

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HARVEY WAROFF and DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE - APPEALS DIVISION, Sunrise, FL

*Docket No. 99-240; Submitted on the Record;
Issued April 11, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant suffered a recurrence of his accepted June 4, 1991 injury on or about September 10, 1996 as alleged.

On June 4, 1991 appellant, then a 48-year-old appeals officer, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that he received pains in his neck and right arm, including tingling in the fingers of the right hand as a result of carrying a suitcase while he was traveling for business for the employing establishment. Appellant's claim was accepted for cervical strain.

On September 17, 1996 appellant filed a notice of recurrence of disability and claim for continuation of pay/compensation (Form CA-2a) alleging that his condition recently became more intense.

In response to a January 10, 1997 request from the Office of Workers' Compensation Programs for further information, appellant submitted a medical report dated January 29, 1997 by Dr. Brad S. Chayet, a Board-certified orthopedic surgeon, wherein Dr. Chayet noted that appellant was presently under his care for a chronic herniated disc with right-sided radiation. He stated that this problem appeared to be chronic in nature as there was indeed a herniated disc present and that appellant would be seen by a surgeon.

In a decision dated March 18, 1997, the Office found that the medical evidence submitted was not sufficient to establish disability and/or need for extensive medical treatment beginning September 10, 1996 was causally related to appellant's accepted work condition. Accordingly, the Office denied appellant's claim for recurrence.

On February 6, 1998 appellant filed a request for reconsideration. In support thereof, he submitted a medical report dated June 23, 1997 by Dr. Alan S. Routman, a Board-certified orthopedic surgeon, he opined that a review of appellant's records indicated that his symptoms were initially felt to be a cervical sprain, but later diagnosed as being cervical spondylotic disease at C5-6 with C6 radiculitis as well. He continued:

“Thus, it would appear to me that the symptoms in your neck and right upper extremity, which were later diagnosed again as cervical spondylosis, cervical disc herniation and C6 radiculitis, would be due in fact to your work-related injury of June 2, 1991. It is notable that the spondylotic changes at both C5-6 and to a lesser degree at C6-7 would have preexisted that date of injury, but certainly your work-related occurrence appears to be an exacerbation of a preexisting condition. It appears that the preexisting degenerative conditions were affected by the injury of June 2, 1991 triggering the initial concrete linear relationship between your symptoms, your preexisting condition and your work-related onset.

“As noted in later medical records, it appears that there is reference to the fact that your conditions could worsen over time. This, of course, is related to the work-related exacerbation of your preexisting condition. In my medical opinion it appears clear-cut that the preexisting conditions at C5-6 and C6-7 were directed affected by the 1991 injury through, again, an aggravation or acceleration of preexisting disease.”

The Office referred this case to Dr. Georges Boutin, a Board-certified orthopedic surgeon, for a second opinion. In a medical report dated June 24, 1998, Dr. Boutin found that appellant was “status post cervical sprain with associated multiple levels of degenerative disc disease.” Dr. Boutin continued:

“In reviewing this case, it definitely appears he may have sustained a cervical sprain while lifting luggage, but the multiple levels of degenerative disc disease was a preexisting condition. The patient states his symptoms of tingling of his index finger and thumb have been persistent since 1991; however, I feel these symptoms are more related to the degenerative disc disease than the cervical sprain itself and would have appeared even without the carrying of luggage incident.”

In a decision dated July 8, 1998, the Office found that the weight of the evidence was with the medical opinion of Dr. Boutin.

The Board finds that the case is not in posture for decision on the issue of whether appellant sustained a recurrence of his work-related injury due to an unresolved conflict in medical opinion.

When an employee claims a recurrence of disability causally related to an accepted employment injury, he or she has the burden of establishing by the weight of the reliable, probative and substantial medical evidence that the claimed recurrence of disability is causally related to the accepted injury. As part of this burden appellant must furnish 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 employment factors and supports that conclusion with sound medical reasoning.¹

¹ *Alfredo Rodriguez*, 47 ECAB 437, 441 (1996); *Jose Hernandez*, 47 ECAB 288, 293-94 (1996).

In the instant case, appellant furnished the report of Dr. Routman, who opined that appellant's preexisting degenerative condition was affected by the injury of June 2, 1991 and therefore, "there appears to be a concrete linear relationship between your symptoms, your preexisting condition and your work-related onset." However, the second opinion physician, Dr. Boutin, disagreed, finding that appellant's current symptoms were "related to the degenerative disc disease and would have appeared even without the carrying of luggage incident." Therefore, there existed a conflict between the opinion of appellant's treating physician and the physician making the examination on behalf of the Office.²

Section 8123(a) of the Federal Employees' Compensation Act provides that when there is a disagreement between a physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict. Accordingly, the case record will be remanded to the office for resolution of the conflict. On remand, the Office should refer appellant, along with the case record and a statement of accepted facts, to an appropriate specialist for a rationalized opinion on the issue in conflict. After such further development as the Office deems necessary, it should issue an appropriate decision.

The decision of the Office of Workers' Compensation Programs dated July 8, 1998 is set aside and the case is remanded for further proceedings consistent with this opinion.

Dated, Washington, D.C.
April 11, 2000

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member

² Appellant argues that the Office failed to consider the report of Dr. F. Gary Gieseke. After a thorough review of the record, this Board has found no report by Dr. Gieseke.