

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of THOMAS G. GASPARRE and U.S. POSTAL SERVICE,  
POST OFFICE, Mount Vernon, NY

*Docket No. 97-2425; Submitted on the Record;  
Issued September 9, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,  
BRADLEY T. KNOTT

The issue is whether appellant has met his burden of proof in establishing that he sustained a recurrence of disability, due to his October 9, 1989 employment injury, beginning on May 16, 1995 and March 26, 1996.

The Office of Workers' Compensation Programs accepted appellant's claim for a herniated disc at the L4-5 level. Appellant returned to light-duty work on October 14, 1989 but was terminated due to his inability to perform this work on July 25, 1990. Appellant worked part time in the private sector in sales and as a security guard from August 1990 through October 1992. Appellant returned to light-duty work for the employing establishment on August 23, 1993.

On August 16, 1995 appellant filed a claim for a recurrence of disability alleging that on approximately May 16, 1995 he sustained a recurrence of disability causally related to the October 9, 1989 employment injury. He did not miss any work at that time. Appellant stated that he had pain in his lower back, numbness in his feet and legs, a pull in his groin area when standing from a sitting position and pulling behind his knees. He stated that, since returning to work, he occasionally had pain in his lower back but in the last two or three months he had been experiencing pain radiating into one or both of his legs and pulling on the right side of his groin. Appellant stated he could not point to a specific time or injury when he started experiencing these symptoms.

On April 11, 1996 appellant filed another claim for a recurrence of disability, alleging that sometime in March 1996 he sustained a recurrence of disability causally related to the October 9, 1989 employment injury. Appellant stated that his back pain becomes severe, that he has back spasms more frequently, and stated that on March 27, 1996 his back "went out," and he was in severe pain for almost five days and was unable to work. In an attached statement dated July 1, 1996, appellant stated that he felt severe back pain on March 26, 1996 while he was working and weakness in his left leg, which caused him to leave work.

Appellant submitted numerous reports from his treating physician, Dr. Anthony L. Brittis, a Board-certified neurologist and physiatrist, dated from September 11, 1995 through May 16, 1996 and a disability note from Dr. Brittis dated April 19, 1996, documenting an ongoing back problem. Appellant also submitted two computerized axial tomography (CAT) scans of the lumbar spine dated September 12, 1995 and April 18, 1996 respectively. In the September 11, 1995 report, Dr. Brittis stated that he had not treated appellant since July 29, 1993. Dr. Brittis stated that appellant had occasional episodes where he either experienced lower back pain with a pulling in his groin, pain behind his knees or numbness in his lower extremities. He further stated that appellant had two recent episodes where his lower extremity gave way and in the past three months all his symptoms had become more frequent. Dr. Brittis diagnosed internal derangement of the lower back with intermittent radiculopathy bilaterally. The September 12, 1995 CAT scan stated that there was very minimal disc bulging at L4-5 and L5-S1. The April 18, 1996 CAT scan showed mild stenosis L3-4 and moderate stenosis at L4-5, which were unchanged since the September 12, 1995 CAT scan. The 1996 CAT scan also showed a left lateral broad based protrusion at L5-S1 compressing the left S1 nerve root as it exited the thecal sac, which compared to the 1995 CAT scan was more prominent.

In his January 18, 1996 report, Dr. Brittis compared the September 12, 1995 CAT scan with the magnetic resonance imaging (MRI) scan he performed in 1989, and found that there were herniated discs at L4-5 and L5-S1 whereas in 1989 appellant showed no herniated disc at L5-S1. He also stated that the findings on the CAT scan and MRI scan correlated to appellant's physical limitations. Dr. Brittis stated that appellant's need to sit down when he stood too long suggested he had a "neurogenic claudication syndrome secondary to stenosis," and his experiencing pain when he sat too long was due to his bulging disc which bulged more when he sat. He stated that appellant adopted the compromise consistent with these findings by alternating sitting and standing at work.

