

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LARRY L. AUSTIN and U.S. POSTAL SERVICE,
POST OFFICE, Albuquerque, NM

*Docket No. 98-431; Submitted on the Record;
Issued September 17, 1999*

DECISION and ORDER

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

The issues are: (1) whether appellant has met his burden of proof in establishing that he sustained a recurrence of disability on or after April 5, 1996 causally related to his April 6, 1993 employment injury; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for merit review on October 27, 1997.

The Board has duly reviewed the case record on appeal and finds that appellant has not established that he sustained a recurrence of disability on or after April 5, 1996 causally related to his April 6, 1993 employment injury.

Where appellant claims a recurrence of disability due to an accepted employment-related injury, he has the burden of establishing by the weight of the substantial, reliable and probative evidence that the subsequent disability for which he claims compensation is causally related to the accepted injury.¹ This burden includes the 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

In the instant case, the Office accepted that appellant sustained a lumbosacral sprain and an aggravation of preexisting degenerative disc disease following an April 6, 1993 incident whereby appellant slipped in some mud as he was getting into his postal jeep. Appellant stopped work after the injury and returned to four hours per day limited-duty position on November 13, 1994. By decision dated February 4, 1995, the Office determined that appellant's actual earnings fairly and reasonably represented his wage-earning capacity.

¹ *Robert H. St. Onge*, 43 ECAB 1169 (1992).

² *Id.*

On May 31, 1996 appellant alleged that he sustained a recurrence of disability causally related to his April 6, 1993 employment injury. In a written statement, appellant claimed numerous falls as being related to his work injury. He further stated that he felt he could not work because it would endanger him. Appellant stopped work on April 5, 1996 and has not returned.

By decision dated August 6, 1996, the Office denied appellant's claim on the grounds that the evidence did not establish a causal relationship between his accepted injury and the claimed condition or disability. The Office stated that indications of a possible new injury due to repeated falls were not established as being work related. They further stated that the history provided by both appellant and Dr. James F. Van Pelt was unclear as to the facts surrounding the alleged falls. By decision dated January 15 and July 31, 1997, the Office denied appellant's request for reconsideration on the grounds that the evidence was insufficient to warrant modification of the August 6, 1996 decision. By decision dated October 27, 1997, the Office denied appellant's request for reconsideration on the grounds that the evidence was insufficient to warrant review of the August 6, 1997 decision.

The Board has duly reviewed the case record on appeal and finds that appellant has not established that he sustained a recurrence of disability on or after April 5, 1996 causally related to his April 6, 1993 employment injury.

In the present case, appellant stopped working at his modified job on April 5, 1996 and claimed a recurrence of disability due to leg weakness as a consequence of his low back injury of April 6, 1993. Prior to the work stoppage, the evidence of record shows that appellant indicated he was bending over to sort mail in a box when his right leg gave way and he fell; he fell once in a driveway in Illinois while visiting his brother and he fell in a bathtub. On August 6, 1996 the Office denied appellant's recurrence claim on the grounds that the evidence of record did not establish that appellant suffered a recurrence of disability as a result of the April 6, 1993 work injury.

When an employee, who is disabled from a 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 job requirements.³ This burden further includes the necessity of furnishing medical evidence from a qualified physician who, on the basis of a complete and accurate factual injury and supports that conclusion with sound medical reasoning.⁴ Where no such rationale is present, medical evidence is of diminished probative value.⁵ The Board has

³ *Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

⁴ *Jerry A. Miller*, 46 ECAB 243 (1994); *Ezra D. Long*, 46 ECAB 791 (1995); *Ronald M. Cokes*, 46 ECAB 967 (1995).

