

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of POTIE PETTWAY and DEPARTMENT OF THE AIR FORCE,
TACTICAL AIR COMMAND, NELLIS AIR FORCE BASE, Nev.

*Docket No. 97-2070; Submitted on the Record;
Issued June 7, 1999*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant has met his burden of proof in establishing that he was totally disabled from February 14 through April 21, 1997, due to his February 6, 1997 accepted lumbosacral strain.

On February 11, 1997 appellant, then a 33-year-old custodial worker, filed a claim for a traumatic injury, alleging that on February 6, 1997 he sustained a back strain while mopping floors. On the reverse side of the form, the employing establishment stated that appellant stopped work on February 7, 1997 and returned to work on February 11, 1997. The employing establishment also controverted continuation of pay, stating that "[Appellant] was released on February 7, 1997 to return to work."

Appellant's regular duties as a custodial worker included cleaning and disinfecting (mopping floors), cleaning toilets, fixtures, cubbies, and storage shelves, picking up supplies, watering lawns and picking up litter.

On March 11, 1997 the record was supplemented to include a February 14, 1997 disability certificate by Dr. John Rebaton, an osteopath, who saw appellant on February 7, 1997, diagnosed lumbosacral strain and indicated that appellant could return to work as of February 7, 1997 with no bending, climbing or lifting; a February 14, 1997 medical certificate, by Dr. Mark M. Weisberg, an osteopath, who stated that appellant was seen on February 7, 1997 and released to return to work on that day but did not return to work until February 11, 1997 due to drowsiness from pain medication; and a February 14, 1997 certificate of disability, by Dr. Weisberg who diagnosed lumbosacral strain and indicated that appellant could work with restrictions of no bending at waist, carrying, pushing or lifting over 20 pounds.

By letter dated March 19, 1997, the Office of Workers' Compensation Programs accepted appellant's claim for a lumbosacral strain. The Office also awarded continuation of pay (COP) from February 7 through 10, 1997.¹

On April 7, 1997 the record was supplemented to include a March 21, 1997 certificate of disability, by Dr. Weisberg who saw appellant that day, diagnosed lumbosacral strain and indicated that appellant could work with no bending at waist or lifting over 20 pounds; and a March 3, 1997 certificate of disability, by Dr. John Huetter, an osteopath, indicating that appellant could work with no bending at waist, pushing or lifting over 20 pounds

On April 21, 1997 appellant completed a claim for compensation (Form CA-7) requesting compensation from February 14 through April 21, 1997.²

By letter dated April 28, 1997, the Office requested a rationalized medical opinion from Dr. Weisberg regarding any continuing disability causally related to appellant's February 6, 1997 accepted injury.

On April 29, 1997 the record was supplemented to include an April 14, 1997 certificate of disability by Dr. Weisberg indicating appellant was still restricted from bending at waist and could lift no more than 50 pounds. On May 7, 1997 the Office received an April 21, 1997 attending physician's report, (Form CA-20) by Dr. Weisberg indicating that appellant was partially disabled from February 7 through April 14, 1997, from the February 6, 1997 lumbosacral strain. Dr. Weisberg indicated that appellant should not lift over 50 pounds.

By decision dated May 12, 1997, the Office denied appellant's claim for compensation on the grounds that the factual and medical evidence of record failed to establish disability causally related to the February 6, 1997 lumbar strain for the period February 7 to April 14, 1997.³

The Board finds that appellant has failed to meet his burden of proof in establishing that he was totally disabled from February 7 through April 21, 1997 due to his accepted February 6, 1997 lumbosacral strain.

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that his disability for this period was due to his accepted employment-

¹ The Office found that appellant was entitled to COP from February 7 through 10, 1997 because the employing establishment failed to offer a modified-duty assignment and, therefore, appellant did not have an opportunity to respond to such an offer. Also, the Office previously accepted a May 23, 1995 lumbosacral strain and a January 9, 1997 lumbosacral strain. On January 28, 1997 appellant was returned to full regular duty with no restrictions.

² Appellant's term position was abolished due to lack of funding. He was notified of the termination on December 11, 1996 and terminated by the employing establishment effective February 14, 1997.

³ The Board notes that subsequent to the issuance of the Office's decision, appellant submitted evidence which was not previously before the Office. As this evidence was not previously submitted to the Office for consideration prior to its decision of May 12, 1997, the evidence represents new evidence which cannot be considered by the Board. The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c). Appellant may resubmit this evidence to the Office, together with a formal request for reconsideration pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.138(b).

related condition. As part of this burden, he must present rationalized medical opinion evidence, based on a complete factual and medical background, demonstrating causal relation.⁴

In support of his claim for total disability from February 14 through April 21, 1997 appellant submitted five disability certificates (three from Dr. Weisberg, one from Dr. Rebaton and one from Dr. Huette) all of which indicated that appellant was able to return to work as early as February 7, 1997 with restrictions. Also submitted was a medical certificate by Dr. Weisberg explaining why appellant did not return to work until February 11, 1997. In addition, appellant submitted an April 21, 1997 attending physician's report by Dr. Weisberg indicating that appellant was partially disabled from February 7 through April 14, 1997.

None of the evidence is sufficient to meet appellant's burden of proof to establish that he was totally disabled to work from February 14 through April 21, 1997, as none of the physicians stated that he was totally disabled. In fact, it was stated that as early as February 7, 1997 appellant could return to work with restrictions.

In summary, appellant failed to submit any rationalized medical opinion evidence opining that he was totally disabled from February 14 through April 21, 1997. The Office requested such evidence by letter dated April 28, 1997, but none was received. Appellant has failed to meet his burden of proof. Therefore, the Office properly denied his claim for compensation for the period February 14 through April 21, 1997.

The decision of the Office of Workers' Compensation Programs dated May 12, 1997 is affirmed.

Dated, Washington, D.C.
June 7, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

⁴ *Minnie L. Bryson*, 44 ECAB 713 (1993).