

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH N. VIOLETTE and DEPARTMENT OF DEFENSE,
DEFENSE COMMISSARY AGENCY, NE REGION, Columbus, Ohio

*Docket No. 95-3018; Submitted on the Record;
Issued April 9, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant has met his burden of proof in establishing that he sustained a recurrence of disability on September 19, 1988 causally related to his November 6, 1979 employment injury.

The Board has duly reviewed the case on appeal and finds it not in posture for decision.

This case has previously been on appeal to the Board. By decision dated August 6, 1993¹, the Board found that there was a conflict of medical opinion evidence regarding whether appellant had sustained a recurrence of disability on September 19, 1988 and remanded the case for referral to an impartial medical examiner. The facts and circumstances of the case as found in the Board's prior decision are incorporated herein by reference.

Following the Board's August 6, 1993 decision, the Office of Workers' Compensation Programs referred appellant, a statement of accepted facts and list of specific questions to Dr. Chester M. Husted, a Board-certified orthopedic surgeon, for an impartial medical evaluation. By decision dated August 21, 1995, the Office denied appellant's claim for recurrence on September 19, 1988 causally related to his November 6, 1979 employment injury.

In situations where there are opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.²

The Office requested that Dr. Husted determine whether appellant's current residuals were due to his 1979 employment injury or to his preexisting back condition. The Office also queried whether appellant sustained a recurrence of disability in September 1988 causally related to his 1979 employment injury, and whether appellant continued to be totally disabled.

¹ Docket No. 92-1770.

² *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

In his report dated December 7, 1994, Dr. Husted provided a history of injury and diagnosed chronic lumbar pain, chronic neck pain, and stated appellant's work injury in 1979 represents a permanent aggravation of his preexisting back condition. In response to the questions posed by the Office, Dr. Husted stated that objective findings of low back strain in 1979 were not separable from those stemming from the prior back condition. He stated, "The patient's current level of pain and findings relate both to the prior lumbar condition which was one of chronic lumbar disc pain with prior disc excision and fusion, plus the accentuation of the pain stemming from handling the heavy load on the hand truck in 1979." Dr. Husted listed appellant's objective findings on examination as pain occurring with range of motion of the back, the labor that occurs with hip range of motion, and lumbar range of motion and with walking. He stated that the January 1988 incident would accentuate the level of pain, but that it would return to baseline. Therefore, appellant had a period of disability of days or weeks. Dr. Husted indicated that appellant could perform the duties of I.D. checker. He did not address the issue of whether appellant sustained a recurrence of disability in September 1988 causally related to his accepted employment injury or to the alleged employment incident in January 1988.

The Office properly requested a supplemental report from Dr. Husted on March 17, 1995.³ The Office requested that he provide any objective medical evidence that appellant's November 6, 1979 employment injury and the January 1988 incident resulted in a lumbar strain, that he explain how he reached the conclusion that appellant's current condition was due to his November 1979 employment injury as well as his preexisting back injury and that he opine whether appellant could perform the duties of an I.D. checker on September 19, 1988.

On April 7, 1995 Dr. Husted stated that he relied on appellant's subjective statements that define the 1979 injury as resulting in lumbar strain and aggravation of the preexisting back condition. He also stated that appellant could perform the duties of an I.D. checker as of 1988, including lifting and carry loads of 10 pounds, alternate sitting and standing, no bending and squatting, climbing or crawling and no operation of pedals.

The Office requested an additional supplemental report on May 3, 1995. The Office inquired whether there was objective medical evidence that appellant currently suffered any residuals of his work-related injury on November 6, 1979. The Office noted that appellant did not stop work following his January 1988 incident until September 1988 and asked whether the disability due to this incident would have resolved by that date.

In a report dated June 12, 1995, Dr. Husted stated that the objective findings supporting residuals of the 1979 injury were limited range of motion with painful range of motion. He stated, "I consider the patient's subjective statements regarding the time of onset of the pain to be correct and therefore in my opinion these subjective statements have as much weight as the objective findings." He further stated that the incident of falling from the stool would have had a temporary accentuation effect and that after a while the pain would return to its baseline level of pain stemming from the prior 1979 injury.

The Board finds that Dr. Husted's reports do not address the central issue in the case, whether appellant sustained a recurrence of disability on September 19, 1988 causally related to

³ *Terrance R. Strath*, 45 ECAB 412, 420 (1994).

his accepted employment injury. Dr. Husted indicated that appellant continued to experience residuals of his employment injury as well as those from a preexisting back condition. He also stated that the January 1988 incident in which appellant fell when a stool broke would have resulted in an aggravation of his condition for days or weeks and that appellant could return to work in 1988. However, Dr. Husted did not address the issue of whether appellant sustained a spontaneous recurrence of his symptoms due to his accepted employment injury in September 1988 resulting in disability for work. He also failed to specify the date on which appellant could return to work in 1988.

When the Office secures an opinion from an impartial medical specialist and the opinion of the specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original report. However, when the impartial medical specialist's statement of clarification or elaboration is not forthcoming or if the physician is unable to clarify or elaborate on his original report or if the supplemental report is also vague, speculative or lacks rationale, the Office must refer appellant to a second impartial medical specialist for a rationalized medical report on the issue in question.⁴ The case must therefore be remanded for further development by referring appellant to a new impartial medical specialist.

The decision of the Office of Workers' Compensation Programs dated August 21, 1995 is hereby set aside and remanded for further development consistent with this opinion.

Dated, Washington, D.C.
April 9, 1998

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁴ *Id.*