

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CARLOS A. MARRERO and U.S. POSTAL SERVICE,
POST OFFICE, Van Nuys, Calif.

*Docket No. 96-2186; Submitted on the Record;
Issued October 19, 1998*

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether appellant has met his burden of proof in establishing that he sustained a recurrence of disability on or after July 12, 1994 due to his accepted back injury; and (2) whether appellant sustained a consequential injury causally related to his accepted employment injury.

The Board has duly reviewed the case on appeal and finds that appellant has not met his burden of proof in establishing that he sustained a recurrence of disability on or after July 12, 1994.

Appellant has filed several claims for injuries occurring in the performance of duty. The Office of Workers' Compensation Programs accepted these claims for left shoulder and rhomboid strains, aggravation of neck and left shoulder strain, left shoulder strain, left shoulder subluxation, left shoulder arthroscopy on February 4, 1994, and lumbosacral strain and herniated discs at L3-4, L4-5 and L5-S1. Appellant received compensation for intermittent periods to July 11, 1990. On July 26, 1994 appellant filed a claim for compensation requesting wage-loss compensation from July 12 to August 23, 1994. By decision dated August 8, 1994, the Office denied this request finding that appellant was not totally disabled due to his accepted back injury, but instead that he wished to prevent future injuries and contemplated surgery. Appellant requested an oral hearing and by decision dated June 14, 1995, the hearing representative affirmed the Office's decision. Appellant requested reconsideration on October 16, 1995 and by decision dated November 3, 1995, the Office denied modification of its prior decisions.¹

In this case, the Office accepted appellant's claim for both back and shoulder conditions. Appellant performed a light-duty job until he underwent surgery on his left shoulder on

¹ Following the Office's November 3, 1995 decision, appellant submitted additional new evidence. As the Office did not consider this evidence in reaching a final decision, the Board may not review it for the first time on appeal. 20 C.F.R. § 501.2(c).

February 10, 1994 and on June 30, 1994, appellant's attending physician for his shoulder condition, Dr. Robert J. Tomlinson, Jr., a Board-certified orthopedic surgeon, released appellant to return to work without restriction regarding his shoulder.

Dr. Todd D. Moldawer, a Board-certified orthopedic surgeon, found on February 21, 1994 that appellant could return to the position of rehabilitation clerk with no restrictions with regard to his back. He found that appellant had a chronic lumbosacral strain and herniated disc at L3-S1 and that his condition was permanent.

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 of record establishes that he 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 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 requirements.²

In this case, appellant established that he sustained a recurrence of total disability due to his accepted shoulder condition and the Office paid appropriate benefits. Appellant's attending physician released appellant to return to work without restrictions on June 30, 1994. There is no evidence in the record supporting continuing disability due to the shoulder condition. Appellant received benefits from this injury from February until July 1994. The Office was paying compensation based upon submission of Forms CA-8 during this period and as such appellant maintained the burden of establishing entitlement to continuing disability which was related to the employment injury.³ Therefore, appellant has not established that he was entitled to continuing compensation benefits after July 12, 1994 due to his accepted shoulder condition.

Appellant has submitted medical evidence in an attempt to establish a change in the nature and extent of his back condition. In a report dated July 8, 1994, Dr. Moldawer noted that appellant exhibited a persistence of significant lumbar extensor strength deficit and stated: "The patient is clearly on the brink of making a decision about surgical management and wanted to give his low back the maximum opportunity to be treated in a conservative, non-surgical manner, without the aggravating influences of his daily work activities." This report does not provide an opinion that appellant's back condition had changed. Furthermore, the report indicates that appellant's disability was due to a fear of future injury. The Board has held that the possibility of a future injury does not constitute an injury under the Act and therefore no compensation can be paid for such a possibility.⁴

Dr. Moldawer continued to submit reports supporting that appellant was totally disabled. In a report dated January 19, 1995, Dr. Moldawer stated that he found appellant totally disabled in March 1994 due to the severity of his pain. He stated that in June 1994 appellant underwent

² *Terry R. Hedman*, 38 ECAB 222 (1986).

³ *Donald Leroy Ballard*, 43 ECAB 876, 882 (1992).

