

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CARL P. CORNELIO and DEPARTMENT OF THE AIR FORCE,
AIR NATIONAL GUARD, Natick, Mass.

*Docket No. 97-700; Submitted on the Record;
Issued September 14, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant has met his burden of proof in establishing that he sustained a recurrence of disability causally related to his April 29, 1975 employment injury.

The Board has duly reviewed the case record on appeal and finds that appellant has not met his burden of proof in establishing that he sustained a recurrence of disability causally related to his April 29, 1975 employment injury.¹

Appellant has the burden of establishing by the weight of the substantial, reliable, and probative evidence, a causal relationship between his recurrence of disability and his April 29, 1975 employment injury.² This burden includes that 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 employment factors and supports that conclusion with sound medical reasoning.³

In this case, the Office accepted appellant's claim on June 6, 1975.

On April 20, 1995 appellant filed a notice of recurrence of disability alleging that "since the original injury I have always had discomfort and depending on the situation I suffer pain in my lower back." Appellant submitted a May 13, 1975 medical report from Dr. Kevin V. Dowling, appellant's treating physician, who stated that x-rays revealed "good progression of the

¹ The Board's jurisdiction to consider and decide appeals from final decisions of the Office of Workers' Compensation Programs extends only to those final decisions issued within one year prior to the filing of the appeal. As appellant filed his appeal with the Board on December 4, 1996, the only decision before the Board is the Office's September 12, 1996 decision; *see* 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

² *Dominic M. DeScala*, 37 ECAB 369, 372 (1986); *Bobby Melton*, 33 ECAB 1305, 1308-09 (1982).

³ *See Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

healing of the fracture of the transverse process of L1, 2, 3 and 4 on the left.” In a June 9, 1975 report, Dr. Dowling stated that he could not find any neurological defect and that x-rays revealed “good healing.” In an August 14, 1975 report, he stated that appellant had good range of motion with minor discomfort on first percussion, and that x-rays revealed a “healed fracture of the transverse process.” In a June 28, 1976 medical report, Dr. Dowling stated that appellant complained of pain in the lower back which had been present for six weeks, and that he had had intermittent pain through the winter “after prolonged standing on concrete floor.” Upon examination he noted discomfort at extremes of motion, but noted no definite neurological deficit. Dr. Dowling further stated that x-rays revealed increased lumbosacral inclination with no evidence of fracture, dislocation, degenerative change or other abnormality. In an August 6, 1980 report, he stated that appellant had “persistent recurrent symptoms with prolonged standing on concrete or walking on a hard surface.” Dr. Dowling further stated upon examination that appellant had spasm, tenderness and mild limitation of motion. He also noted that recent x-rays revealed that appellant’s transverse processes had healed although he noted that his spine listed to the left. Dr. Dowling opined that appellant had a 5 to 10 percent impairment referable to the April 29, 1975 employment injury.

By letter dated May 16, 1995, the Office advised appellant that he needed to submit additional information regarding his claimed recurrence of disability including a detailed narrative medical report containing a well-rationalized medical opinion as to the relationship between his April 29, 1975 employment injury and his claimed disability beginning in April 1995.

In a decision dated June 17, 1995, the Office denied appellant’s claim for a recurrence of disability on the grounds that appellant had failed to present evidence sufficient to demonstrate a causal relationship between his employment-related injury and his current medical condition.

On May 7, 1996 appellant filed a request for reconsideration. In support of his request, appellant submitted a June 29, 1996 medical report from Dr. Elliott B. Sweet, appellant’s treating physician and a Board-certified orthopedic surgeon. In this report, Dr. Sweet demonstrated a familiarity with appellant’s medical and injury history, and provided findings upon examination conducted that day. Dr. Sweet noted an essentially negative physical examination, and stated that recent x-rays were read as normal with the exception of an abnormality “in some broadening of the left transverse processes of the involved vertebrae,” noting, however, that “there has been a complete healing of these fractures without any displacement of the fragments.” Dr. Sweet further noted that “with a basically negative physical and x-ray examination on the basis of his complaints, I would estimate his partial disability at five percent.”

In a decision dated September 12, 1996, the Office denied appellant’s request for reconsideration on the grounds that the evidence failed to establish a causal relationship between appellant’s employment injury and his claimed recurrence of disability.

