

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LEE H. HARLAN and VETERANS ADMINISTRATION,
DAYTON VETERANS HOSPITAL, Dayton, Ohio

*Docket No. 96-146; Submitted on the Record;
Issued July 29, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant has established that he sustained a recurrence of disability commencing July 18, 1991, causally related to his 1977 employment injury.

On October 4, 1977 appellant, then a 29-year-old housekeeping aid, filed a claim alleging back injury that date when he pulled a box out of a compactor. The Office of Workers' Compensation Programs accepted his claim, and appellant subsequently underwent laminectomies and foraminotomies at L4-5 and L5-S1. On July 17, 1986 appellant returned to part-time work doing light duty. Beginning February 14, 1987 appellant became employed by the Nashville post office doing custodial duties.

By decision dated March 7, 1988, the Office found that appellant was employed in the position of postal distribution clerk at a pay rate of \$10.15 per hour working 40 or more hours per week, and that the current pay rate of his former position with the employing establishment which he held when injured was then only \$7.59 per hour, such that he now had no loss of wage-earning capacity. The Office, therefore, determined that payment of compensation for lost wages would cease effective March 13, 1988.

Appellant resigned from the postal service on July 18, 1991. He claimed that he had to stop work because he had too much pain in his back. On August 21, 1992 appellant filed a Form CA-2a with the employing establishment claim alleging a recurrence of disability commencing in May 1991. He alleged that he was no longer able to perform his postal position. In support appellant submitted a May 28, 1991 medical progress note which diagnosed degenerative joint disease of the lumbosacral spine and "doubt recurrent HNP [herniated nucleus pulposus]," and which noted that appellant had radicular pain in his lower back on left but without radiation into his leg. A July 11, 1991 progress note indicated the presence of low back pain and residual left posterior leg pain status post 1980 laminectomy. Neither causation nor disability was discussed. A November 13, 1991 note diagnosed mechanical low back pain. A September 17, 1991 electromyography study report was abnormal with evidence of a chronic L4 radiculopathy of the

left lower extremity with no acute changes noted. An October 14, 1992 progress report indicated a diagnosis of chronic low back pain but did not discuss causation or disability.

Appellant filed a claim for occupational disease on March 20, 1993 alleging that on March 16, 1993 he became aware that his condition was caused or aggravated by his employment. He alleged that he was required to lift and move mailbags weighing up to 90 pounds. By letter dated June 20, 1993, the employing establishment indicated that it was controverting appellant's claim, noting that postal employees were not required to lift any more than 70 pounds, and noting that the two people appellant claimed had knowledge of his injury/condition were not employed at that specific post office branch when the injury was alleged to have occurred.

Appellant submitted an April 13, 1993 neurologic assessment, which noted that he had an onset of left lower back pain 24 years earlier in Viet Nam, that he was diagnosed with muscle strain, and that the symptoms had persisted over the intervening 24 years. "Trauma to the spine with lumbar radiculopathy, pain from paravertebral muscle spasm, ... and possible herniated disc" was diagnosed, but neither causation nor disability was discussed. A May 21, 1993 magnetic resonance imaging (MRI) scan of the lumbar spine was reported as demonstrating a degenerated bulging L4 disc. An October 4, 1993 attending physician's report noted clinical findings as "degenerated bulging L4 disc," noted a diagnosis of "lumbar radiculopathy," and checked "yes" to the question of whether the condition found was caused or aggravated by an employment activity. No further explanation was included. The Office combined appellant's claims.

By decision dated December 21, 1993, the Office rejected appellant's claim, finding that the evidence of record failed to establish that appellant was entitled to compensation for wage loss on or after July 18, 1991. The Office noted that appellant resigned from the post office on July 18, 1991, and stated that his resignation constituted a voluntary refusal to perform suitable work, and that he was not entitled to compensation under 5 U.S.C. § 8106(c) for that reason. By decision dated January 20, 1994, the Office denied appellant's request for a schedule award finding that he was not entitled to compensation benefits as he refused suitable work.

