

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLES T. NEMCHICK and U.S. POSTAL SERVICE,
POST OFFICE, Binghamton, NY

*Docket No. 99-1741; Submitted on the Record;
Issued August 28, 2000*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant has met his burden of proof in establishing that he sustained a recurrence of disability on or about June 26, 1996; and (2) whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a).

On September 24, 1987 appellant, then a 35-year-old letter carrier, filed a claim for compensation benefits alleging that he sustained an injury to his lower back when, picking up a tray while bending his knees and his back popped. The Office accepted that he sustained an employment-related lumbosacral sprain and paid him appropriate compensation benefits. Appellant did not stop work but began performing limited-duty work.

On February 6, 1990 appellant filed a CA-2a, notice of recurrence of disability. He indicated a recurrence of back spasms on January 19, 1990 which occurred since the employment-related injury of September 24, 1987. Appellant did not stop work at this time. By letter dated October 28, 1991, the Office accepted that appellant sustained a recurrence of disability for aggravation of lumbosacral sprain.¹

On June 26, 1996 appellant filed a Form CA-2a, notice of recurrence of disability. He indicated a recurrence of chronic lumbar syndrome and a bulging disc which had progressively become worse since the employment-related injury of September 24, 1987. Appellant stopped work on June 27, 1996. He indicated in a separate statement that Dr. Kashan S. Desai, an orthopedic surgeon, placed appellant on a work restriction whereby appellant was advised not to carry a mailbag on his shoulder.

By letter dated July 23, 1996, the Office informed appellant that he must provide a statement regarding any possible change in his light-duty job such that appellant would be

¹ Appellant was placed on limited duty effective April 3 through June 3, 1991.

unable to perform these duties and a narrative report from a physician which describes objective findings which show that appellant's condition prohibits appellant from performing the light-duty job.

In support of his claim for recurrence, appellant submitted medical reports from Dr. Desai dated January 3, August 1 and November 4, 1996 and May 8, 1997; and duty status reports prepared by Dr. Desai dated November 4, 1996 and May 8, 1997. His report dated January 3, 1996 diagnosed appellant with chronic lumbar syndrome. Dr. Desai indicated that appellant remained intermittently symptomatic in the area of the lumbar spine and noted appellant did not have any true radicular pain. He noted appellant's work restrictions whereby appellant was to avoid bending and lifting activities. Dr. Desai's report dated August 1, 1996 indicated a diagnosis of chronic lumbar syndrome. He noted that appellant had ongoing symptoms and that exacerbation occurs at times secondary to work-related activities which required repetitive bending or lifting. Dr. Desai also noted appellant was subject to work restrictions and advised to avoid bending, lifting and twisting. He indicated appellant's persistent ongoing back symptoms were related to appellant's employment injury. Dr. Desai's November 4, 1996 report diagnosed appellant with chronic lumbar syndrome with left radiculopathy, and noted appellant experienced intermittent sharp pain. Appellant's work restrictions included avoiding bending, lifting and twisting. Dr. Desai's medical report dated May 8, 1997 indicated that appellant remained symptomatic in the area of the lumbar spine without any episodes of acute spasm. He noted appellant is subject to work restrictions. The duty status reports prepared by Dr. Desai note a diagnosis of chronic lumbar syndrome with a lifting restriction of 10 to 25 pounds and indicated that appellant was able to perform limited duty.

The employing establishment submitted a position description as well as a note indicating appellant resumed full duty prior to the recurrence. The supervisor indicated that appellant had other medical conditions, nonwork related which could prevent him from performing his duties.²

On April 8, 1998 the Office referred appellant for a second opinion to Dr. Albert B. Kochersperger, a Board-certified orthopedic surgeon. The Office provided Dr. Kochersperger with appellant's medical records, a statement of accepted facts as well as a description of appellant's employment duties.

In a medical report dated April 8, 1998, Dr. Kochersperger indicated that he reviewed the records provided to him and performed a physical examination of appellant. He noted that he reviewed appellant's past x-rays and magnetic resonance imaging (MRI) scan. Dr. Kochersperger noted objective findings of left lumbar tenderness and left sciatic notch tenderness and positive straight leg raising testing on the left side which support that appellant's condition is active and causing symptoms. He indicated that appellant continued to be partially

² On August 8, 1997 and January 26, 1998 appellant participated in two telephone conference calls with a claims examiner. In the August 8, 1997 conference, appellant's manager noted that appellant made a bid for a position as a regular carrier, which required performance of full-time carrier duties and appellant was awarded this job on July 20, 1996. Thereafter, appellant was placed in a limited-duty position on July 27, 1997. In the January 26, 1998 conference, appellant noted that he bid and was awarded a position; however, he never performed the duties of the position. Appellant stated that he was placed on light duty.

disabled; however, there were no medical findings to connect the current findings to the injury of September 24, 1987. Dr. Kochersperger indicated that appellant's diagnosis was not an aggravation of a preexisting condition, either temporary or permanent. He indicated on the work capacity evaluation that appellant was able to work 8 hours a day subject to limitations, with weight restriction of 20 pounds.

In a decision dated July 16, 1998, the Office denied appellant's claim for recurrence of disability on the grounds that he did not submit sufficient medical evidence to establish that he sustained a recurrence of disability on or about June 26, 1996 which was causally related to the accepted employment injury sustained September 24, 1987.

Appellant requested reconsideration of the Office decision dated July 16, 1998. He submitted additional medical evidence. Appellant submitted progress notes from Dr. Desai dated September 8, 1997, February 25 and July 27, 1998; a duty status report dated February 25, 1998 and a narrative statement.

By decision dated January 11, 1999, the Office denied appellant's request for a merit review on the grounds that the evidence submitted was immaterial and not sufficient to warrant a review of the prior decision.

The Board finds that this case is not in posture for a decision due to a conflict in the medical evidence.

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establish that he 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 show that he 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 requirements.³

In the present case, appellant has submitted evidence from his treating physician, Dr. Desai, an orthopedic surgeon, who indicated in his report dated August 1, 1996 that appellant had ongoing back symptoms with exacerbation relating to the employment injury of September 24, 1987. On the other hand, an Office referral physician, Dr. Kochersperger, an orthopedic surgeon, has indicated that appellant continued to be partially disabled; however, there were no medical findings to connect the current symptoms to the injury of September 24, 1987. Accordingly, there exists a conflict in the medical evidence. Section 8123(a) of the Federal Employees' Compensation Act provides that when there is a disagreement between the 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.⁴ Accordingly, the case will be remanded to the Office for resolution of the conflict. On remand, the Office should refer appellant, along with a statement of accepted facts and the medical

³ *Terry R. Hedman*, 38 ECAB 222 (1986).

⁴ *Joseph D. Lee*, 42 ECAB 172 (1990).

records, to an appropriate specialist for an impartial evaluation and report including a rationalized opinion as to whether appellant's condition was causally related to the September 24, 1987 employment injury.⁵ After such further development as the Office deems necessary, it should issue an appropriate decision.

The decisions of the Office of Workers' Compensation Programs dated January 11, 1999 and July 16, 1998 are set aside and the case is remanded for further action consistent with this decision.

Dated, Washington, D.C.
August 28, 2000

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁵ Due to the Board's disposition of the first issue in this case it is not necessary to address the second issue.