

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ELMA J. SHOAF and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Spokane, Wash.

*Docket No. 95-2947; Submitted on the Record;
Issued February 25, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether appellant met her burden of proof in establishing that she sustained a recurrence of disability commencing November 11, 1992 causally related to the September 11, 1991 employment injury.

On June 11, 1992 appellant, then a 58-year-old food service worker, filed a claim for a recurrence of disability occurring on January 11, 1992, alleging that she injured her neck, as well as her shins, in the September 11, 1991 employment injury and her neck condition had worsened. On July 27, 1992 the Office of Workers' Compensation Programs accepted appellant's claim for abrasion on the right and left lower legs. Appellant last worked on March 29, 1993 and was on disability retirement.

Appellant submitted progress notes from Dr. Ted Brow, a Board-certified family practitioner, dated January 12, 1992 noting the onset of neck and shoulder pain two weeks earlier and progress notes dated April 5, 1992, in which he noted the onset of low back pain in February and diagnosed acute myofascial pain syndrome and possible facet joint dysfunction. Appellant also submitted medical reports, from Dr. Ronald L. Vincent, a Board-certified neurological surgeon, dated April 30, June 3, June 8, July 2, August 4 and September 3, 1992. In his June 8, 1992 report, Dr. Vincent stated that appellant had anterior cervical discectomy at C4-5 and C5-6. In his July 2, 1992 report, he noted that appellant developed low back pain, within a week's release from the hospital after her surgery. Dr. Vincent stated that it probably was a low back strain or due to usual neck pain and spasm following surgery triggering back spasm. He also stated that as appellant's neck improved, she had some underlying back problems which were surfacing at the time. In his July 30, 1992 report, Dr. Vincent noted that appellant had had pain since January in her buttock and perineal area, that she had been in an auto accident the last weekend but did not feel that it aggravated her condition.

Appellant submitted progress notes from Dr. Philip A. Lenoue, a chiropractor, dated January 13 and February 3, 1992 documenting ongoing neck and shoulder pain. In his

January 13, 1992 notes, Dr. Lenoue stated that appellant experienced neck and shoulder pain when she woke up two weeks earlier. Appellant also submitted the progress notes of Dr. Rohla dated March 31, 1992 documented ongoing neck pain. The progress notes of Dr. Rutzar dated March 13, 1992, documented pain in appellant's lower pelvic area. The progress notes of Dr. Timothy J. Meyer, a Board-certified family practitioner, dated April 6, 1992, documented lower back discomfort. He diagnosed lumbar spine pain and stated that it was unclear as to whether appellant's lumbar spine was related to her neck pain. The notes of the physical therapist, Michael Amstutz, dated from July 13 through July 30, 1992, documented pain in appellant's back and neck. Further, medical notes dated April 1, 1992 and a report dated August 20, 1992, from Dr. Timothy J. Ritchey, a Board-certified family practitioner, summarized appellant's treatment for her neck.

By decision dated October 15, 1992, the Office denied appellant's claim, stating that the evidence of record does not show that appellant's recurrence of disability commencing on November 11, 1992 is causally related to the September 11, 1991 employment injury.

On November 5, 1992 appellant requested an oral hearing before an Office hearing representative and submitted additional evidence. The hearing was held on March 25, 1993.

In a report dated July 17, 1990, Dr. Myron E. Bloom, a Board-certified family practitioner with a subspecialty in geriatrics, performed a physical examination and diagnosed myositis. In a report dated July 20, 1990, Dr. Lenoue noted that appellant woke up with neck and upper back pain two weeks earlier, performed a physical examination and diagnosed acute cervical strain and joint dysfunction with attendant neck pain and referred pain into the left arm, possible thoracic outlet syndrome and left sacroiliac joint dysfunction, with attendant left hip pain. In a report dated April 10, 1992, Dr. Jeffrey S. Hirschauer, a Board-certified neurological surgeon, considered appellant's personal history, performed a physical examination and diagnosed cervical spondylosis with Lhermitte's symptoms of undetermined etiology and coccygodynia. He stated that appellant presented a somewhat confusing problem, in that her Lhermitte's symptoms dated back to early 1991, prior to her neck injury and significantly worsened since January, her shakiness preexisted her injury but worsened since January and he wondered if too much Synthroid might be the etiology of it.