Appellant requested a hearing, and by decision dated March 29, 1994 the hearing representative set aside the December 21, 1993 decision finding that the fact that appellant voluntarily resigned his postal position was not sufficient grounds to invoke 5 U.S.C. § 8106(c). The hearing representative directed further development of the record for both entitlement to loss of wages and to a schedule award.

By letter dated April 15, 1994, the Office requested that appellant submit a medical narrative discussing how his job duties had caused a change in his condition.

In an April 26, 1994 statement appellant claimed that he had signed a "waiver on [his] back" for the post office and had a lifting profile limited to not more than 30 pounds. He claimed that he was instructed to unload mail bags from trucks which aggravated his back pain, and that he was required to do bending, stooping and heavy lifting which caused his back to worsen to the point where he had trouble walking. Appellant alleged that this precipitated his resignation. Appellant submitted a November 23, 1993 clinic review note from his treating Board-certified neurologist, Dr. David R. Longmire, who reported appellant's history and noted that after 1969 x-rays revealed marked post-surgical defects at L4-5 and L5-S1 plus the wear and

tear of degenerative spinal and joint changes consistent with progressive arthritis and lumbar radiculopathy. Dr. Longmire opined that the distribution of these changes were consistent with the history of trauma to the back, legs, hips and feet, and were related to progressive debilitating spine and lower extremity joint arthritis.

By decision dated May 13, 1994, the Office denied modification of the March 7, 1988 decision, finding that the medical reports submitted covering the period 1988 to 1993 did not comment on his ability or inability to work, with the exception of a CA-20 form report which stated that appellant was totally disabled from 1978 through the present. The Office noted that this report suggested that appellant's condition remained the same throughout the entire period, including the period during which he had worked full time for the post office. The Office concluded that the medical evidence did not establish that the March 7, 1988 loss of wage-earning capacity determination was in error or that appellant's medical condition had changed since that time.

Thereafter appellant alleged that he was reinjured after he began work with the post office in 1987. He requested reconsideration.

Appellant submitted reports dating from August 12, 1993 through June 13, 1994 from Dr. Longmire, who again indicated that appellant had first been seen on April 13, 1993, identified a degenerated bulging L4 disc as demonstrated by MRI, reported his history of back injury dating from 1969 in Viet Nam, reported a second back injury in 1978 while employed with the employing establishment, indicated that appellant returned to full-time work in 1987 which he continued until July 18, 1991, discussed his symptomatology, and diagnosed degenerated L4 disc, lumbar radiculopathy and gait disturbance. Dr. Longmire stated that his records showed that appellant had last work on July 18, 1991, and that therefore interpretation that appellant was totally disabled and not working from 1978 was incorrect. Dr. Longmire stated that he remembered discussing with appellant exacerbations of his pain and lumbosacral radicular symptoms as the reason by his history for him to not be able to perform his tasks and hence his resignation on July 18, 1991. Dr. Longmire did not discuss how or why specific employment tasks caused a recurrence of L4-5 or L5-S1 disc problems, and he did not opine that appellant became totally disabled as of July 18, 1991. He stated that he had nothing further to offer appellant, and discharged him from care on August 8, 1994.

By decision dated November 17, 1994, the Office denied modification of the March 7, 1988 loss of wage-earning capacity determination finding that the evidence submitted in support was not sufficient to warrant modification.

Subsequent to the November 17, 1994 decision, the Office issued a schedule award to appellant for seven percent impairment of his left lower extremity. Appellant has not appealed from the schedule award determination.

The Board finds that appellant has failed to establish that he sustained a recurrence of disability commencing July 18, 1991, causally related to his accepted L4-5 and L5-S1 herniated disc injuries.

An individual who claims a recurrence of disability due to an accepted employment 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. 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.¹ Causal relationship is a medical issue and can be established only by medical evidence.² The medical evidence submitted in this case does not contain such rationalized medical opinion.

