

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM R. STEWART and GENERAL SERVICES ADMINISTRATION,
Arlington, Va.

*Docket No. 96-2020; Submitted on the Record;
Issued January 8, 1999*

DECISION and ORDER

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

The issue is whether appellant met his burden of proof to establish that his leg condition or recurrence of disability beginning November 27, 1994 were causally related to his August 26, 1985 employment-related back injury.

The Board has given careful consideration to the issue involved, the contentions on appeal and the entire case record and finds that this case is not in posture for decision.

The facts in this case indicate that on August 26, 1985 appellant, then a customer service representative, sustained an employment-related low back strain and degenerating and bulging discs at L3-4 and L4-5 when he tripped over an uneven elevator. On his claim form he also indicated that he injured his left thigh. He received appropriate continuation of pay and compensation and returned to regular duty on January 13, 1986. He again stopped work on February 13, 1986 and, following further development of the record, underwent authorized left laminectomy at L4-5 with nerve root decompression in June 1987. On November 7, 1988 he returned to regular duty as a building inspector. On September 28, 1994 he filed a recurrence claim, contending that his left thigh had been injured in the 1985 fall. He stopped work on October 4, 1994 and returned to regular duty on November 1, 1994, following surgery on his left leg.

By decision dated January 19, 1995, the Office of Workers' Compensation Programs denied the recurrence claim, finding that the evidence of record failed to demonstrate a causal relationship between the 1985 employment injury and the claimed condition. Following appellant's timely request, a hearing was held on May 23, 1995. By decision finalized on September 6, 1995, an Office hearing representative affirmed the prior decision. On February 29, 1996 appellant requested reconsideration and submitted additional evidence. In a merit decision dated March 19, 1996, the Office again denied the claim, finding that the evidence submitted with appellant's reconsideration request was either duplicative or cumulative. The instant appeal follows.

The relevant medical evidence includes an August 22, 1994 report, in which Dr. Neil J. Barkin, a Board-certified orthopedic surgeon, noted that x-ray of the left femur demonstrated a probable old fracture. An August 23, 1994 magnetic resonance imaging (MRI) of the left leg demonstrated diffuse bone thickening in the anterolateral shaft of the left femur consistent with old injury. In an August 26, 1994 treatment note, Dr. Barkin stated that appellant had had pain in his leg since 1985 and referred him to Dr. Martin W. Malawer, a Board-certified orthopedic surgeon. A September 12, 1994 computerized tomography (CT) of the left lower extremity demonstrated marked thickening of the anterior cortex of the mid-third of the left femur. In reports dated September 8 and September 26, 1994, Dr. Malawer noted appellant's complaints of persistent pain in the left anterior thigh and the x-ray, CT and MRI findings. On October 5, 1994 appellant underwent resection of myositis ossificans and bursa of the left thigh. By report dated May 25, 1995, Dr. Malawer advised that appellant's surgery for removal of a painful bursa was secondary to an old fracture "which he sustained ten years ago," noting that the bursa was associated with a myositis ossificans, "which is a well-known complication of fractures of the mid-shaft of the femur." He reiterated this conclusion in a September 28, 1995 report.

An individual who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the recurrence of the disabling condition, for which compensation is sought is causally related to the accepted employment injury.¹ This burden includes the condition necessity of furnishing evidence from a qualified physician who, on the basis of a complete and accurate factual and medical history, concludes that the condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.²

While Dr. Malawer's reports are insufficient to establish entitlement, the fact that they contain deficiencies preventing appellant from discharging his burden does not mean that they may be completely disregarded by the Office. It merely means that their probative value is diminished. As Dr. Malawer indicated that appellant's myositis ossificans was caused by the 1985 employment injury, his opinion is sufficient to require further development of the record.³ It is well established that proceedings under the Federal Employees' Compensation Act⁴ are not adversarial in nature,⁵ and while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.⁶ On remand the Office should refer appellant along with an updated statement of accepted facts to an

¹ *Kevin J. McGrath*, 42 ECAB 109 (1990); *John E. Blount*, 30 ECAB 1374 (1974).

² *Frances B. Evans*, 32 ECAB 60 (1980).

³ See *John J. Carlone*, 41 ECAB 354 (1989). The Board notes that the case record does not contain a medical opinion contrary to appellant's claim and further notes that the Office did not seek advice from an Office medical adviser or refer the case for a second opinion evaluation.

⁴ 5 U.S.C. § 8101 *et seq.*

⁵ See, e.g., *Walter A. Fundinger, Jr.*, 37 ECAB 200 (1985).

⁶ See *Dorothy L. Sidwell*, 36 ECAB 699 (1985).

appropriate Board-certified specialist for a rationalized medical opinion on the issue of whether appellant's left leg condition is causally related to the August 26, 1985 employment injury. The Office should request that the physician advise whether an x-ray or CT scan would have shown a fracture immediately after the injury and to express an opinion with rationale as to whether appellant sustained a fracture at the time he fell in the elevator in 1985. After such development of the case record as the Office deems necessary, a *de novo* decision shall be issued.

The decisions of the Office of Workers' Compensation Programs dated March 19, 1996 and September 6, 1995 are hereby set aside and the case is remanded to the Office for proceedings consistent with this opinion.

Dated, Washington, D.C.
January 8, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member