In a report dated September 22, 1992, Dr. Vincent stated that appellant's cervical disc herniations were a result of an aggravation of a preexisting injury to her spine she reported to him on September 11, 1991. In a report dated October 19, 1992, Dr. Ritchey performed a physical examination and considered appellant's personal history. He diagnosed neck pain, status post surgical disc removal and lumbosacral strain with evidence of lumbar disc bulging by computerized axial tomography (CAT) scan. Dr. Ritchey stated that regarding "the association of her work injury and the neck condition diagnosed in January 1992, I believe, as usual in these cases, it is difficult to prove a direct connection, however, I suspect the injuries certainly aggravated the situation." He also stated that it was unclear at the time whether appellant's condition was permanent. In a report dated October 26, 1992, Dr. Gordon K. MacKenzie, Board-certified in family practice and physical medicine and rehabilitation, noted that on June 3, 1992 appellant stated that she had neck injuries, which worsened in the past month and she felt a choking in her throat and could barely turn her head. He performed a physical examination and

stated that he was “somewhat hard pressed to explain her diffuse symptomatology on a physiological basis,” and that some of her symptoms were “somewhat on the bizarre side” such as the sensation of a “pulling in her vagina” and “a hot poker up her rear” when she sat a certain way. He believed appellant’s condition was fixed and stable and further treatment would not be helpful.

At the hearing, one of appellant’s supervisors testified seeing appellant shaken and with scraped skin, the date of her September 11, 1991 employment injury and she looked worse the day after the injury, for she was swollen and had developed bruises. Appellant also subsequently developed a stiff neck. She testified that she had problems with her neck in the seventies, missed three months due to a ruptured disc and was fine after treatment until September 1991 when she had her injury and her neck got “bad” and compelled her to stop working. Appellant testified that her neck continued to hurt her and she was unable to move it completely. Her daughter testified that after the September 11, 1991 employment injury, appellant had a lot of pain in her neck and sometimes was unable to drive to work. Another daughter of appellant testified that after the September 11, 1991 employment injury, appellant had difficulty driving and doing her housework and suffered great pain.

By decision dated April 30, 1993, the Office hearing representative found that the additional evidence, appellant submitted did not establish her claim for a recurrence of disability and affirmed the Office’s October 15, 1992 decision.

Appellant subsequently filed an application for review of the hearing representative’s decision, with the Board but subsequently sought to withdraw her appeal in order, to submit additional evidence to the Office in support of a motion for reconsideration. By order dated April 22, 1994, the Board dismissed her appeal, No. 94-668. Appellant subsequently submitted additional evidence received by the Office on June 21, 1994. In a report dated June 6, 1994, Dr. Charles M. Colwell, a Board-certified family practitioner, with a subspecialty in emergency medicine, considered appellant’s personal history and reviewed a cervical magnetic resonance imaging (MRI) scan dated February 17, 1994 and a thoracic MRI scan dated March 31, 1994. He opined that appellant had a preexisting cervical disc disease which was clearly aggravated by her September 11, 1991 fall. He stated:

“Her history following the fall is not inconsistent with the type of disease she presented with. Typically, progression and/or herniations of dis[c]s are the end result of a cumulative trauma event rather than the result of a single event in and of itself. The inflammation and irritation that we see with dis[c] herniations often time evolve over several weeks following an accident and is not acutely apparent.”

Dr. Colwell stated that it was more likely than not that the September 11, 1991, fall caused an aggravation and/or extension of her cervical disc disease to the point where she became progressively disabled. Appellant also submitted the results of the February 17, 1994 MRI of the cervical spine and the March 31, 1994 MRI of the thoracic spine showing moderate right T10-11 apophyseal spondylosis and showing mild posterior disc bulge/protrusion at C3-4 and C6-7, which was unchanged since April 29, 1992 and marked bilateral neural foraminal stenosis at C4-5 and C5-6.

