

U. S. DEPARTMENT OF LABOR
Employees' Compensation Appeals Board

In the Matter of SAMUEL L. NEELY and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Salisbury, NC

*Docket No. 99-1039; Submitted on the Record;
Issued October 5, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant has met his burden of proof in establishing that he sustained an injury in the performance of duty on May 8, 1998, as alleged.

The Board finds that the case is not in posture for decision on appeal and must be remanded for further development of the evidence.

An employee seeking benefits under the Federal Employees' Compensation Act¹ has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an "employee of the United States" within the meaning of the Act, and that the claim was filed within the applicable time limitations of the Act.² An individual seeking disability compensation must also establish that an injury was sustained at the time, place and in the manner alleged,³ that the injury was sustained while in the performance of duty,⁴ and that the disabling condition for which compensation is claimed was caused or aggravated by the individual's employment.⁵ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or occupational disease.⁶

¹ 5 U.S.C. §§ 8101-8193.

² *Elaine Pendleton*, 40 ECAB 1143 (1989).

³ *Robert A. Gregory*, 40 ECAB 478 (1989).

⁴ *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁵ *Steven R. Piper*, 39 ECAB 312 (1987).

⁶ *David J. Overfield*, 42 ECAB 718 (1991); *Victor J. Woodhams*, 41 ECAB 345 (1989).

There is no dispute that appellant is a federal employee, that he timely filed his claim for compensation benefits and that the incident occurred as alleged. Appellant, a nursing assistant, alleged that on May 8, 1998 he was lifting a patient who resisted causing a strain to his lower back and pain radiating down his left leg. However, the Office of Workers' Compensation Programs found that the evidence was insufficient to establish that appellant's diagnosed medical condition was causally related to the May 8, 1998 employment incident.

To support the claim appellant submitted employing establishment health records with a May 12, 1998 entry by Dr. Ada M. Fisher, a Board-certified family practitioner, indicating that appellant was diagnosed with a lumbar strain and restricted from lifting and pulling and a May 15, 1998 entry stating that appellant was 50 percent improved and continued on medication and work restrictions; a September 8, 1998 report of employee's emergency treatment by Dr. Fisher indicating that appellant would have permanent work restrictions; an August 28, 1998 report by Dr. David L. Kelly, Jr., a Board-certified neurosurgeon, who stated that appellant had back surgery from a herniated disc at L4-5 in his lumbar spine on July 30, 1998; July 24, 1998 office notes by Dr. Kelly noting that a computerized tomography (CT) scan performed for Dr. Fisher revealed a very large herniated disc, that appellant stated that he hurt his back in May 1998 and on examination appellant was in distress, could hardly sit still and had limited range of motion in back. Dr. Kelly stated that x-rays showed an extruded disc at L4-5 on the left consistent with appellant's clinical picture; a July 23, 1998 radiology report by Dr. Paul N. Karmin who interpreted the test as revealing a "left-sided protrusion at L5-S1 which narrows the lateral foramen and is producing compression of the existing nerve root. There is edema and enlargement of the exiting nerve root at this site. Incidental notes is made of a small central bulge at L4-5"; a July 24, 1998 message from Dr. Fisher to the Office, indicating that he saw appellant that day for the same type of pain he had in May but more severe and noting that he was not sure if this was a recurrence; reports of emergency treatment by Dr. Fisher, covering May 12, 1998 when he put appellant on restrictive duty until June 12, 1998 when he returned appellant to work with no restrictions; and employing establishment health records covering the period May 12 through August 5, 1998 indicating that appellant was seen on May 12, 1998 and diagnosed with a lumbar strain, that on June 12, 1998 the strain was essentially resolved and he was returned to work without restrictions, that on July 23, 1998 he was seen with complaints of pain in his hip and down the leg with CT scan showing nerve root irritation and that back surgery was scheduled for July 30, 1998 for extruded disc.

The Board finds that appellant has submitted evidence sufficient to establish a *prima facie* case and to require further development of the evidence. In the instant case, appellant submitted a July 23, 1998 message from Dr. Fisher, a Board-certified family practitioner, to the Office stating that appellant was seen for the same type of pain he had in May, though more severe, that appellant had not been lifting, etc. when the pain returned and he was being referred to a neurosurgeon for evaluation. Also submitted was a July 24, 1998 report by Dr. Kelly, Jr., a Board-certified neurosurgeon, who stated that appellant hurt his back in May 1998, felt better for a few days then suffered pain down the left leg and that a CT scan and x-rays revealed a herniated disc at L4-5.

The Board finds that the record as a whole contains a history of the injury, a diagnosis and absence of any other trauma, and in particular Dr. Fisher's July 23, 1998 message which

notes an absence of any other trauma and Dr. Kelly's July 24, 1998 report, which contains a diagnosis supported by CT scan, x-ray and physical examination and notes an absence of prior surgery, are sufficient to require further development of the record by the Office.⁷ The evidence submitted by appellant raises an uncontroverted inference of causal relationship between appellant's diagnosed condition and the May 8, 1998 employment-related incident.

On remand, the Office should further develop the medical evidence as appropriate as appropriate. After such development of the case record as the Office deems necessary, a *de novo* decision shall be issued.

The decisions of the Office of Workers' Compensation Programs dated November 30 and July 29, 1998 are set aside and the case is remanded for further action consistent with this decision.

Dated, Washington, DC
October 5, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

⁷ *Rebel L. Cantrell*, 44 ECAB 660 (1993); *John J. Carlone*, 41 ECAB 354 (1989).