

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BERNARD A. DAVIS and U.S. POSTAL SERVICE,
POST OFFICE, Albany, NY

*Docket No. 99-2030; Submitted on the Record;
Issued November 16, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant has met his burden of proof in establishing that he sustained two recurrences of disability on April 19 and September 29, 1998 due to his July 24, 1994 employment injury; and (2) whether the Office of Workers' Compensation Programs' refusal to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

The Office accepted appellant's claim for aggravation of lumbar disc prolapse as a result of a July 24, 1994 employment injury. Appellant returned to light-duty work on August 7, 1996 and sustained two recurrences of disability, the last occurring on December 1, 1996, which was accepted by the Office. Appellant returned to a rehabilitation position of a modified distribution clerk on December 8, 1996 with restrictions including no carrying, climbing, bending or kneeling, 1 hour of intermittent lifting of 20 pounds or less, 1 hour of intermittent standing, walking, pushing and pulling, 8 hours of intermittent sitting and 4 hours of intermittent reaching above the shoulder.

On April 27, 1998 appellant filed a claim for a recurrence of disability, Form CA-2a, commencing April 19, 1997 when he was working at a copying machine for about 15 minutes when he felt pain in both legs and his lower back. Appellant stated that the pain was so intense that he went back to the computer and sat for about 15 minutes but when he got up he had trouble walking. Appellant took sick leave from April 19 to April 22, 1998.

On October 6, 1998 appellant filed a claim for a recurrence of disability, Form CA-2a, commencing September 29, 1998 due to the July 24, 1994 employment injury, stating that it "seem[ed]" that prolonged sitting or even standing for over 10 minutes caused severe pain in his low back and legs, which were the areas of the original employment injury. Appellant stated that he missed work from September 29 to October 5, 1998 when he returned to working four hours a day.

By letter dated October 21, 1998, the Office informed appellant that additional evidence was necessary to show either that there was a change in the nature and extent of his injury-related condition or a change in the nature and extent of the light-duty requirements.

Appellant submitted physical therapy notes dated from April 30 through July 13, 1998.

By letter dated November 9, 1998, the Office again informed appellant of the evidence that was necessary to establish his claim.

Appellant submitted a magnetic resonance imaging (MRI) scan dated December 11, 1998, which stated that there was no evidence of disc herniation, significant spinal stenosis or obvious neural compression and there was complete resolution of previously seen posterior central and inferior L5-S1 disc herniation. Additionally, the scan showed predominantly anterior spondylosis from T11 through L2 and multilevel facet degenerative changes of mild to moderate degree.

Appellant submitted a report from the orthopedic associates dated April 23, 1998 with the typed initials "amc," which contained the diagnosis lumbar syndrome with right radiculopathy. The report stated that appellant complained of increased pain as of April 21, 1998, that he had no new symptoms and had an exacerbation of the symptoms he had been experiencing for approximately the last three years, which included pain in the lower back as well as bilateral pain in the posterior aspect of the thighs.

Appellant also submitted progress reports from his treating physician, Dr. Kamlesh S. Desai, a Board-certified orthopedic surgeon, dated July 16 and October 1, 1998 and work restrictions dated October 1, 1998. In his July 16, 1998 report, Dr. Desai diagnosed acute exacerbation of lumbar syndrome and stated that appellant had shown some improvement after receiving physical therapy. He prescribed treatment. In his October 1, 1998 report, Dr. Desai stated diagnosed acute exacerbation of the lumbar right radiculopathy and disc herniation at L5-S1. He noted that appellant returned with an acute exacerbation of the back and right leg pain. Dr. Desai concluded that appellant was temporarily totally disabled because of the increased symptoms for at least the next few days and should then return to work on four hours a day basis to see if he could tolerate working. On October 1, 1998 Dr. Desai restricted appellant to 20 minutes of intermittent sitting, no standing, 1 hour of intermittent walking, lifting and pushing and pulling and no carrying, climbing, bending, kneeling and 2 hours of reaching above the shoulder. He stated that appellant should only work four hours a day as of October 5, 1998.

By decision dated January 6, 1999, the Office denied appellant's claim.

By letters dated January 25 and March 22, 1999, appellant requested reconsideration of the Office's decision and submitted a report from Dr. Desai dated February 18, 1999. In that report, Dr. Desai reiterated his diagnosis of lumbar syndrome with right radiculopathy and additionally diagnosed degenerative disc syndrome at L5-S1, some resolution in the size of the disc herniation and persistent degenerative changes at the L5-S1 disc and facet joint level. He stated that due to the last MRI scan, which showed some resolution or improvement of the disc herniation, appellant's symptoms had improved to a normal level. Dr. Desai prescribed

avoidance of repetitive bending, lifting and twisting and a reduction in overall work time until appellant's back and right leg got into better control.

