

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN L. MULL and U.S. POSTAL SERVICE,
PROCTOR POST OFFICE, Tacoma, Wash.

*Docket No. 97-2549; Submitted on the Record;
Issued June 18, 1999*

DECISION and ORDER

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

The issues are: (1) whether appellant has met his burden of proof in establishing that he sustained a recurrence of disability causally related to his June 26, 1987 employment injury; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for consideration of the merits.

The Board has duly reviewed the case on appeal and finds that appellant failed to meet his burden of proof in establishing that he sustained a recurrence of disability causally related to his June 26, 1987 employment injury.

Appellant filed a claim alleging that on June 26, 1987 he injured his lower back lifting in the performance of duty. The Office accepted appellant's claim for lower back strain and authorized compensation benefits. Appellant returned to work in light-duty positions. On February 26, 1996 appellant alleged that he sustained a recurrence of disability on January 18, 1996 causally related to his accepted employment injury. By decision dated January 30, 1997, the Office found that appellant had not established a recurrence of total disability. Appellant requested reconsideration on March 31, 1997 and by decision dated June 12, 1997, the Office denied appellant's request finding that he failed to submit relevant new evidence.

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.¹ Furthermore, appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between

¹ *Terry R. Hedman*, 38 ECAB 222 (1986).

his recurrence of disability commencing January 18, 1996 and his June 26, 1987 employment injury.² This burden includes the 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 support of his claim for a recurrence of disability, appellant submitted a report dated February 13, 1996 from Dr. Kevin P. Schoenfelder, a Board-certified orthopedic surgeon. Dr. Schoenfelder noted appellant's history of injury and stated that appellant had experienced an exacerbation of his back pain. He performed a physical examination and examined x-rays. Dr. Schoenfelder noted that these demonstrated degenerative joint disease and mild foraminal stenosis. He diagnosed lumbar radiculopathy, left and recommended further testing.

This report is not sufficient to meet appellant's burden of proof as Dr. Schoenfelder did not provide an opinion that appellant's lumbar radiculopathy, stenosis or degenerative joint disease were causally related to his accepted employment injury.

The Office referred appellant for a second opinion evaluation with Dr. W. Brandt Bede, a Board-certified orthopedic surgeon. In his September 16, 1996 report, Dr. Bede noted appellant's history of injury, his medical history and performed a physical examination. He also examined x-rays and appellant's computed axial tomography. Dr. Bede diagnosed lumbosacral strain and previous L5 radiculopathy causally related to the employment injury. He noted that appellant exhibited preexisting degenerative disc disease, facet arthropathy, thoracic and lumbar spines unrelated to the employment injury. Dr. Bede stated that appellant could perform the duties of his limited position full time, but that he was not capable of returning to work as a letter carrier.

This report is not sufficient to meet appellant's burden of proof as Dr. Bede did not opine that appellant's current conditions of degenerative disc disease or facet arthropathy were causally related to his accepted employment injury. Furthermore, he did not indicate that appellant had experienced a change in the nature or extent of his accepted employment injury.

As the record does not contain the necessary medical opinion evidence to establish that appellant has sustained a change in the nature and extent of his employment-related condition, the Office properly denied his claim for a recurrence of disability.

The Board further finds that the Office abused its discretion by refusing to reopen appellant's claim for consideration of the merits.

Section 10.138(b)(1) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the

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).

Office.⁴ Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without review the merits of the claim.⁵

In support of his request for reconsideration, appellant submitted a report dated March 24, 1997 from Dr. Schoenfelder. In this report, Dr. Schoenfelder noted appellant's history of injury, medical history and work history. He stated:

“The classic history of patients with spinal stenosis is periodic exacerbation from the compression of nerve roots. Typically once symptoms start to occur, then these symptoms will persist to a greater or lesser degree very often progressive in nature. The onset of these symptoms are commonly precipitated by an injury or over stressing of an area, although this can occur without any precipitating action.

By [appellant's] history his has been asymptomatic with his spinal stenosis until his injury at work. He has had exacerbation of problems associated with work activities. He certainly has an underlying preexisting condition and that is spinal stenosis, however, his entire injury history is well documented as aggravation of a preexisting problem that was asymptomatic prior to his injury.

From his history and his examination in this office it would appear his symptoms and problems now are associated with the primary injury in 1986 which aggravated a preexisting but asymptomatic problem.”

The Board finds that this report constitutes relevant new evidence as Dr. Schoenfelder provided an opinion that appellant's current condition was causally related to his accepted employment injury. He had not provided an opinion on the causal relationship between appellant's current condition and his accepted employment injury in his February 13, 1996 report. Therefore, the Office abused its discretion by refusing to reopen appellant's claim for consideration of the merits.

⁴ 20 C.F.R. § 10.138(b)(1).

⁵ 20 C.F.R. § 10.138(b)(2).

The decision of the Office of Workers' Compensation Programs dated January 30, 1997 is hereby affirmed. The June 12, 1997 decision is hereby set aside and the case is remanded for further development by the Office.

Dated, Washington, D.C.
June 18, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member