By decision dated November 21, 1994, the Office denied the claim, stating that the additional evidence appellant submitted did not establish that her cervical condition and her upper extremities condition were causally related to the September 11, 1993 employment injury.

By letter dated May 11, 1995, appellant requested reconsideration of the claim and submitted additional evidence including a report dated May 12, 1995 from Group Health Northwest diagnosing that appellant had chronic pain syndrome and an old neck injury, progress notes from nurses, a physical therapist and Dr. Charles Morrison, a Board-certified family practitioner with a subspecialty in geriatrics, dated November 3, December 20 and 21, 1994, March 2 and 3, May 1 and May 5, 1995. These progress notes documented that appellant had pain her neck and back, and from a student dated April 13 and 14, 1995 stating low back pain of uncertain etiology and urinary, bowel and inner thigh pain suggesting possible lower spine nerve etiology. The Office interpreted the request as requesting reconsideration of the Office's October 15, 1992 decision, and by decision dated July 12, 1995, denied the claim, stating that the additional evidence failed to establish clear evidence of error.

The Board finds that the case is not in posture for decision and requires further evidentiary development.

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 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.² However, while the claimant has the burden to establish entitlement to compensation, the Office shares the responsibility in the development of the evidence.³ The Office has an obligation so see that justice is done.⁴

Reports appellant submitted from Dr. Vincent dated September 22, 1992, from Dr. Ritchey dated October 19, 1992 and from Dr. Colwell dated June 6, 1994. In his September 22, 1992 report, Dr. Vincent stated that appellant's cervical disc herniations were a result of an aggravation of a preexisting injury to her spine she reported to him on September 11, 1991. In his October 19, 1992 report, Dr. Ritchie stated that he suspected the injuries appellant sustained at work aggravated her neck condition, consisting of neck pain status post surgical disc removal. In his June 6, 1994 report, Dr. Colwell stated that appellant's preexisting cervical disc disease was clearly aggravated by her September 11, 1991 employment injury. Noting that appellant's history following her fall was not inconsistent with cervical disc disease, that progression of the disease or herniations of discs are the result of cumulative trauma

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

² *See Nicolea Brusio*, 33 ECAB 1138 (1982).

³ *Dennis J. Lasanen*, 43 ECAB 549, 550 (1992); *Robert A. Redmond*, 40 ECAB 796 (1989).

⁴ *Dennis Lasanen*, *supra* note 3 at 550; *William J. Cantrell*, 34 ECAB 1233 (1983).

rather than the result of a single event as the inflammation and irritation from disc herniations may take several weeks to evolve, he stated that it was more likely than not that the September 11, 1991 employment injury aggravated appellant's cervical disc disease to the point where she became progressively disabled.

While the reports, of Drs. Veneer, Ritchie and Colwell are insufficient to discharge appellant's burden of proving by the weight of the reliable, substantial and probative evidence that her alleged recurrence of her neck condition was causally related to the January 11, 1992 employment injury, they constitute sufficient evidence in support of appellant's claim to require further development of the record by the Office.⁵ These doctors' reports, state that appellant's current cervical disc disease and her herniated disc was aggravated or caused by the September 11, 1991 employment injury. The doctors, however, did not provide sufficient rationale to support their opinions. However, no evidence in the record refutes causation or aggravation.

On remand the Office should prepare a statement of accepted facts and refer the case record and appellant, if necessary, to a physician in the appropriate field of medicine for a rationalized medical opinion regarding whether appellant sustained a recurrence of disability commencing November 11, 1992 causally related to the September 11, 1991 employment injury. Following this and any necessary further development, the Office shall issue a *de novo* decision.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated July 12, 1995 and November 21, 1994 are hereby set aside and the case is remanded for further proceedings consistent with this decision of the Board, to be followed by a *de novo* decision.

Dated, Washington, D.C.
February 25, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member

⁵ See *Horace Langhorne*, 29 ECAB 820 (1978).