

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NATHANIEL TATE and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Long Beach, CA

*Docket No. 98-1335; Submitted on the Record;
Issued August 4, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant sustained a recurrence of disability on or about July 4, 1996 causally related to his employment injury of August 26, 1982.

On August 26, 1982 appellant, then a 36-year-old nursing assistant, injured his back in the performance of duty while placing a combative patient in restraints. The Office of Workers' Compensation Programs accepted appellant's traumatic injury claim for the conditions of lumbosacral strain and a herniated disc at L-3. Appellant received compensation for intermittent periods of partial and total disability. He returned to work full time as a medical machinery technician on July 27, 1983.

Appellant sought treatment for his work injury at a clinic on August 27, 1982. A nursing assistant noted that appellant developed back pain after restraining a patient on August 26, 1982. It was noted that appellant walked with difficulty favoring his left leg and that his pain traveled from the lower back all the way to his left toes.

Appellant was subsequently treated by Dr. Eric D. Feldman, a Board-certified physician in physical medicine and rehabilitation. In reports dated August 30 and October 14, 1982, he noted that appellant had a history of back pain beginning in 1970 when appellant was involved in a lifting accident and had to undergo a laminectomy at L4-5. According to Dr. Feldman, appellant returned to work after his surgery, suffered another exacerbation of low back pain and left extremity pain about a year later, returned to work again and had no real problems until the work incident on August 26, 1982. He stated that, at the time of his examination, appellant presented with the same symptom complaints of low back and left extremity pain he had experienced in 1970. Dr. Feldman reported that appellant tried to restrain a patient at work on August 26, 1982 when his back "went out again." He noted physical findings including lower back muscle spasm and a positive bilateral straight raising test. Dr. Feldman diagnosed an acute exacerbation of the low back, ruling out a left L4-5 radiculopathy, for which he prescribed a course of epidural steroid injections and medication for pain.

A lumbar x-ray performed on September 28, 1982 showed marked prominence at L3-4 of the left facet joint with “a large excrescence of bone extending posteriorly behind the facet.” There was no evidence of a disc herniation. It was noted, however, that “the lamina on the left of L5 was somewhat irregular indicating a prior surgical procedure. Appellant also underwent electromyogram and computerized axial tomography (CAT) scans, which were essentially normal.

Dr. Feldman referred appellant for a consultation with Dr. Curtis Spencer, a Board-certified orthopedic surgeon. In a report dated October 15, 1982, Dr. Spencer indicated that appellant might have a “previous laminotomy defect on the left of L4/5” as well as a herniated disc given appellant’s symptoms. He scheduled appellant for a lumbar metrizamide myelogram on February 15, 1983 which was interpreted as normal. Appellant also underwent a discogram that was interpreted as showing L3-4 degenerative disc disease.¹

Appellant was subsequently admitted to the hospital from June 7 to 11, 1983 for a chymopapain injection at the L3 disc space. He was released with a final diagnosis of “recurrent disc L4 lumbar spine and contained rupture of L3.”

In a August 2, 1983 report, Dr. Spencer indicated that appellant felt significantly better, with his left leg pain having resolved. He noted that appellant still had some back pain but that x-rays showed good narrowing at L3-4 with no discitis. Dr. Spencer later stated that appellant could return to work in a light job with no lifting or pulling of more than 30 pounds.

In a December 15, 1983 report, Dr. Spencer advised that appellant returned to his office after having wrenched his back working around the house, approximately 10 days prior to the visit. He took x-rays and diagnosed an acute back sprain, for which Dr. Spencer prescribed physical therapy, medication and exercise.

In a report dated March 14, 1985, Dr. Spencer noted that appellant’s back condition was getting progressively worse over the last three months, with episodes of appellant having his back lock and more back pain and occasional left leg pain. He noted that appellant walked with a lunched over posture and suffered from recurrent episodes of low back spasm secondary to “some component of mechanical instability.”

Dr. Spencer treated appellant on a monthly basis over the next year for muscle spasms, for which he prescribed medication and exercise. On November 6, 1985 Dr. Spencer approved appellant for a job training program so he could return to work in a new position that would not involve repetitive bending or lifting.

In report dated July 6, 1990, Dr. Spencer noted that he last examined appellant in November 1985. He related that, while appellant has been capable of performing light duty since 1987, he still suffered from intermittent back pain. Dr. Spencer ordered x-rays, which

¹ Dr. Spencer noted in a March 24, 1983 report that a discography at L3 had exactly reproduced appellant’s pain in the back and leg. He continued to diagnose a “probable herniated disc.”

revealed mild degenerative changes at L4-5 and L3-4. He stated that appellant's back condition required ongoing treatment of medication and physical therapy.

In a treatment note dated June 23, 1992, Dr. Jaw-Huei Chen, a Board-certified internist, reported that appellant complained of severe low back pain and noted that he could not put weight on the left knee. Dr. Chen advised that appellant was totally disabled from work.

