

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EARL L. STEVENS and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Pittsburgh, PA

*Docket No. 01-286; Submitted on the Record;
Issued September 18, 2001*

DECISION and ORDER

Before DAVID S. GERSON, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issue is whether appellant sustained disability due to an injury in the performance of duty.

On September 9, 1999 appellant, then a 46-year-old housekeeping aide, filed a claim for a traumatic injury alleging that on September 8, 1999 he injured his lower back when an elevator door struck his upper torso.¹

By decision dated October 29, 1999, the Office denied appellant's claim. By letter dated November 8, 1999, he requested an oral hearing. A hearing was held on March 22, 2000, and the hearing representative issued a decision on June 20, 2000 finding that the September 8, 1999 incident occurred as appellant alleged, stating specifically that appellant "was hit on the right side of his body by an elevator door, while in the performance of duty, on September 8, 1999."

The hearing representative then remanded the case to the Office to obtain further medical opinion evidence either from Dr. Richard B. Kasdan, appellant's treating physician and Board-certified in psychiatry and neurology, or a second opinion physician. By letter dated August 22, 2000, the Office referred appellant, his medical records and a statement of accepted facts to Dr. Stephen R. Bailey, Board-certified in orthopedic surgery, for a second medical opinion.²

¹ Appellant had a prior December 3, 1992 work-related injury and subsequently returned to a light-duty position as a housekeeping aide. Appellant has not worked since September 8, 1999, alleging that the employing establishment refused to find another light-duty position for him after the Office of Workers' Compensation Programs denied the current claim.

² The statement of accepted facts notes that the "elevator doors struck [appellant] on the upper torso," as appellant stated in his claim form. However, the hearing representative found that appellant "was hit along the right side of his body by an elevator door...."

By decision dated September 27, 2000, the Office denied appellant's claim.³

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

In a report dated September 10, 1999, Dr. Kasdan, appellant's treating physician, noted that he related a work-related injury on September 9, 1999.⁴ He noted appellant's pain in the back, buttocks and right thigh "which is worse with lumbar extension." Dr. Kasdan also noted a prior 1993 injury which resulted in appellant's loss of six months' work.⁵ Upon examination, he noted significant reduction of lumbar extension and pain with straight leg raising, supine at 40 degrees. Dr. Kasdan noted no weakness, sensory loss, reflex change or Babinski's reflex. He ordered physical therapy and scheduled a follow-up appointment in two weeks. Appellant was off work until the next appointment.

In a report dated September 27, 1999, Dr. Kasdan stated that appellant felt better but remained symptomatic with pain down his right leg with lumbar extension. He then ordered a lumbar magnetic resonance imaging (MRI) scan. Appellant remained off work.

In a report dated September 27, 1999, Dr. Kasdan stated that the MRI scan revealed midline and right-sided herniation at L5-S1 and a right lateral bulge and possible small herniation at L4-5. He further noted that an electromyography test revealed positive, sharp waves in paraspinals "indicative of nerve irritation."

In an attending physician's report dated September 30, 1999, Dr. Kasdan stated that appellant was totally disabled from September 10 to October 20, 1999 based on a September 8, 1999 work-related injury. In a report dated the same day, Dr. Kasdan stated that he was treating appellant for lumbar radiculopathy.

In a report dated October 20, 1999, Dr. Kasdan stated that appellant fractured a bone in his right foot in a fall at home and that incident increased his back pain and tingling in his right foot. Upon examination, he noted appellant's restriction of lumbar extension with pain.

In a report dated November 22, 1999, Dr. Kasdan stated that appellant remained symptomatic with pain in the back, buttocks and right leg and was totally disabled from work. Upon examination, he noted restriction of lumbar extension and pain with supine straight right leg raising. Dr. Kasdan opined that appellant's disc condition at L5-S1 had worsened and now affected his S1 roots and ordered a second MRI scan.

³ The Board notes that the Office initially denied appellant's claim for a traumatic injury. The hearing representative then found that the injury occurred and remanded the case for further medical evaluation of appellant's cervical strain. The Office developed the case further and then terminated appellant's benefits finding that he had no residuals or disability of his accepted thoracic strain and contusion injuries.

⁴ The Board notes that Dr. Kasdan stated in several reports that the date of the injury was September 8, 1999 while in other reports he noted September 9, 1999.

⁵ The record reveals a December 1992 work-related injury.

In a report dated December 22, 1999, Dr. Kasdan stated that appellant “could do light-duty work with a maximum lifting of 10 pounds. However, at this point I think he is better off having this thing surgically repaired.”

In a report dated December 23, 1999, Dr. Kasdan noted a familiarity with appellant’s history of injury, noting his symptoms as reported on September 10, 1999. Upon examination the prior day, he noted “unrelenting right thigh pain.” Dr. Kasdan stated that appellant “had a large right lateral disc at L4-5 that was a direct result of the work injury of September 9, 1999. Accordingly, I sent him to Dr. Peter Sheptak for surgical correction of this problem.”

In a report dated September 18, 2000, Dr. Bailey, the Office’s second opinion physician, stated that he had examined appellant that day and noted a familiarity with appellant’s September 8, 1999 history of injury. Upon examination of the lower extremity, he noted sensation intact to light touching, manual motor testing was normal, seated leg strength negative at 90 degrees, measured trunk flexion was 60 degrees with complaints of low back “pulling,” 30 degrees of extension with right thigh pain and tingling in toes and lumbar tilting was 30 degrees with complaints of “pulling.” Dr. Bailey noted no tenderness and no evidence of spasm to explain restricted range of motion of the trunk. He stated that appellant’s soft tissue sprain and contusion had resolved, but noted that “the impact from the elevator door was insufficient to cause a spine trauma or an aggravation of a preexisting spine condition.”

Section 8123(a) of the Federal Employees’ Compensation Act⁶ provides, “if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.”

In this case, appellant’s treating physician, Dr. Kasdan, consistently attributed appellant’s pain in the back, buttocks and right thigh to his employment injury. He also found that based on an MRI scan a disc herniation at L5-S1 and a large right lateral disc at L4-5 were related to the September 8, 1999 work-related injury. In his December 23, 1999 report, Dr. Kasdan noted appellant’s unrelenting thigh pain. On the other hand, the Office’s second opinion physician, Dr. Bailey, indicated that appellant’s soft tissue injury had resolved. He also noted that the September 8, 1999 injury was insufficient to cause spine trauma or an aggravation of a preexisting condition. Due to this conflict of medical opinion evidence regarding the causal relationship between appellant’s current condition and his employment injury, on remand, the Office should refer appellant, a statement of accepted facts and a list of specific questions to a Board-certified physician, for an impartial medical evaluation. After this and such other development as the Office deems necessary, the Office should issue a new decision.

⁶ 5 U.S.C. §§ 8101-8193, 8123(a).

The September 27, 2000 decision of the Office of Workers' Compensation Programs is hereby set aside and remanded for further development consistent with this opinion.⁷

Dated, Washington, DC
September 18, 2001

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member

⁷ Appellant, through counsel, requested reconsideration in a letter dated October 19, 2000, the same day as appellant's letter of appeal to the Board, also sent through counsel. The Board and the Office may not have concurrent jurisdiction over the same issue in a case; *see Russell E. Lerman*, 43 ECAB 770 (1992) and *Douglas E. Billings*, 41 ECAB 880 (1990). Furthermore, the Board may not consider new evidence on appeal. 20 C.F.R. § 501.2(c).