

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLES F. MORGAN and DEPARTMENT OF THE AIR FORCE,
SCOTT AIR FORCE BASE, IL

*Docket No. 98-2170; Submitted on the Record;
Issued April 13, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant has established that he sustained a recurrence of disability causally related to either his August 19, 1992 or September 21, 1993 employment injury.

On September 14, 1992 appellant, then a 39-year-old laborer, filed a claim alleging that he sustained a traumatic injury on August 19, 1992 when he stepped off a lift. He stopped work on August 19, 1992 and returned to work on August 22, 1992. The Office of Workers' Compensation Programs accepted appellant's claim for a right ankle strain. He also filed a traumatic injury claim alleging that he injured his back on September 23, 1993 unloading furniture from a truck. The Office accepted appellant's claim for cervical disc displacement.

On December 23, 1994 appellant filed a claim for a recurrence of disability on September 23, 1993 causally related to his August 19, 1992 employment injury. On the reverse side of the claim form, an official with the employing establishment indicated that appellant sustained a recurrence of disability on December 23, 1993 and stopped work on December 24, 1993. The official further noted that appellant was working limited duty at the time.

An x-ray of appellant's spine dated October 7, 1993 revealed findings consistent with demyelinating plaque. A magnetic resonance imaging (MRI) scan of appellant's cervical spine dated December 16, 1993 revealed a "[c]entral herniation of the C5-6 dis[c], with a soft dis[c] lesion just impinging upon the cord." In chart notes dated December 23, 1993, Dr. Steven R. Brenner, a Board-certified neurologist, diagnosed "probable spinal cord compression from [a] herniated cervical dis[c]." An MRI scan of the cervical spine obtained on December 23, 1993 revealed "findings suspicious for [an] intramedullary tumor with associated syrinx" with "a minimal disc bulge noted at C5-6."

In a discharge summary dated December 29, 1993, a physician diagnosed “unexplained neurologic symptoms,” a bulging C4-5 disc and possible multiple sclerosis. He listed permanent work restrictions.

In a letter dated April 18, 1994, Dr. Brenner related:

“[Appellant] has a herniated cervical disc and has weakness of the left arm. He also has low back pain. [Appellant] has undergone MRI [scans] of his neck as well and there has been a question of herniated cervical disc and multiple sclerosis. He does have herniated cervical disc. I do not believe [appellant] is able to perform any kind of work at this time.

“[Appellant] reported his neck and back problems began when he was at work at [the employing establishment] where he was working as a laborer. From his description of the events, I believe it is likely his neck and back problems originated from his work.”

In a report dated March 8, 1995, Dr. Brenner noted that appellant related “back pain after a fall from some scaffolding” and that a May 19, 1994 computerized tomography (CT) scan revealed a mild central disc herniation at L4-5. He further discussed the MRI scan findings and indicated that appellant required additional diagnostic studies. Dr. Brenner related that “the differential diagnosis or different diagnostic possibilities are residuals of traumatic neck and back injury, multiple sclerosis and even a tumor of the spinal cord and syringomyelia.” He stated:

“With reference to how [appellant’s] diagnosed condition is medically connected to [his] work at the [employing establishment], [he] reported his health was good and he had no pain or weakness until he experienced a fall while he was an employee. Since there is still some question in my mind with reference to an exact diagnosis, I am hesitant to make an assessment or determination of the relationship of his symptoms to his work.”

Dr. Brenner found appellant totally disabled from physical labor.

By decision dated October 3, 1995, the Office denied appellant’s claim on the grounds that the evidence did not establish that he sustained a recurrence of disability on December 23, 1993 causally related to his September 23, 1993 employment injury.

By letter dated October 25, 1995, appellant, through his representative, requested a hearing before an Office hearing representative. In a decision dated August 14, 1996 and finalized August 16, 1996, the hearing representative set aside the October 3, 1995 decision. The hearing representative specified that the Office should combine the case records for appellant’s August 1992 and September 1993 employment injuries and, if necessary, further develop the medical evidence regarding the August 1992 injury. The hearing representative then instructed the Office to refer appellant for a second opinion evaluation to determine “the diagnoses of any conditions causally related to the injuries the claimant sustained in the course

of his employment in August 1992 and September 1993 and the periods, if any, he was disabled as a result of those injuries.”

In a memorandum dated March 31, 1997, the Office noted that appellant’s temporary job assignment with the employing establishment ended in December 1993.

By letter dated March 31, 1997, the Office requested that appellant submit medical records relevant to his 1992 employment injury. He did not respond to the Office’s request within the time allotted. In a decision dated May 5, 1997, the Office found that the evidence was insufficient to establish that appellant sustained a recurrence of disability on December 23, 1993 causally related to his August 19, 1992 or September 23, 1993 employment injuries.

In a memorandum dated April 18, 1997, the employing establishment provided a summary of the leave taken by appellant from October through December 1993.

By letter dated November 7, 1997, appellant, through his representative, requested reconsideration of his claim. In support of his request, appellant submitted a report dated November 9, 1994 from Dr. Brenner, who discussed appellant’s medical history and the results of objective testing performed since December 1993. He noted that appellant had limitations due to stiffness and weakness of the left hand, loss of feeling in his finger tips of the right hand and weakness of both legs. Dr. Brenner opined, “He has an undefined disease of the nervous system and may have syringomyelia [-]- a cyst in the spinal cord, multiple sclerosis [MS] or [a] disc herniation pressing on the spinal cord.”