In a treatment note dated September 30, 1992, Dr. Chen noted that appellant walks with great difficulty due to low back pain, but that he was afraid to go back for neurological review because he did not want to have another surgical procedure. He related that appellant felt "like he did before he had his previous laminectomy."

After completing a rehabilitation program, appellant returned to full-time duty as medical machinery technician on July 27, 1993. The Office determined that appellant had no loss of wage-earning capacity with respect to his job change.

On July 31, 1996 appellant filed a claim alleging a recurrence of disability beginning July 4, 1996. Appellant stated on his CA-2a form that he still experienced back pain and leg pain on and off and was still under medication. He described his recurrence of disability as chronic low back pain.

In support of his claim, appellant submitted a July 10, 1996 report from Dr. Chen. He noted that appellant complained that his job duties caused aggravation of his back pain. Dr. Chen also noted that appellant had difficulty ambulating, suffered from stiffness of the back with slow moving on getting up and a diffuse spasm in the lumbar area. He diagnosed chronic low back pain (status post history of laminectomy) with a date of injury listed as February 1, 1996. Dr. Chen indicated that appellant was disabled from July 4 to 18, 1996.

The employing establishment submitted a September 18, 1996 statement from James A. Inman, chief of human resources, indicating that appellant was not on duty on July 4, 1996 and that appellant called in sick on July 8, 1996. Mr. Inman noted that appellant was on educational leave from July 7, 1994 to June 1996. He also noted that appellant had only taken four days of sick leave during the period March 1994 to April 1995.

In a July 10, 1996 report, Dr. Chen noted that he first examined appellant on February 23, 1996 for an injury on February 1, 1996. He diagnosed "chronic low back pain (status post history of laminectomy)" and ordered a CAT scan. Disability was noted July 4 through 18, 1996.

In a decision dated October 23, 1996, the Office denied compensation on the grounds that the evidence was insufficient to establish that appellant sustained a recurrence of disability causally related to his employment injury of August 26, 1982.

Appellant underwent motor and sensory nerve conduction studies on December 5, 1996 which were interpreted as normal.

In a letter dated December 9, 1996 that was sent by facsimile on December 13, 1996, appellant requested reconsideration.

Appellant submitted a magnetic resonance imaging (MRI) report of the lumbar spine dated September 27, 1996, which stated that a herniated disc at L3-4 was suspected.

In a report dated October 7, 1996, Dr. William So, a neurologist, examined appellant and noted that appellant had a long history of low back and leg pain beginning in 1970 when appellant underwent a L4-5 lumbar laminectomy and a prolonged period of convalescence. He related that appellant was retrained as a psychiatric technician and worked until he developed "recurrent back and left leg pain" leading to a chemonucleolysis in 1983. According to Dr. So, appellant was off work from 1992 to 1995. He further related that appellant worked on July 4, 1996 and noticed nothing until he awoke on July 5, 1996 the next day with severe low back pain and leg pain. Dr. So diagnosed a focal disc herniation at L3-4 and opined that appellant was totally disabled from work "due to the severity of his symptoms."

In a report dated October 28, 1996, Dr. Penelope Kent, a physical medicine and rehabilitation specialist, noted that appellant had an increase in pain in July 1996 due to "no specific event." Dr. Kent noted that a July 1996 x-ray report of the lumbar spine showed moderate osteoarthritic changes and degenerative disc disease at L3-4, L4-5, while a CAT scan of the lumbar spine in July 1996 showed a small right focal disc herniation. She stated that it was difficult to attribute all of appellant's back pain to the herniated disc since appellant's pain was located more on the left side and the herniated disc was located more on the right side. Dr. Kent refused to comment on appellant's previous injury, noting that she was not appellant's treating physician at the time of injury. She noted, however, that, according to appellant's description, his symptoms were the same "only worsening more recently."²

Dr. Kent referred appellant to Dr. Glenn Shulman, a Board-certified orthopedic surgeon. In a report dated November 10, 1996, Dr. Shulman discussed appellant's history of injury and noted physical findings including a positive straight leg raising test. He noted that the L3-4 disc herniation was on appellant's right side and did not correspond well with his left-sided symptoms, "which one would suspect would be a lower root and left sided." Dr. Shulman noted "this could be referred pain from degenerative [disc], but [appellant] does have some components which suggest sciatica as opposed to simply referred pain. He diagnosed failed back syndrome, degenerative disc and degenerative joint disease of the lumbar spine and left-sided sciatica.

In a decision dated January 8, 1997, the Office denied modification of the October 23, 1996 decision.