In the April 19, 1996 disability note, Dr. Brittis found that the April 18, 1996 CAT scan showed that appellant's condition had worsened since the 1995 CAT scan. He stated that appellant informed him that he recently experienced an exacerbation of the back condition, which forced him to remain at home on bed rest. In his May 16, 1996 report, Dr. Brittis stated that the results of the April 18, 1996 CAT scan showed that the left lateral broad based protrusion at L5-S1 was slightly more prominent than in the 1995 CAT scan.

By letters dated June 11 and July 18, 1996, the Office informed appellant that more evidence was necessary to establish his claim.

Appellant subsequently submitted medical reports dated May 25 and June 13, 1996 and attending physician reports, Forms CA-20a, dated June 27, July 18 and August 9, 1996, from Dr. Robert A. Marini, a physiatrist and internist and a report dated August 20, 1996 and a CA-20a dated June 13, 1996 from Dr. Brittis. In his reports dated May 25 and June 13, 1996, Dr. Marini considered appellant's history of injury, performed a physical examination and diagnosed lumbosacral radiculopathy and chronic lumbosacral derangement with spasm, secondary to nerve root irritation. In the August 9, 1996 CA-20a, Dr. Marini checked the "yes" box that appellant's condition was related to the October 9, 1989 employment injury.

In his August 20, 1996 report, Dr. Brittis stated that appellant reported a recent exacerbation of his back symptoms on May 16, 1995. He reiterated the results of his earlier reports in 1995 and 1996 and diagnosed lumbar disc disease at multiple levels, facet joint hypertrophy, lumbar canal stenosis and herniated disc at L5-S1. In the June 13, 1996 CA-20a, Dr. Brittis checked the “yes” box that appellant’s condition of S-1 radiculopathy and constant pain in the left lower extremity were causally related to the October 9, 1989 employment injury.

By decision dated August 28, 1996, the Office denied the claim, stating that the evidence of record failed to establish that the claimed medical condition or disability was causally related to the October 9, 1989 employment injury.

By letter dated September 26, 1996, appellant requested an oral hearing before an Office hearing representative which was held on April 9, 1997. At the hearing, appellant testified that when he returned to work in 1993, he worked as a mail sorter and used a “rest pole” to lean against. Appellant also testified that, after missing some work due to the recurrence of disability in March 1996, he worked intermittently since September 1996. Appellant testified that he had the same symptoms of back pain as he had when he injured himself in 1989 except that they had worsened.

Appellant submitted additional evidence including medical reports from Dr. Marini dated from June 13, 1996 through February 5, 1997, documenting his continued treatment of appellant’s back condition and a report from Dr. Brittis dated April 30, 1997. In his January 6, 1997 report, Dr. Marini stated that appellant continued to reveal chronic lumbosacral derangement with acute exacerbation at this time. In his April 30, 1997 report, Dr. Brittis reiterated his finding that, based on the 1989 MRI scan and the September 1995 and April 1996 CAT scans, the L5-S1 vertebral level was always involved by disc bulging which eventually herniated compressing the L5 and S1 nerve roots. He stated that the October 9, 1989 employment injury “was the mitigating factor in the continuing deterioration and resultant exacerbations of pain syndromes experienced by him over the years including the current disc herniation at the L5-S1 level.”

By decision dated June 12, 1997, the Office hearing representative affirmed the Office’s August 28, 1996 decision.

The Board finds that this case is not in posture for decision.

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 disability for which compensation is claimed is causally related to the accepted injury.<sup>1</sup> 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

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<sup>1</sup> *Dominic M. DeScala*, 37 ECAB 369 (1986); *Bobby Melton*, 33 ECAB 1305 (1982).

disability and show that he cannot perform such light duty.<sup>2</sup> As part of this burden, the employee must show a change in the nature and extent of the light-duty job requirements.<sup>3</sup> 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 the employment injury and supports that conclusion with sound medical reasoning.<sup>4</sup> However, while the claimant has the burden to establish entitlement to compensation, the Office shares the responsibility in the development of the evidence.<sup>5</sup> The Office has an obligation to see that justice is done.<sup>6</sup>