In an unsigned report dated February 1, 1996, Dr. Daniel Scodary stated that he agreed with Drs. Jafri and Brenner “that the disc herniation is not [appellant’s] problem but his progressive multiple sclerosis.”

An MRI scan dated February 23, 1996 revealed findings of multiple sclerosis or sarcoidosis.

Appellant further submitted treatment notes from Dr. Joseph W. Novinger, an osteopath. In a report dated January 16, 1996, he noted that appellant had a fall in September 1993 which caused partial paralysis and that testing showed a C5-6 disc herniation and possible MS. In an office visit note dated September 16, 1997, Dr. Novinger indicated that appellant had a history of MS and disc disease.

By decision dated February 10, 1998, the Office denied modification of its prior decision. In a letter dated March 13, 1999, appellant, through his attorney, requested reconsideration and submitted evidence regarding his 1992 and 1993 employment injuries. By letter dated April 9, 1998, the Office referred appellant, together with the case record and a statement of accepted facts, to Dr. Gerlyn Friesenhahn, a Board-certified neurologist, for a second opinion evaluation. The Office requested that he discuss whether appellant had any current condition and/or disability causally related to his accepted employment injuries and to address whether he had any periods of partial or total disability due to his accepted employment injuries.

In a report dated May 18, 1998, Dr. Friesenhahn, discussed appellant's history of employment injuries in 1992 and 1993, the medical treatment he received and the results of objective testing. He stated:

“The first [work injury] on August 19, 1992 where [appellant] incurred an ankle strain injury from which he recovered fully and the second, a lifting injury of September 23, 1993. The second injury disclosed an unrelated problem, that of a cervical myelopathy which to date remains of uncertain etiology. The leading contention is that this is some type of a demyelinating disorder such as multiple sclerosis although he has not had further relapses within the nervous system and it may have been a single episode of myelitis from which he has made remarkable recovery but remains with a mild left hemiparesis.

“In response to the questions you raised in your letter of April 9, 1998, it is my opinion that the diagnosed studies to evaluate [appellant's] injury of August 19, 1992 have been adequate. The plain x-rays of his ankle were negative and he has recovered completely from that injury. No further diagnostic evaluation is indicated. The injury of September 23, 1993 in which [appellant] was lifting furniture and incurred worsening of his neck and back pain probably caused some type of strain in the cervical and lumbar region. He had MRI scans of the cervical and lumbar region which showed mild disc bulges that do not require any type of surgical treatment. [Appellant] continued to complain of pain on the left side of his body which is a consequence of the cervical myelopathy and not a lifting or strain injury. Lifting and strain injuries cause muscular type of symptoms in the cervical region. They do not cause chronic radicular or neuropathic pain. It is my opinion that [appellant] has a permanent partial disability as a consequence of his cervical myelopathy and that he has no disability as a consequence of his work-related injuries as discussed above.”

By decision dated May 27, 1998, the Office denied modification of its prior decision. The Office found that the report of Dr. Friesenhahn established that appellant had no disability due to his employment injuries.

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

Where an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee 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 to show that he or she 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.¹

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

In the present case, appellant sustained a right ankle strain on August 19, 1992, following which he resumed employment on August 22, 1992. He filed a claim for a traumatic injury to his back on September 23, 1993 which the Office accepted for cervical disc displacement. Appellant also filed a claim for a recurrence of disability on September 23, 1993 which he attributed to his August 19, 1992 employment injury. He worked limited-duty employment until December 24, 1993 when he stopped work and did not return. The employing establishment provided an account of the intermittent leave taken by appellant from October through December 1993. In a March 31, 1997 memorandum, the Office indicated that appellant had been working in a temporary capacity with the employing establishment and that his job ended in December 1993.²

By decision dated August 14, 1996 and finalized August 16, 1996, a hearing representative instructed the Office to refer appellant for a second opinion evaluation to determine the conditions which resulted from his August 19, 1992 and/or September 21, 1993 employment injuries and any periods of disability due to these injuries. The Office referred appellant to Dr. Friesenhahn, a Board-certified neurologist, for resolution of these issues. In a report dated April 9, 1998, he found that appellant had fully recovered from his August 19, 1992 ankle strain. Dr. Friesenhahn further found that appellant's September 23, 1993 employment injury most likely caused a strain injury and that a strain injury would "not cause chronic radicular or neuropathic pain." He opined that appellant was partially disabled due to nonemployment-related cervical myelopathy and further opined that he had no current employment-related disability. However, Dr. Friesenhahn did not discuss the periods, if any, that appellant was disabled due to his accepted employment injuries. Further, the Office accepted that appellant sustained cervical disc displacement due to his September 23, 1993 employment injury while he found, without any rationalized explanation, that the injury caused only a strain. As the Office referred appellant to Dr. Friesenhahn, it has the responsibility to obtain an evaluation which will resolve all the issues in this case.³ Accordingly, the case will be remanded to the Office. On remand, the Office should secure a reasoned medical opinion on the issue of whether appellant sustained any periods of disability causally related to his accepted employment injuries. After such further development as it deems necessary, the Office should issue a *de novo* decision.

² The Office procedure manual states that a recurrence of disability does not include a work stoppage caused by, *inter alia*, the "termination of a temporary appointment, if the claimant was a temporary employee at the time of the injury." Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(2)(a) (May 1997). The term disability is defined as "the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of the injury." *Id.*

³ *Mae Z. Hackett*, 34 ECAB 1421 (1983).

The decisions of the Office of Workers' Compensation Programs dated May 27 and February 10, 1998 are set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Dated, Washington, D.C.
April 13, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member