⁵ *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

also held that the fact that a condition worsens to cause total disability, without establishment of causal relationship, is not sufficient to establish entitlement to total disability benefits. The burden of proof can be met, however, if the employee demonstrates a change in the injury-related condition, which is now totally disabling and that the compensation of the condition was a natural consequence arising from the accepted employment injury.⁶

In support of his first reconsideration request, appellant resubmitted a July 22, 1996 report from Dr. Van Pelt, which the Office previously considered, an October 14 and November 26, 1996 narrative medical report from Dr. Van Pelt. A copy of a June 22, 1996 magnetic resonance imaging (MRI) report was also submitted which revealed that the MRI scan of the lumbar spine on that date showed bilateral facet joint hypertrophic osteoarthritis at three levels, with no significant foraminal or central canal stenosis and no posterior disc herniation causing any neural impingement. In the October 14, 1996 report, Dr. Van Pelt, a neurologist, indicated that appellant had a history of a lumbar injury which he received at work on April 6, 1993. He also stated that appellant had reaggravated his lower back around December 15, 1994, when he fell and landed on his right hip while reaching over and putting mail away. He noted that appellant subsequently developed pain in the right lower extremity with weakness, while working half days with time off. He further indicated that appellant had had physical therapy. Dr. Van Pelt stated that appellant demonstrated weakness of the right lower extremity and that his weakness had progressed and was associated with pain. He noted findings of the June 22, 1996 MRI scan of the lumbar spine and opined that appellant was permanently disabled with a 100 percent apportioned to the injuries sustained on April 6, 1993, with reaggravation in mid-December 1994, while working for the employing establishment. In his November 26, 1996 report, Dr. Van Pelt stated that appellant had been complaining of triggering muscle spasm in the back which radiates down both legs, which initiated several falls and injuries both at work and away from work. Dr. Van Pelt opined that the weakness of appellant's lower extremities was causally related to his accepted conditions of April 1993. Dr. Van Pelt stated that a lumbar disc disease associated with disc protrusions, as demonstrated at the L1 and L4-5 with associated bilateral facet joint hypertrophy was characteristic of trigger pain radiating down the posterior aspect at the thigh to the calf and if severe, could produce weakness in the calf muscle causing the patient to lose strength and fall. Dr. Van Pelt stated that this is what occurred to appellant and that for fear of severe injury, he declared appellant permanently impaired from the initial injury of April 6, 1993.

However, Dr. Van Pelt does not explain how, with reference to the specific facts of the case, appellant's 1993 work injury caused any condition or disability attributable to the November 1994 fall or for his conclusion that appellant's leg weakness is due to the 1993 aggravation of the underlying condition. The record reflects that following the work injury of April 5, 1996, there was no evidence of any nerve root impingement. Appellant underwent back x-rays on April 9, 1993 and had a CT scan performed on May 10, 1993. The CT scan revealed degenerative disc disease with osteophyte formation anteriorly at the L3-4 level principally. The L4-5 disc was diffusely bulging and the L5-S1 had mild to moderate diffuse bulging. An MRI of June 1, 1993 showed degenerative changes in the discs, bony hypertrophic facet changes but no other significant abnormalities. The record further reflects that prior to the work injury,

⁶ *Dana Bruce*, 44 ECAB 132 (1992).

appellant had had multiple metatarsal osteotomies, surgery on both knees, borderline diabetes mellitus by history and morbid obesity. It is noted that the June 22, 1996 MRI scan was taken after appellant stopped work and Dr. Van Pelt does not explain how the mild abnormalities are competent to produce the bilateral leg symptoms. Furthermore, in the absence of any demonstrated nerve root impingement, there is no explanation of the neurological pathology responsible for any nerve weakness. Medical reports not containing rationale on causal relation are entitled to little probative value and are insufficient to meet appellant's burden of proof.⁷ Moreover, Dr. Van Pelt's opinion does not appear to be based on a complete medical history of appellant's condition as he does not acknowledge appellant's other medical conditions or discuss how they affect his current symptoms. Such discussion is particularly pertinent in this case as appellant has preexisting pathology to his knees.

Furthermore, appellant has raised an allegation of a new injury occurring on December 1, 1994 in which he fell by bending over to sort mail in a box. Although the record contains a copy of the front side of the Form CA-1, the Office noted that they never received record of such a claim and, thus, there had been no adjudication of the alleged injury. Appellant was advised that he could file a claim for the December 1, 1994 injury under separate cover. Within the duplicate report of July 22, 1996, Dr. Van Pelt reported that appellant had weakness in both legs. He noted that during the fall of December 1994, appellant fell and landed on his right hip and had reaggravated his back. However, Dr. Van Pelt does not explain the etiology of the leg weakness, particularly the left leg as appellant had landed on his right hip, or provide any correlation to radiological findings. There is no rationalized medical evidence linking the weakness of either extremity to the accepted condition of aggravation of degenerative disc disease. As previously stated, medical reports not containing rationale on causal relation are entitled to little probative value.⁸ The Office properly advised appellant that he could file a claim for this new injury.

