that an employee is disabled for work.³ However, in the present case, it is not clear what a physical examination on each of the claimed dates, which Dr. Monsein indicated was impracticable, would have added to the medical evidence. As early as July 26, 1993 he stated that appellant had reached a medical plateau and that Dr. Monsein had nothing further to offer him.

In his December 12, 1996 report, Dr. Monsein stated that appellant’s condition was essentially unchanged from when he last examined him on September 10, 1996. Dr. Monsein based his support for disability on the dates claimed from October to December 1996 on appellant’s complaints that his back and leg hurt too much for him to work. The Board has stated that when a physician’s statements regarding an employee’s ability to work consist only of a repetition of the employee’s complaints that he or she hurt too much to work, without objective signs of disability being shown, the physician has not presented a medical opinion on this issue or a basis for payment of compensation.⁴ Dr. Monsein stated in a March 18, 1997 report that appellant had objective findings every time he was seen and described these findings as diminished range of lumbar motion, and absent Achilles reflex and a positive straight leg raising test. The Office accepted that appellant had a permanent impairment of his left leg related to his July 7, 1987 employment injury and paid him a schedule award for this permanent impairment. The permanent impairment for which the Office paid appellant was related to a dysfunction of the S1 nerve root manifested by pain and discomfort, as reported by an Office referral physician, Dr. Thomas H. Comfort, in a June 17, 1988 report. Dr. Monsein related appellant’s disabling

² *Terry R. Hedman*, 38 ECAB 222 (1986).

³ *See Dean E. Pierce*, 40 ECAB 1249 (1989); *Paul D. Weiss*, 36 ECAB 720 (1985).

⁴ *John L. Clark*, 32 ECAB 1618 (1981).

pain during the period in question and during other periods for which the Office paid compensation, to chronic radiculopathy due to his July 7, 1987 employment injury.

The Office erred in its April 16, 1997 decision by stating that subjective complaints of pain are not compensable under the Federal Employees' Compensation Act. While there must be a proven basis for the pain, pain due to an employment-related condition can be the basis for payment of compensation for disability under the Act.⁵ However, Dr. Monsein's reports are insufficient to establish that appellant sustained recurrences of disability on the claimed dates.

The decision of the Office of Workers' Compensation Programs dated July 13, 1998 is hereby affirmed.

Dated, Washington, DC
October 16, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Valerie D. Evans-Harrell
Alternate Member

⁵ See *Sylvia Lucas (Richard Lucas)*, 32 ECAB 1582 (1981) (the Board found that the evidence established that the employee's symptom of angina pectoris was related to factors of his employment and that the employee was entitled to compensation for the period of disability due to the angina pectoris).