In the present case, Dr. Brittis' statement in his April 30, 1997 report that appellant's October 9, 1989 employment injury "was the mitigating factor in the continuing deterioration and resultant exacerbations of pain syndromes experienced by [appellant] over the years including the now disc herniation at the L5-S1 level" is supportive of appellant's May 16, 1995 and March 26, 1996 recurrences of disability being causally related to the October 9, 1989 employment injury. Further, Dr. Brittis based his opinion on his review of the September 12, 1995 and April 18, 1996 CAT scans, which he stated showed disc bulging at the L5-S1 level which eventually herniated compressing the L5 and S1 nerve roots particularly when compared to the 1989 MRI scan. The CA-20a dated August 9 and 20, 1996 from Dr. Marini and Dr. Brittis, respectively, in which they checked the "yes" box that appellant's lumbosacral radiculopathy and chronic lumbosacral derangement were causally related to the October 9, 1989 employment injury further supports a causal connection between appellant's recurrences of disability and the 1989 employment injury. In his September 11, 1995 report, Dr. Brittis noted that in the past three months appellant's symptoms of back pain, knee pain and numbness in his lower extremities had increased. In his January 18, 1996 report, he correlated appellant's inability to stand, walk and sit for any length of time to his objective findings. In his April 19, 1996 disability note, Dr. Brittis stated that appellant's back condition had worsened since the 1995 CAT scan based on the 1996 CAT scan results and that appellant had informed him that he sustained an exacerbation of his back condition which forced him to remain at home on bedrest.

While Dr. Brittis' opinion that appellant's current condition is due at least in part to his October 9, 1989 employment injury and the corroborating evidence consisting of Dr. Marini's and Dr. Brittis' CA-20s and the September 1995 and April 1996 CAT scans, is insufficient to discharge appellant's burden of proving by the weight of the reliable, substantial and probative evidence that his alleged recurrences of his back condition were causally related to the October 9, 1989 employment injury, Dr. Brittis opinion constitutes sufficient evidence in support of appellant's claim to require further development of the record by the Office.<sup>7</sup> Dr. Brittis

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<sup>2</sup> *George DePasquale*, 39 ECAB 295, 304 (1987); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

<sup>3</sup> *Id.*

<sup>4</sup> *See Nicolea Brusio*, 33 ECAB 1138 (1982).

<sup>5</sup> *Dennis J. Lasanen*, 43 ECAB 549, 550 (1993); *Robert A. Redmond*, 40 ECAB 796 (1989).

<sup>6</sup> *Dennis J. Lasanen*, *supra* note 5 at 550; *William J. Cantrell*, 34 ECAB 1233 (1983).

<sup>7</sup> *See Horace Langhorne*, 29 ECAB 820 (1978).

opined that the October 9, 1989 employment injury contributed to appellant's exacerbations including the herniated disc at L5-S1 but provided no medical rationale explaining his opinion. Dr. Marini also supplied no medical rationale for his opinion as reflected in his checking a "yes" box that appellant's radiculopathy was work related. Although the doctors did not provide sufficient rationale to support their opinions, no evidence of record refutes that appellant sustained recurrences of disability as alleged.

On remand, the Office should prepare a statement of accepted facts and refer the case record and appellant, if necessary, to a physician in the appropriate field of medicine for a rationalized medical opinion regarding whether appellant sustained recurrences of disability on May 16, 1995 and March 26, 1996 are causally related to the October 9, 1989 employment injury. If further diagnostic testing is necessary, such as a current MRI scan, it should be obtained. Following this and any necessary further development, the Office shall issue a *de novo* decision.

The decisions of the Office of Workers' Compensation Programs dated June 12, 1997 and August 28, 1996 are hereby vacated and the case is remanded for further consideration consistent with this decision.

Dated, Washington, D.C.  
September 9, 1999

Michael J. Walsh  
Chairman

George E. Rivers  
Member

Bradley T. Knott  
Alternate Member