

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LEON de los REYES and DEPARTMENT OF THE NAVY,
NAVAL SUBMARINE BASE, Groton, Conn.

*Docket No. 96-1722; Submitted on the Record;
Issued December 24, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant has established that he sustained a recurrence of disability on or around November 27, 1993¹ causally related to his accepted August 14, 1989 employment injury.

The Board has duly reviewed the case record and concludes that this case is not in posture for decision as there is insufficient information in the record upon which to make a determination.

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 establishes that the employee 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 to 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 job requirements.²

In the present case, on October 19, 1989 the Office of Workers' Compensation Programs accepted that appellant sustained a herniated disc at L4-5 and L5-S1, contusions and a low back sprain as a result of an August 14, 1989 employment injury. The Office has also accepted that appellant sustained recurrences of disability on December 11, 1989 and July 23, 1990 as a result of the accepted injury. In an Office hearing representative decision, dated February 14, 1995, the Office denied appellant's additional claims for recurrences of disability for intermittent periods between September 18 and November 6, 1992, and for a continuous period of disability

¹ The date of appellant's claimed recurrence of disability is alternately referred to throughout the record file as November 23 and November 27, 1993.

² *Cynthia M. Judd*, 42 ECAB 246 (1990); *Terry R. Hedman*, 38 ECAB 222 (1986).

from November 8, 1992 through April 4, 1993.³ Pursuant to the Office hearing representative's February 14, 1995 decision, however, the Office accepted that back surgery undergone by appellant on May 9, 1994 was causally related to the accepted employment injury and thus authorized payment of the bills relating to this surgery.⁴ On April 5, 1993 appellant returned to work in a limited-duty position as a mail and file clerk. Appellant stopped work again on November 22, 1993 and filed a notice of recurrence of disability. Appellant explained that as the weather turned cold and damp he experienced increasing pain and muscle spasms in his back. Appellant did not return to work. The Office denied appellant's notice of recurrence of disability in a decision dated July 17, 1995 on the grounds that the medical evidence of record did not explain how, as of November 27, 1993 appellant's medical conditioned worsened, preventing him from performing his light-duty job.

In support of his notice of recurrence of disability beginning November 23, 1993, appellant submitted several reports from Dr. Frank W. Maletz, a Board-certified orthopedic surgeon, who has treated appellant for his accepted conditions since November 1993, when he took over appellant's care from his partner, Dr. Zeppieri, who was away on fellowship. In an Office note dated November 10, 1993, Dr. Maletz stated that although appellant had been scheduled for an appointment on that day, he had to be rescheduled as the doctor was called away to perform emergency surgery. Dr. Maletz concluded that appellant was to be considered temporarily totally disabled for any kind of work until cleared by his office. In a report dated February 10, 1994, Dr. Maletz stated that appellant had functioned on his pain medication until approximately October 1993 but by November 27, 1993, due to increasing sciatica and pain, aggravated by the winter weather, appellant could not function any longer and left work. Following his physical examination and review of the medical records, Dr. Maletz noted that in light of his physical findings, appellant's continuing complaints and the herniated L4-5 and L5-S1 discs diagnosed in 1992, he wanted to admit appellant to the hospital for a full day of testing. Dr. Maletz concluded that he was "covering him for work from [November 23, 1993] until the present and until studies are completed." In a report dated March 21, 1994, Dr. Maletz stated, in pertinent part, that testing had confirmed the original diagnoses of herniated discs and revealed progression of nerve root compression on the right side. He noted that based on the examination, the clinical narrowing, the patient's long-term symptoms and the failure of any treatment to resolve this, surgical intervention was recommended and agreed to by appellant. Dr. Maletz concluded that appellant was at that time incapable of performing the work he left and would remain disabled for approximately six months to a year postoperatively. On form reports dated April 18, 1994, Dr. Maletz stated that appellant had been temporarily totally disabled since November 23, 1993 and noted that surgery had been scheduled. In a report dated April 30, 1994, after reviewing the full history of appellant's injury and treatment beginning on August 14, 1989, Dr. Maletz stated:

³ The February 14, 1995 decision of the Office hearing representative affirmed the Office's prior decisions dated February 25, 1993 and April 13, 1994.

⁴ On May 9, 1994 appellant underwent decompression and hemilaminectomy at L4, total laminectomy at L5, removal of herniated nucleus pulposus at L5-S1, fusion at L4-5, L5-S1 and a bone graft with implantation of a battery-powered bone growth stimulator.

“On the basis of this evaluation, his leg greater than back pain, his nearly six years of conservative treatment without resolution, his demonstrated central stenosis and pressure on the dural sac over the years on studies and his continuing worsening clinical symptoms, with progressive neurologic deficit, the patient is an excellent candidate for operative intervention. This was discussed with him and agreed to. The patient clearly is showing the signs and symptoms of progression....”

On May 9, 1994 appellant underwent back surgery. Dr. Maletz continued to follow him and submitted periodic reports documenting his progress. In a report dated January 6, 1995, Dr. Maletz summarized appellant’s entire course and treatment, stating:

“In summary, the patient had unequivocal evidence early in the course of disc problems. His history is quite clear that a fall on his back had initiated this. Throughout the chart, which has been submitted by a number of treating physicians, he has had documentations of loss of work time despite his best efforts to pursue work while hurting.... It is quite clear that the patient had an injury which occurred at work and which produced a progression of symptoms which waxed and waned initially and then became quite specific and severe, and for which surgery was done.... His diagnosis, his establishment of a work connection, the findings at surgery all corroborate his complaints through the years in no uncertain terms.”

Although Dr. Maletz, in his various reports, did not offer a rationalized opinion⁵ supporting appellant’s specific claim of a recurrence of disability beginning November 23, 1993, his reports, taken as a whole, reveal the progression and worsening of appellant’s condition until it became clear, sometime in February 1994, less than three months after appellant stopped work, that surgical intervention was necessary. The Board notes that while appellant’s extensive surgery, performed on May 9, 1994, was subsequently authorized by the Office as necessary for treatment of appellant’s accepted condition, the Office has yet to determine whether May 9, 1994 was the first dated of compensable disability related to the accepted condition for which surgical correction was authorized, or whether appellant became disabled sometime earlier, as indicated in Dr. Maletz’s reports. The Board, therefore, does not have sufficient information in the record before us to determine what period of disability on or after November 23, 1993 was causally related to appellant’s accepted August 14, 1989 employment injury. In addition, the record reveals that there remains before the Office a pending request submitted by appellant, together with a new report dated August 8, 1995 from Dr. Maletz, for reconsideration of the July 17, 1995 decision of the Office. Therefore, on remand the Office should review all of the evidence of record, including Dr. Maletz’s August 8, 1995 report, in light of the Office’s authorization of the May 9, 1994 surgery as necessary treatment for appellant’s accepted conditions and issue a *de novo* decision.

⁵ *Lourdes Davila*, 45 ECAB 139 (1993).

The decision of the Office of Workers' Compensation Programs dated July 17, 1995 is hereby set aside and this case is remanded to the Office pursuant to this decision.⁶

Dated, Washington, D.C.
December 24, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

⁶ The April 10, 1996 decision is rendered moot by this decision.