

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN R. RYAN and U.S. POSTAL SERVICE,
POST OFFICE, Lehigh Valley, Pa.

*Docket No. 97-416; Submitted on the Record;
Issued September 8, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether appellant has met his burden of proof to establish that he sustained a recurrence of total disability on or after May 9, 1991 due to his accepted employment injury of April 30, 1990.

This is the second appeal in this case. On the first appeal, the Board, by decision and order dated May 12, 1993, set aside the August 7, 1991, and January 10 and April 6, 1992 decisions of the Office of Workers' Compensation Programs. The Board noted that appellant had presented evidence from Dr. Matt M. Vegari, an attending physician specializing in neurology, who stated that while the Office had accepted appellant's claim for a groin strain, appellant actually had cervical and lumbar radiculopathy, left rotator cuff tear, cervical myelopathy and posterior osteophytes impinging on neural foramen at C5-6 and L4-5 directly related to his April 1990 work injury. In a report dated February 17, 1992, Dr. Vegari explained that L5 root irritation was one of the neurological etiologies for groin pain, and the fact that other causes for appellant's groin pain had been excluded made L5 root irritation with referred pain to the groin, the possible true cause of appellant's condition. Dr. Vegari further stated that he felt appellant had not initially volunteered that, following the employment incident, he experienced low back, left shoulder and right lower extremity pain because this pain was less intense than his groin pain. As Dr. Vegari's reports raised an uncontroverted inference between appellant's claimed condition and the employment incident of April 30, 1990, the Board directed the Office to further develop the medical evidence and the case record.¹ The complete history of the case to this point is contained in the prior decision and is incorporated by reference.

Upon remand, the Office forwarded the case file to an Office medical adviser, together with a statement of accepted facts and the medical evidence of record. Based on the recommendation of the Office medical adviser, the Office then referred appellant, together with

¹ Docket No. 92-1450 (issued May 12, 1993).

the statement of accepted facts, the medical evidence of record and a list of questions to be answered to Dr. Robert L. Gunderson, a Board-certified orthopedic surgeon. The Office specifically asked Dr. Gunderson to determine the proper diagnosis of the injury sustained on April 30, 1990, and to address whether the recurrence of May 13, 1991 was related to the April 30, 1990 employment injury and whether appellant has any residual impairment related to the April 30, 1990 employment injury.

By report dated October 1, 1993, Dr. Gunderson reviewed the medical evidence and indicated that he examined appellant on September 21, 1993. Dr. Gunderson negated a causal relationship between appellant's current medical condition and his April 30, 1990 employment injury.

In a decision dated November 2, 1993, the Office denied appellant's claim for a recurrence of disability beginning May 13, 1991 on the grounds that the evidence of record, represented by the opinion of Dr. Gunderson, failed to establish a causal relationship between the claimed disability and the original injury.

Appellant requested an oral hearing on November 16, 1993. After a review of the evidence, however, the hearing representative found that the report of Dr. Gunderson was not well rationalized and remanded the case for further development and a *de novo* decision.

After receiving a supplemental report from Dr. Gunderson dated October 13, 1994, on October 27, 1994 the Office again denied appellant's claim for a recurrence of disability on the grounds that the evidence of record failed to establish a causal relationship between the claimed recurrence and the original employment injury.

Appellant requested an oral hearing before an Office representative. After reviewing the evidence, however, the Office hearing representative again found Dr. Gunderson's report insufficient to constitute the weight of the medical evidence, and again set aside the Office's prior decision and remanded the case for further development.

After obtaining an amplifying report dated May 16, 1995, from Dr. Gunderson, the Office denied appellant's claim for a recurrence of disability beginning May 13, 1991 on the grounds that a causal relationship between the work incident and the claimed recurrence had not been established.

On August 20, 1995 appellant requested a hearing before an Office representative. In a decision dated February 15, 1996, the Office hearing representative again found that the case was not in posture for a hearing and required further medical development. The Office hearing representative set aside the Office's prior decisions and directed the Office to prepare a statement of accepted facts and refer appellant to another Board-certified specialist for an examination and a rationalized opinion regarding the issue of whether appellant sustained a recurrence of disability beginning May 13, 1991 as a result of factors of his federal employment.

On April 3, 1996 the Office referred appellant, together with a statement of accepted facts and a list of questions to be answered, for an examination by Dr. David Sussman, a Board-certified orthopedic surgeon.

In his report dated June 16, 1996, Dr. Sussman stated that he did not feel that appellant sustained a recurrence of disability on May 13, 1991 because his original disability was a traumatic right epididymitis/possible groin strain and appellant's complaints in May 1991, at the time he filed his claim for a recurrence of disability, were in regards to his shoulder and his back, as well as his neck.² Dr. Sussman further stated that there was no evidence in the record that appellant sustained either a shoulder condition or a back injury as a result of his April 30, 1990 employment accident. Dr. Sussman concluded that appellant was not suffering from any residual problems related to his 1990 employment injury.

By decision dated July 1, 1996, the Office found that the weight of the medical evidence rested with the opinion of Dr. Sussman and that appellant had not established that his claimed recurrence of disability on or after May 13, 1991 was causally related to his accepted employment injury.

The Board finds that this case is not in posture for decision due to a conflict in medical opinion.

Section 8128(a) of the Federal Employees' Compensation Act provides in part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."³ Because of the disagreement in medical opinion between Drs. Vegario and Sussman, on whether appellant sustained a recurrence of disability on May 13, 1991 causally related to his April 30, 1990 employment injury, the Board finds that this case must be remanded to the Office for a referral to an appropriate Board-certified specialist to serve as the impartial medical examiner. The Board notes that the impartial medical examiner should be provided with the statement of accepted facts and the medical evidence and asked to determine the proper diagnosis of the injury sustained on April 30, 1990, to address whether appellant sustained a recurrence of disability on May 13, 1991 as a result of his April 30, 1990 employment accident, and to address whether appellant currently has any residuals of the April 1990 employment injur.

² The Board notes that contrary to Dr. Sussman's statement, a review of the medical evidence of record reveals that appellant submitted in support of his claim for a recurrence of disability, an attending physician's report dated May 13, 1991 which noted that appellant was experiencing tenderness of the lower abdominal muscles on both sides of his groin. Thereafter, in addition to mounting complaints regarding his back, neck and shoulder, appellant consistently complained of groin pain.

³ 5 U.S.C. § 8123(a).

The decision of the Office of Workers' Compensation Programs dated July 1, 1996 is hereby set aside and remanded for further action consistent with this decision of the Board.

Dated, Washington, D.C.
September 8, 1998

Michael J. Walsh
Chairman

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member