On appeal to the Board, appellant stated the following:

“I would like to state that at the time of my injury 20 years ago to when it was determined by my attending orthopedic surgeon that I had a 10 percent disability,

at that time I was told by the support personnel management office (SPMO) at the state armory that I would have to wait until I was ready to retire from civil service to put in a disability claim because my injury involved my back. Now, after 20 years, my present orthopedic surgeon contends that I still have a 5 percent disability in my lower back due to the original injury and my claim is still disallowed. I feel that I was given wrong directives and information from the onset of my case by SPMO. Also I was told I could not receive any more medical treatment after August 1980 (page 3 of memo[andum]) and there is no Dr. Defuse (page 3) involved in my case. It seems that the Office of Workers' Compensation [Programs] is finding negatives with Dr. Sweet's medical report, but not concurring with the fact that I still have a percentage of disability in my lower back for the rest of my life. At this time I wish to appeal this decision by [the Office] denying modification."

Turning first to all of the medical evidence appellant submitted to the record from Dr. Dowling dated from May 13, 1975 through August 6, 1980, none of these reports are probative of appellant's medical condition on or subsequent to April 20, 1995, the date he alleged he sustained a recurrence of disability due to the accepted employment injury on April 29, 1975.

The only relevant medical evidence as to appellant's current physical condition is contained in the report of Dr. Sweet dated June 29, 1996. Dr. Sweet stated in pertinent part, the following:

"Physical Examination: On examination today, he is a very healthy appearing 52-year-old who appears to be quite fit. His gait is entirely normal. He is able to walk on his heels and toes normally. I was not able to find any points of tenderness in his back. He bends forward well and touches his fingertips to his toes with complete reversal of the lumbar lordosis and without a shift of his trunk going through this motion. He resumes the upright posture normally. Lateral bends, trunk torsion and hyperextension are well done and all without any complaints of pain. Knee jerks and ankle jerks are equal and active. Muscle strength is intact throughout. Straight leg raising is limited to about 60 to 70 degrees by some tightness of the hamstring muscles.

"X-rays: Of the lumbosacral spine were obtained. These consists of AP [anterior-posterior], lateral, coned-down views of the lumbosacral junction and oblique views. Disc spaces are all well maintained. The vertebral bodies appear entirely normal. There are no hypertrophic changes. The facets all appear to be perfectly healthy. I see no soft tissue calcification. The only abnormalities I see is some broadening of the left transverse processes of the involved vertebrae, but there has been complete healing of these fractures without any displacement of the fragments.

"Discussion: This gentleman received a very significant sprain to his back sufficient so that he avulsed the transverse processes of the lumbar spine on the left. This represents considerable soft tissue as well as bony injury and usually

results in significant diffuse scar tissue formation in the lumbar region adjacent to the fractures. Characteristically, it takes a few years to reach maximum improvement which he obtained several years ago. He was followed by Dr. Kevin Dowling who some 5 or 6 years after the event gave him an estimated permanent partial disability of from 5 to 10 percent. Today with a basically negative physical and x-ray examination on the basis of his complaints, I would estimate his partial disability at 5 percent.”

Dr. Sweet did not support appellant’s contention that he sustained a recurrence of disability commencing April 20, 1995 or at any subsequent period. He noted that appellant developed discomfort in the left low back with dysesthesias and paresthesias in the sciatic distribution but noted that this condition has not required the use of medication or any form of treatment. Thus, the only relevant medical evidence of record does not show a need for medical treatment for residuals of the 1975 injury under section 8103 of the Federal Employees’ Compensation Act.

Although Dr. Sweet estimated a five percent impairment of the back as a result of avulsed transversed processes of the lumbar spine on the left, he did not indicate that this condition prevented appellant from performing his former job or adversely affected his wage-earning capacity.

Although Dr. Sweet estimated that appellant had sustained an estimated five percent permanent impairment to his back as a result of the accepted 1975 employment injury,⁴ no claimant is entitled to a schedule award under section 8107 of the Act for permanent disability to the back.

This being the case, appellant has failed to establish that he sustained a recurrence of disability or need for medical care causally related to his April 29, 1975 employment injury.

⁴ Section 8107 of the Act provides that, if there is permanent disability involving the loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of specific members, functions, or organs of the body. *Jerome M. Myers*, 46 ECAB 1058 (1995). The back is not one of the organs or body parts listed or added by regulation by the Secretary.

The September 12, 1996 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
September 14, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member