Further, an employee returning to light duty, or whose medical evidence shows the ability to perform light duty, has the burden of proof to establish a recurrence of temporary total disability by the weight of reliable, probative, and substantial evidence and to show that he cannot perform the light duty.³ As part of his burden, the employee must show a change in the nature and extent of the injury-related conditions or a change in the nature and extent of the light-duty requirements.⁴ Appellant contends on appeal that he was forced to resign from his employment as his medical condition prevented him from performing light-duty work.

Appellant returned to part-time light duty in 1986 and to full-time duty on February 14, 1987. Thereafter, he was promoted from custodian to distribution clerk. The Office determined on March 7, 1988 that appellant did not have any loss of wage-earning capacity, such that he was no longer in receipt of wage-loss compensation benefits under the Act. Thereafter he successfully performed the position of distribution clerk for over three years before he stopped work, alleging a recurrence of total disability.

Appellant has failed to submit sufficient factual evidence establishing a change in the nature or extent of his distribution clerk assigned duties during the period from March 1988 until July 1991 such that as of July 18, 1991 he could no longer perform them. Further, he submitted insufficient medical evidence establishing a change in the nature or extent of his injury-related condition. None of the medical evidence submitted identified a physical disability for employment as of July 18, 1991, or attributed such a disability to appellant's 1977 accepted herniated disc injuries. A May 28, 1991 note diagnosed degenerative joint disease of the lumbosacral spine and "doubt recurrent HNP;" a July 11, 1991 report merely noted the presence of low back pain and left leg pain; and a November 13, 1991 note diagnosed mechanical low back pain. None of these reports discussed causal relation or attributed any of the diagnosed conditions to factors of appellant's employment. Consequently, none of these reports support appellant's recurrence of disability claim. Medical reports subsequent to 1991 merely repeated appellant's allegations of a 1991 reinjury and diagnosed degenerated bulging L4 disc and lumbar radiculopathy. None of the subsequent reports diagnosed disability as of July 18, 1991 due to a recurrence of appellant's L4-5 and L5-S1 herniated disc injuries, and none of them contained a rationalized explanation of the causation of the conditions diagnosed. Consequently, none of these reports support appellant's recurrence of disability claim. In fact, the 1994 reports of Dr. Longmire attributed appellant's back problems to degenerative spinal and joint changes

¹ *Stephen T. Perkins*, 40 ECAB 1193 (1989); *Dennis E. Twardzik*, 34 ECAB 536 (1983); *Max Grossman*, 8 ECAB 508 (1956); 20 C.F.R. § 10.121(a).

² *Mary J. Briggs*, 37 ECAB 578 (1986); *Ausberto Guzman*, 25 ECAB 362 (1974).

³ *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

⁴ *Id.*

consistent with progressive arthritis and lumbar radiculopathy. No factors of his postal employment in 1991 were mentioned, and his L4-5 and L5-S1 disc conditions were not implicated as a cause of his disability. Dr. Longmire stated that he discussed appellant's cessation of work in July 1991 in relation to his exacerbations of pain, but he did not discuss whether appellant's job duties caused these exacerbations, noting only that because of appellant's exacerbations he could not perform his duties and therefore he resigned. This evidence is not sufficient to establish causal relation of appellant's back condition with either factors of his employment or with his previously accepted herniated disc injuries. Further, the Board notes that the information provided by Dr. Longmire was all elicited from appellant more than a year and one half after the fact, as Dr. Longmire did not even begin to treat appellant until 1993.

As no further rationalized medical evidence was submitted relating appellant's cessation of work on July 18, 1991 to factors of his employment or to his surgically treated L4-5 and L5-S1 herniated discs, he has failed to meet his burden to establish his recurrence claim.

Consequently, the decision of the Office of Workers' Compensation Programs dated November 17, 1994 is hereby affirmed.

Dated, Washington, D.C.
July 29, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member