Accordingly, the Office properly denied modification of its prior decision in its January 15, 1997 decision.

In his second reconsideration request, appellant, through his attorney, submitted additional medical reports from Dr. Van Pelt. In a May 7, 1997 report, Dr. Van Pelt outlined a history of appellant's treatments. In an April 22, 1997 report, Dr. Van Pelt stated that appellant's weakness was a continuation of the initial pain demonstrated on his consult dating back to the initial injury. He stated that documentation of weakness of the right lower extremity and subsequently the left lower extremity could easily be explained by the MRI scan which revealed the disc bulges at the L4-5 and L5-S1 areas. Dr. Van Pelt stated that disc bulges can cause aggravation in the area of damage and can cause radicular pain and weakness in the same area, both unilaterally and bilaterally. Dr. Van Pelt opined that appellant stopped work in April 1996 as a result of both the December 1, 1994 incident and of the progressive deterioration, starting with the initial pain radiating down the right lower extremity with reaggravation of the lower lumbar back injury in December 1994.

⁷ *Arlonia B. Taylor*, 44 ECAB 591 (1993).

⁸ *Id.*

However, since Dr. Van Pelt is relating appellant's condition in part to a new injury, the December 1, 1994 injury which the Office never adjudicated, such an intervening cause is sufficient to bar appellant's recurrence claim. Furthermore, as previously noted, Dr. Van Pelt does not provide a complete history of appellant's medical condition or provide an explanation as to how his conditions could affect his current condition.

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's claimed condition became apparent during a period of employment nor his belief that his condition was aggravated by his employment is sufficient to establish causal relationship.⁹ Appellant failed to submit rationalized medical evidence establishing that his claimed recurrence of disability was causally related to the accepted employment injury in 1993 and therefore, the Office properly found that the evidence submitted in support of the requests for reconsideration were not sufficient to warrant modification of its prior order in its decisions dated July 31 and January 15, 1997.

The Board further finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for merit review on October 27, 1997.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act, the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.¹⁰ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.¹¹ When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.¹²

In support of his reconsideration request, appellant, through his attorney, submitted an affidavit dated August 8, 1997 from appellant. Within the affidavit, appellant stated that he felt it was important to point out gross inaccuracies in the decision which made him believe that the Office was not relying upon his medical records. Appellant asserted that although he was a U.S. Postal Service employee, he was never employed as a letter carrier in Albuquerque, New Mexico. Appellant further stated that the decisions state that the medical evidence of file indicate that he had bilateral knee surgery and had arthritis of the hips, knees and feet. Appellant asserted that he never had bilateral knee surgery. He stated that he did have an arthrogram of the right knee, but has never had any left knee problems. He further stated that he has never had any difficulty, diagnosis, or treatment for arthritis in his hips, knees or feet.

⁹ See *Walter D. Morehead*, 31 ECAB 188, 194-95 (1986).

¹⁰ 20 C.F.R. § 10.138(b)(1), 10.138(b)(2).

¹¹ 20 C.F.R. § 10.138(b)(2).

¹² *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

In this case, the Office denied appellant's recurrence claim on the grounds that the medical evidence did not establish that he sustained a recurrence of disability on April 5, 1996. Although appellant has alleged that he has never suffered from certain conditions, the affidavit is not sufficient to require a merit review of the file as it does not deal with the issue in this case, that being, the establishment of a causal relation between appellant's claimed recurrence and his accepted work-related injury. The Office, therefore, properly found that this evidence was insufficient to warrant a merit review.

As appellant has not established that the Office erroneously applied or interpreted a point of law, advanced a point of law or fact not previously considered by the Office or submitted relevant and pertinent evidence not previously considered by the Office, he has not established that the Office abused its discretion in denying his request for review under section 8128 of the Act.

The decisions of the Office of Workers' Compensation Programs dated October 27, July 31 and January 15, 1997 are affirmed.

Dated, Washington, D.C.
September 17, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

Bradley T. Knott
Alternate Member