On January 7, 1998 appellant requested reconsideration and submitted a December 12, 1997 report from Dr. Bart De Coro, a Board-certified physician in physical medicine and rehabilitation. Dr. De Coro stated:

² In a supplemental report dated October 31, 1996, Dr. Kent that diagnosed chronic low back pain with left lower extremity radicular symptoms, herniated nucleus pulposus L3-4 right sided.

“[Appellant] sustained an industrial injury and underwent a laminectomy in 1970 for his lower back. His problem at that time was low back pain and left sciatica. He continued to have problems through the 70’s, but was able to return to full-time work in 1978.... Again of note is the fact that [appellant] did work and was not treated for his back from 1978 through 1982 when he injured his back at work [trying to restrain a patient]. He was treated for his back and sciatica problem from which he never really recovered although he did attempt to return to work. However, symptoms continued to worsen and there were continual exacerbations until he found that he simply could not work any further. I have reviewed his Kaiser chart and he has been a member since 1989 and throughout the chart, even in June of 1989, there is mention of his severe back problems. Throughout the 80’s and 90’s, he continued to be treated for his back and leg symptoms. I think this is of importance to show that he, in fact, never recovered from the 1982 industrial injury.”

Dr. De Coro also noted while an MRI performed in September 1996 indicated a posterior protrusion encroachment upon the dural sac posteriorly and slightly to the right side, but that such results did not rule out appellant had an impingement on the left side. He further pointed out that a CAT scan of December 1991 indicated scar tissue at the left lateral recess at L3-4 with focal osteophytes, narrowing of the left L5 neural foramen that “could be affecting” the left nerve root at L5.

The record also contains medical records from Kaiser Permanente, indicating appellant was treated on an intermittent basis for recurrent back pain from November 1991 to November 1996.

In a decision dated January 12, 1998, the Office denied modification of its prior decisions.

The Board finds that the case is not in posture for a 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.³ 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.⁴ An award of compensation may not be made on the basis of surmise, conjecture, or speculation or on appellant’s unsupported belief of causal relationship.⁵

³ *Dominic M. DeScala*, 37 ECAB 369 (1986); *Bobby Melton*, 33 ECAB 1305 (1982).

⁴ *See Nicolea Brusco*, 33 ECAB 1138 (1982).

⁵ *Ausberto Guzman*, 25 ECAB 362 (1974).

In the instant case, the Office accepted that appellant sustained a lumbosacral strain and a herniated disc at L3 when he tried to restrain a patient while working as a nursing assistant on August 26, 1982. Appellant subsequently returned to work in a full-time position as a medical machine technician. He filed a claim alleging a recurrence of disability beginning July 4, 1996. In its most recent merit decision denying compensation, the Office found that appellant had sustained an injury on February 1, 1996 which served as an intervening event and discounted his allegation of a recurrence of disability beginning July 4, 1996. Appellant, however, adequately explained in his January 7, 1998 reconsideration request that he experienced a “spontaneous increase in his pain level” on February 1, 1996 “beyond what he had been experiencing up to that point and very similar to the “July 4, 1996” incident but not as severe.” He further described having experienced a spontaneous increase in symptoms on July 4, 1996 while at work and stated that those symptoms progressed over the next few days requiring him to seek medical attention. Thus, appellant has clarified to some extent that he did not sustain a new and intervening injury on February 1, 1996. Moreover, even if appellant had increased symptoms on February 1, 1996 that incident does not negate the possibility that appellant sustained a recurrence of disability on or after July 4, 1996.

The Office further determined that appellant’s symptoms of left-sided pain were inconsistent with his diagnosis of a right-sided disc herniation. The Board notes, however, that Dr. De Coro specifically noted that appellant’s left-sided symptoms could not be discounted simply because he had a disc herniation that was “slightly more predominant” on the right side. He further explained that a December 1991 CAT scan showed evidence of scar tissue at the “left lateral” recess at L3-4 with narrowing of the left L-5 neural foramen which could have affected appellant’s left nerve root. Furthermore, since the time of his August 26, 1982 work injury appellant has complained of radiating pain from the lower back to his left leg.

While Dr. De Coro’s opinion is not sufficiently reasoned to establish that appellant sustained a recurrence of disability, it suggests that appellant has continued to have back problems related to his work injury of August 26, 1992. Because the medical record also contains treatment notes from Kaiser Permanent indicating a bridging of symptoms and treatment between the original injury and the claimed recurrence of disability, the Board concludes that appellant has submitted sufficient evidence to require the Office to further develop the claim.⁶ On remand, the Office should send appellant along with a copy of the medical record and a statement of accepted facts to a qualified physician for an examination. After further medical development as the Office deems necessary, the Office shall issue a *de novo* decision.

⁶ See *Lourdes Davila*, 45 ECAB 139 (1993).

The decision of the Office of Workers' Compensation Programs dated January 12, 1998 is hereby vacated and the case is remanded for further consideration consistent with this opinion.

Dated, Washington, D.C.
August 4, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member