

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of CLAYTON W. KLINE and DEPARTMENT OF AGRICULTURE,  
FOOD SAFETY INSPECTION SERVICE, Omaha, NE

*Docket No. 98-710; Submitted on the Record;  
Issued November 19, 1999*

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DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issue is whether appellant sustained a recurrence of disability beginning April 20, 1993.

The Office of Workers' Compensation Programs accepted that appellant sustained a compression fracture at T11 when he slipped and fell on ice on December 20, 1991. Appellant stopped work on December 20, 1991 and received continuation of pay until he returned to work on January 13, 1992, then again stopped work on January 28, 1992, filing a claim for a recurrence of disability and receiving continuation of pay until his return to his regular work on February 18, 1992.

Appellant again stopped work on April 20, 1993 and filed a claim for a recurrence of disability related to his December 20, 1991 injury. By decision dated August 1, 1995, the Office terminated appellant's compensation including entitlement to medical benefits on the basis that its referral physician, Dr. Richard Whitehead, a Board-certified orthopedic surgeon, found that appellant's disabling condition resulted from his preexisting condition rather than from his employment injury.

Appellant requested a hearing. In a decision dated June 10, 1996, an Office hearing representative found that Dr. Whitehead's report established that appellant's current condition and disability were causally related to his employment injury, but that a supplemental report was needed to address whether appellant was disabled from work beginning April 20, 1993. After obtaining a supplemental report from Dr. Whitehead, the Office, by decision dated September 12, 1996, found that the evidence failed to establish that appellant was disabled for work beginning April 20, 1993. Appellant requested reconsideration and the Office, by decision dated December 8, 1997, found that appellant had presented no new evidence or rationale to overcome the weight of Dr. Whitehead's opinion.

The Board finds that there is a conflict of medical opinion on the question of whether appellant sustained a recurrence of disability beginning April 20, 1993.

In his supplemental report, which was dated May 28, 1996, Dr. Whitehead stated:

“I do not believe that [appellant] was disabled from any type of employment during the period of April 20, 1993 until July 7, 1995. In view of the fact that the patient was able to lift 50 pounds in the office today and states that he has not improved as compared with during that period, I believe he could have worked as a food inspector. I say this after carefully reviewing the job description that you supplied to me. I believe that the patient demonstrates a full ROM [range of motion] of the lumbar spine and good strength in the lower extremities. He has no upper extremity problems. My only concern is that the patient subjectively states to me that he has muscle spasms when he does heavy types of work. I did not see these myself in the office on examination however. I think for that reason that it might well have been very helpful for him at that time and for that matter now to wear a spinal support to try and prevent muscle spasms with heavy work activities. I also think that in his particular case that work hardening would be very helpful to get him to the point where he could perform that job with ease. Nevertheless, I believe that he was and is capable of that job.”

While this report indicates that appellant could perform the job he held when injured as of April 20, 1993, the date he claimed a recurrence of disability, reports from appellant’s attending physician, Dr. Michael J. Morrison, a Board-certified orthopedic surgeon, indicate that appellant could not perform the duties of that position on that date. In a report dated March 24, 1995, Dr. Morrison set forth work tolerance limitations that would clearly preclude the performance of appellant’s position as a food inspector. Dr. Morrison indicated that appellant could lift 10 to 20 pounds and sit or stand intermittently 4 hours per day. The functional requirements of the position provided by the employing establishment indicate that lifting and carrying of 15 to 44 pounds is required, as is standing for 8 hours in a limited space. In a report dated August 27, 1997, Dr. Morrison stated, “It would be my opinion that his present work restrictions since April 20, 1993 relate back to the injury of 1991 to his mid and lower back.”

The reports of Drs. Morrison and Whitehead conflict on the question of whether appellant was disabled for his position of food inspector beginning April 20, 1993. Although Dr. Whitehead provides more explanation why he believes appellant could perform the position than Dr. Morrison provides for his contrary opinion, Dr. Morrison examined appellant on April 26, 1993, only six days after the claimed recurrence of disability. Dr. Whitehead first examined appellant on July 7, 1995, over two years after the date he is addressing. In addition, Dr. Whitehead changed his opinion on appellant’s work tolerance limitations from those in his initial report of no lifting greater than 15 pounds and no standing longer than 20 minutes. Dr. Whitehead’s supplemental report is also unclear as to appellant’s tolerance for walking. His August 8, 1996 work tolerance limitations state “Walking continuously should be limited to no more than two city blocks at a time.” His August 28, 1996 report states, “I do not agree with my previous thinking that patient is limited to 10 to 15 minutes of sitting and/or walking -- which patient volunteered to me at that time.”

The reports of Drs. Morrison and Whitehead are of sufficiently equal probative value to constitute a conflict of medical opinion under the Federal Employees' Compensation Act. To resolve this conflict, the Office should, pursuant to section 8123(a) of the Act,<sup>1</sup> refer appellant to an appropriate impartial medical specialist for a reasoned opinion on appellant's ability to work beginning April 20, 1993. The Office should then issue an appropriate decision on appellant's claim for a recurrence of disability beginning April 20, 1993.

The decision of the Office of Workers' Compensation Programs dated December 8, 1997 is set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Dated, Washington, D.C.  
November 19, 1999

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>1</sup> 5 U.S.C. § 8123(a) states in pertinent 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."