

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD L. CHEEK and DEPARTMENT OF THE ARMY,
FORT BENNING, Fort Benning, Ga.

*Docket No. 96-1513; Submitted on the Record;
Issued November 2, 1998*

DECISION and ORDER

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

The issues are: (1) whether appellant has met his burden of proof in establishing that he sustained a back injury causally related to factors of his federal employment; and (2) whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a) of the Federal Employees' Compensation Act.

On June 30, 1995 appellant, then a 57-year-old maintenance worker, filed a notice of traumatic injury and claim for continuation of pay/compensation alleging that on June 15, 1993 he injured his head, neck and left shoulder in the performance of duty when he fell from some plywood on which he was standing.

In support, appellant submitted a June 26, 1995 personal statement which addressed how he was injured, the progress of his injury, and the treatment his physicians provided.

On July 22, 1994 Dr. Thomas R. Walsh, a Board-certified orthopedic surgeon, recorded a history that about a year prior to his report appellant was standing on plywood and fell backwards hitting his left shoulder, neck and head. Dr. Walsh diagnosed a "C3-4 herniated nucleus pulposus with left C4 radiculopathy. Multi-level disc herniations significant changes also broad-based at C4-5 with bilateral peripheral canal encroachment and C5-6 with a left of midline disc herniation."

In a report dated August 3, 1994, Dr. Walsh diagnosed C3-4 large herniated nucleus pulposus toward the left most consistent with his complaints into the left neck and shoulder, but he has substantial degenerative changes, osteophytes and discs throughout the cervical spine.

On August 29, 1994 Dr. Walsh noted neck, left shoulder and arm pain. He again recorded a history that about a year prior to his report appellant was standing on plywood and fell backwards hitting his left shoulder, neck and head. He diagnosed a C3-4 herniated nucleus

pulposus with a left C4 radiculopathy, multiple level disc herniations with significant changes broad based at C4-5 and bilateral peripheral canal encroachment of C5-6 with a left midline disc herniation. He recommended surgery.

Dr. Walsh indicated on August 30, 1994 that appellant presented with C3-4 cervical spondylosis with herniated nucleus pulposus and left radiculopathy. He indicated that an anterior cervical discectomy and fusion C3-4 with fibular allograft, microscopic, was performed.

On September 13 and October 12, 1994 Dr. Walsh indicated that appellant was progressing well after surgery.

On March 14, 1995 Dr. Walsh reported that appellant's neck and arms were doing much better.

In a report dated June 1, 1995, Dr. Walsh stated that a July 13, 1994 magnetic resonance imaging revealed a large disc rupture at C3-4 and a less severe herniation at C4-5, mostly towards the right. He indicated that disc abnormalities were noted at C5-6, C6-7, C7-T1 and T1-T2. He stated that appellant's symptoms were consistent with a left C3-4 lesion and that surgery improved the symptoms. Finally, Dr. Walsh stated that "[B]ased on his initial history given to me in July 1994 his disc herniation is consistent with the injury he described."

In a letter dated August 14, 1995, the Office requested that appellant submit additional information, including a physician's rationalized opinion on the causal relationship between the alleged work injury and the alleged condition.

On November 3, 1995 an Office medical adviser indicated that he could not determine whether appellant's injury was work related without further information.

In a decision dated January 8, 1996, the Office accepted that the June 15, 1993 incident occurred, but found that the medical evidence failed to demonstrate a causal relationship between the injury and the claimed condition or disability.

In a letter received February 12, 1996, appellant requested reconsideration. In support, appellant resubmitted his June 26, 1995 personal statement which addressed the work injury, the pain he suffered, and the treatment provided.

In a decision dated March 7, 1996, the Office denied reconsideration finding that appellant's letter failed to raise substantive legal questions or include new and relevant evidence.

The Board finds that this case is not in posture for decision.

An employee seeking benefits under the Act¹ has the burden of establishing the essential elements of his or her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged

¹ 5 U.S.C. §§ 8101-8193.

and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.² These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.³

In order to determine whether an employee actually sustained an injury in the performance of duty, the Office begins with an analysis of whether “fact of injury” has been established. Generally “fact of injury” consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred. The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence. In the present case, the Office accepted that appellant sustained an employment incident on June 15, 1993 as alleged. The Office, however, denied appellant’s claim on the grounds that he did not provide the necessary medical evidence to establish that he sustained a personal injury.

To establish personal injury in a traumatic injury case, the medical evidence must establish the existence of a physical or mental condition caused by trauma or a factor of employment.⁴ In the present case, Dr. Walsh, a Board-certified orthopedic surgeon, opined on June 1, 1995 that, “[B]ased on his initial history given to me in July 1994 his disc herniation is consistent with the injury he described.” Dr. Walsh’s opinion is supported by multiple physical examinations and x-ray readings beginning July 22, 1994 and continuing through his latest examination on June 1, 1995. Dr. Walsh, however, did not fully explain his conclusion relating appellant’s disc herniation to the June 15, 1993 employment incident or provide an explanation for the long delay in diagnosis from the June 15, 1993 employment incident until appellant sought treatment in July 1994. While Dr. Walsh’s opinion is not sufficient to meet appellant’s burden of proof, it does raise an uncontroverted inference of causal relationship between appellant’s back condition and his specific employment duties, and is sufficient to require further evidentiary development of the case.⁵

On remand, the Office should further develop the medical evidence by obtaining a rationalized medical opinion on whether appellant’s back condition is causally related to identified factors of his federal employment. After such development of the case record as the Office deems, a *de novo* decision shall be issued.

The decisions of the Office of Workers’ Compensation Programs dated March 7 and January 8, 1996 are hereby set aside and the case is remanded for further development consistent with this opinion.

² *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 41 ECAB 1143, 1145 (1989).

³ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁴ *See Carolyn King Palermo and Travis Palermo (Dwayne Palermo)*, 42 ECAB 435 (1991).

⁵ *Reba L. Cantrell*, 44 ECAB 660 (1993).

Dated, Washington, D.C.
November 2, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member