

**United States Department of Labor
Employees' Compensation Appeals Board**

A.S., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
CLEMENT J. ZABLOCKI MEDICAL CENTER,)
Milwaukee, WI, Employer)

Docket No. 12-1260
Issued: November 13, 2012

Appearances:

Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 24, 2012 appellant, through his attorney, filed a timely appeal of an April 30, 2012 Office of Workers' Compensation Programs' (OWCP) merit decision denying a recurrence of disability. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained a recurrence of disability on August 3, 2001 causally related to his January 6, 1993 employment injury.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On January 6, 1993 appellant, then a 43-year-old health care technician, slipped and fell due to water on the floor of the employing establishment. OWCP accepted that he sustained a cervical strain and low back strain. It subsequently included a herniated disc at L5-S1 on October 5, 1993 and authorized surgery. Appellant did not undergo surgery.

Appellant was injured in a motor vehicle accident on December 5, 1993. In a report dated January 31, 1994, Dr. Andrew J. Seter, an internist, stated that appellant's condition had improved since November 22, 1993 and that his radiculopathy was resolving. A myelogram dated May 4, 1993 demonstrated a large disc herniation at L5-S1 with significant displacement of the right S1 nerve root. On March 8, 1994 OWCP placed appellant on the periodic rolls.

By decision dated April 19, 1995, OWCP granted appellant a schedule award for 14 percent impairment of his right leg.

On September 25, 1999 appellant was involved in a motor vehicle accident which resulted in post-traumatic neck pain. Appellant underwent an electromyogram and nerve conduction studies which demonstrated mild carpal tunnel syndrome on the right. In a report dated January 11, 2000, Dr. Kevin A. Weidman, a Board-certified orthopedic surgeon, noted that appellant was injured in a motor vehicle accident in September 1999 which resulted in marked increased in his low back pain. The record contains treatment notes from September 25, 1999 through November 22, 2000 from Dr. Weidman, who examined appellant again on September 16, 2003. Dr. Weidman recommended surgery on October 11, 2003 and attributed appellant's neck and back pain to his motor vehicle accident. He stated, "The accident had aggravated the asymptomatic neck and back pain to a point that was beyond its normal progression causing severe pain..." On August 30, 2004 appellant filed a claim for compensation. He did not provide the dates of disability and the form was not completed by the employing establishment.

Appellant requested an additional schedule award on May 24, 2004. Dr. Weidman examined appellant on October 22, 2004 and stated that he experienced pain in his lower back and cervical spine. He provided an impairment rating. On August 26, 2005 Dr. Weidman discussed appellant's impairment rating and opined that appellant could perform sedentary work lifting up to 10 pounds.

By decision dated August 23, 2006, OWCP granted appellant a schedule award for 10 percent of the left leg.

In a report dated January 23, 2006, Dr. Raj D. Rao, a Board-certified orthopedic surgeon of professorial rank, examined appellant. He diagnosed multilevel degenerative cervical and lumbar spondylosis, chronic right-sided radicular sensory deficits and musculoligamentous neck and low back pain. Dr. Rao described appellant's 1993 employment injury and noted that appellant stopped work in 2001. He examined appellant on February 13, 2006 and recommended conservative treatment.

Appellant filed a claim for a recurrence of disability on February 11, 2008 alleging that he sustained total disability on August 3, 2001 due to his January 6, 1993 employment injury. In a letter dated November 24, 2009, OWCP requested that he submit additional factual and medical evidence in support of his claim.

By decision dated November 2, 2011, OWCP denied appellant's claim for a recurrence of disability. It found that the medical evidence was not sufficient to establish a period of disability on or after August 3, 2001 due to appellant's January 6, 1993 employment injury. OWCP noted that Dr. Rao did not include a detailed history of injury.

Appellant requested an oral hearing before an OWCP hearing representative on November 10, 2011. On November 24, 2009 he stated that he was performing regular duty at the time of his recurrence and that his condition had degenerated from wearing lead jackets. Appellant testified at the February 14, 2012 oral hearing that he resigned from the employing establishment in October 2001 because he was unable to continue working. He testified that he returned to full duty and was performing his full duties when he resigned in 2001. During the last five years of work, appellant wore a lead jacket more than eight hours a day to allow imaging in the operating room. He also stated that he lifted trays weighing 25 to 30 pounds.

By decision dated April 30, 2012, OWCP's hearing representative denied appellant's claim finding insufficient medical evidence to establish that his disability for work on or after August 2011 was due to the 1993 injury.

LEGAL PRECEDENT

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness. This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.² Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between his recurrence of disability commencing August 2001 and his 1993 employment injury.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 employment factors and supports that conclusion with sound medical reasoning.⁴

² 20 C.F.R. § 10.5(x).

³ *Dominic M. DeScala*, 37 ECAB 369, 372 (1986); *Bobby Melton*, 33 ECAB 1305, 1308-9 (1982).

⁴ *See Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

ANALYSIS

Appellant filed a notice of recurrence alleging that his work-related condition worsened in August 2001 such that he was totally disabled. He has not submitted any medical evidence addressing an onset of total disability in August 2001. The relevant medical evidence consists of a series of reports from Drs. Rao and Weidman.

Dr. Weidman began treating appellant in January 2000 following a motor vehicle accident in September 1999. He opined that this accident resulted in increased low back pain. Dr. Weidman recommended surgery on October 11, 2003 and attributed appellant's neck and back pain to his motor vehicle accident. He examined appellant on October 22, 2004 and stated that appellant experienced continued pain in his lower back and cervical spine. Dr. Weidman's notes are not sufficient to meet appellant's burden of proof in establishing a recurrence of disability on or after August 3, 2001 as he attributed appellant's disability to his motor vehicle accident. He did not offer any medical evidence supporting that appellant's condition after August 2001 was due to his accepted employment injury. Without a medical report offering an opinion that the claimed recurrence of disability was due to the accepted employment injury, appellant has failed to meet his burden of proof.

Dr. Rao first examined appellant in January 2006 and diagnosed multilevel degenerative cervical and lumbar spondylosis, chronic right-sided radicular sensory deficits and musculoligamentous neck and low back pain. He described appellant's 1993 employment injury and noted that appellant stopped work in 2001. Dr. Rao did not discuss appellant's motor vehicle accident in 1999 and did not address his ability to work on or after August 2001. As he did not offer an opinion based on a complete medical history that appellant was disabled due to his accepted employment injury, his reports are not sufficiently detailed to meet appellant's burden of proof in establishing that he sustained a recurrence of total disability on or after August 2001.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not submitted the necessary medical opinion evidence to establish a causal relationship between his January 6, 1993 employment injury and any disability for work on or after August 3, 2001. As such appellant has not established a recurrence of disability.

ORDER

IT IS HEREBY ORDERED THAT the April 30, 2012 Office of Workers' Compensation Programs' decision is affirmed.

Issued: November 13, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board