By decision dated March 22, 1999, the Office denied appellant's request for reconsideration.

The Board finds that appellant did not meet his burden of proof in establishing that he sustained recurrences of disability on April 19 and September 29, 1998 due to his July 24, 1994 employment injury.

An individual who claims a recurrence of disability, due to an accepted employment-related injury, has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which compensation is claimed is causally related to the accepted injury.¹ 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 establishes 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.² As part of this burden, the employee must show a change in the nature and extent of the light-duty job requirements or a change in the nature and extent of the injury-related condition.³ This burden includes the necessity of furnishing 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 the employment injury and supports that conclusion with sound medical reasoning.⁴ An award of compensation may not be made on the basis of surmise, conjecture, or speculation or an appellant's unsupported belief of causal relation.⁵

None of the medical evidence appellant submitted explained how the recurrences of disability on April 19 and September 28, 1998 resulted from his July 24, 1994 employment injury. The physical therapy notes dated from April 30 through July 13, 1998 are not probative because a physical therapist does not constitute a physician under the Federal Employees' Compensation Act.⁶ The December 11, 1998 MRI scan showed no disc herniation and complete resolution of a previously seen posterior central and inferior L5-S1 disc herniation. It also showed anterior spondylosis from T11 through L2 and multilevel facet degenerative changes of mild to moderate degree but there was no explanation how these changes resulted from the July 24, 1994 employment injury.

¹ *Dominic M. DeScala*, 37 ECAB 369 (1986); *Bobby Melton*, 33 ECAB 1305 (1982).

² *George DePasquale*, 39 ECAB 295, 304; *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

³ *Id.*

⁴ *See Nicolea Brusco*, 33 ECAB 1138 (1982).

⁵ *See William S. Wright*, 45 ECAB 498, 503 (1994).

⁶ *See Jerre R. Rinehart*, 45 ECAB 518, 520 (1994).

In his July 16, 1998 report, Dr. Desai diagnosed acute exacerbation of lumbar syndrome but did not state that appellant's physical condition had changed and did not relate appellant's recurrences of disability to appellant's employment. In his October 1, 1998 report, Dr. Desai reiterated his diagnosis of acute exacerbation of the lumbar right radiculopathy and additionally diagnosed disc herniation at L5-S1. He reduced appellant's restrictions from the previous eight hours of intermittent sitting to twenty minutes of intermittent sitting, from one hour of intermittent standing to no standing and four hours of intermittent reaching above the shoulder to two hours of reaching above the shoulder. Dr. Desai stated that appellant should work only four hours a day. He, however, provided no rationalized medical explanation as to how the increase in appellant's restrictions resulted from the recurrences of disability on April 19 and September 29, 1998 and were related to the July 24, 1994 employment injury. His report, therefore, did not establish that appellant's medical condition had changed due to his employment.

The Board finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a) did not constitute an abuse of discretion.

To require the Office to reopen a case for merit review under section 8128(a) of Act, the Office's regulations provide that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.⁷ A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or arguments that meets at least one of the standards described in section 10.606(b)(2).⁸ If reconsideration is granted, the case is reopened and the case is reviewed on the merits.⁹

In the present case, appellant submitted Dr. Desai's February 18, 1999 report to support his request for reconsideration. In his report, Dr. Desai reiterated his diagnosis of lumbar syndrome with right radiculopathy and additionally diagnosed degenerative disc syndrome at L5-S1, with some resolution in the size of the disc herniation and persistent degenerative changes at the L5-S1 disc and facet joint level. He stated that appellant's symptoms had improved to a normal level and prescribed restrictions. Dr. Desai's report did not explain that any change in appellant's physical condition was due the April 19 and September 29, 1998 recurrences of disability and resulted from the July 24, 1994 employment injury. His report, therefore, does not constitute relevant and pertinent new evidence not previously considered by the Office. Appellant has, therefore, not shown that the Office erroneously applied or interpreted a specific point of law, he did not advance a relevant legal argument not previously considered by the Office or submit relevant and pertinent new evidence not previously considered by the Office.

⁷ Section 10.606(b)(2)(i-iii).

⁸ Section 10.608(a).

⁹ *Id.*

Accordingly, the decisions of the Office of Workers' Compensation Programs dated March 22 and January 6, 1999 are hereby affirmed.

Dated, Washington, DC
November 16, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member