⁴ *Gaetan F. Valenza*, 39 ECAB 1349 1356 (1988).

an evaluation for the strengthening program and that this resulted in additional discomfort from straining to demonstrate maximum lumbar extension strength. A recurrence of disability is defined as a spontaneous material change in the employment-related condition without an intervening injury.⁵ In this report, Dr. Moldawer attributes appellant's recurrence of disability to an intervening cause, the use of a strengthening machine. Therefore, Dr. Moldawer's reports are not sufficient to establish a recurrence of disability.

Appellant's representative alleged that there was a change in the nature and extent of appellant's light-duty job requirements in that his light-duty position was no longer available. There is no evidence in the record to support this contention. On July 11, 1994 the employing establishment requested that the Office indicate whether it was necessary to adjust appellant's rehabilitation position. As appellant retains the burden of proof in establishing a recurrence of disability due to his accepted back condition, he must submit some evidence that his limited-duty position was no longer available. As he failed to do this, appellant failed to meet his burden of proof.

The Board further finds that appellant sustained a consequential injury.

It is an accepted principle of workers' compensation law that when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause which is attributable to the employee's own intentional conduct. As is noted by Larson in his treatise on workers' compensation, once the work-connected character of any injury has been established, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause and so long as it is clear that the real operative factor is the progression of the compensable injury, associated with an exertion that in itself would not be unreasonable under the circumstances.⁶

In this case, appellant has attributed the worsening of his back condition to exertion on the strengthening machine prescribed by Dr. Moldawer. Dr. Moldawer recommended that appellant participate in a strengthening program for his leg and back conditions on April 21, 1994. Dr. Moldawer noted improvement following the initial program and recommended an additional strengthening program for appellant's back on June 6, 1994. On July 12, 1994 he found that the additional strengthening program had no significant symptomatic benefit, that appellant's strength had decreased and that appellant felt his back was too uncomfortable for work.

As noted previously, on January 19, 1995 Dr. Moldawer stated that he discussed the etiology of the increased symptomatology with appellant and that the June 6, 1994 evaluation increased discomfort from straining to demonstrate maximum strength. He stated that appellant telephoned his office regarding his increased discomfort. Dr. Moldawer submitted a statement

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(b)(1) (January 1995).

⁶ *Clement Jay After Buffalo*, 45 ECAB 707, 715 (1994). Larson notes that aggravation of the primary injury by medical treatment is compensable. See A. Larson, *The Law of Workers' Compensation* § 13.21(a) (1996).

from his office worker, Sara Chavez, noting that on or around June 14, 1994 appellant called and reported that his back was hurting due to the exercise machine. In a report dated April 12, 1995, Dr. Moldawer noted that he was not aware that appellant's increased symptomatology was due to the strength evaluation until after July 1994.⁷ On October 3, 1995 Dr. Moldawer reported that the strengthening machine worsened appellant's condition as he was asked to exercise maximal force against the resistance provided by the machine which could result in a sprain/strain of the lumbar musculature.

Appellant submitted two statements that his pain increased in June 1994 following a strengthening test. Appellant stated that he sustained a drop in strength on the July 12, 1994 test due to a prior test which had worsened his condition. Appellant stated that he spoke to both Ms. Chavez and Dr. Moldawer regarding this problem.

Appellant has provided a factual statement and medical evidence including an opinion on the causal relationship between his increased back pain after June 1994 and the recommended strengthening program. Although, Dr. Moldawer stated that he was not aware of appellant's increased pain, Ms. Chavez provided a statement that appellant had reported this change in his condition to Dr. Moldawer's office contemporaneously with his injury. Dr. Moldawer further provided an explanation of how use of the strengthening machine worsened appellant's low back condition. For these reasons, the Board finds that appellant has established a consequential back injury occurring in June 1994.⁸ However, appellant has not established that this injury caused or contributed to his disability after July 12, 1994.

⁷ In a report dated June 5, 1995, Dr. Robert S. Bray, Jr., a Board-certified neurosurgeon, evaluated appellant and recommended further testing. He did not provide an opinion on the causal relationship between appellant's accepted employment injury and his current condition and noted a worsening of appellant's symptoms following the strengthening program.

⁸ Where treatment for a condition causally related to the employment injury causes disability, it is compensable. *See Melvin D. Dombach*, 8 ECAB 389 (1955).

The decision of the Office of Workers' Compensation Programs dated November 3, 1995 is affirmed, as modified, to find that appellant has not established a recurrence of disability after July 12, 1994 or that he had disability after that date related to his treatment on June 6, 1994.

Dated, Washington, D.C.
October 19, 1998

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member