

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD W. BUTTORFF and DEPARTMENT OF DEFENSE,
DEFENSE CONTRACT MANAGEMENT COMMAND, Wyomissing, PA

*Docket No. 99-1350; Submitted on the Record;
Issued August 23, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant has met his burden of proof in establishing that he sustained a recurrence of disability in November 1995 causally related to his May 23, 1995 accepted injury.

In this case, appellant, then a 52-year-old contract supervisor, filed a traumatic injury claim on August 31, 1997 alleging that on May 23, 1995 he tripped and fell on his back while attending work-related training. The Office of Workers' Compensation Programs accepted his claim for lumbosacral strain. Appellant stopped work on May 31, 1995, worked half days intermittently and returned to work full time on August 18, 1995.

Appellant filed a claim for a recurrence of disability on November 13, 1996, which he attributed to his May 23, 1995 employment injury. He alleged that, at sometime in November 1995 he developed a disabling back pain in the same manner as his original injury, which was aggravated and worsened by his employment. Appellant stopped work on or about November 17, 1995 and has since not returned.

Appellant submitted evidence to the Office through his counsel, Timothy Polishan, Esq., in support of his claim of disability. In a medical report dated January 2, 1997, Dr. James Heintz, a Board-certified orthopedic surgeon, reported that appellant was referred for treatment of back pain relating to a work injury on December 4, 1994. Dr. Heintz noted that, appellant had landed on his buttocks on his right side in the fall at work and had complaints of numbness and hypesthesia of the right lower extremity that did resolve with some residual numbness intermittently in the right thigh. Dr. Heintz indicated that, appellant was seen again by him on February 1, 1996 for mechanical back and sacroiliac pain that had persisted for some time. He noted that, appellant's severe mechanical and discogenic low back pain remained and that he would likely continue to have such pain, precluding employment other than intermittent, sedentary or light work. In a May 31, 1996 report, Dr. Heintz noted that, he saw appellant again on May 29, 1996 for continued complaints of low back pain. He stated:

“I believe this is mechanical, facet and/or posterior element pain.... There is a suggestion of bilateral abnormalities in the pars interarticularis region at the L5 level. This translates into either residuals from a stress fracture sustained in 1994, or more likely, posterior element arthrosis. I think that he has facet joint inflammation and SI inflammation that is aggravated by his weight, inactivity and deconditioning.”

In a November 5, 1996 report, Dr. Heintz summarized for appellant’s counsel his treatment and condition and stated:

“I believe this gentleman continues to have mechanical back injury related to the fall in December of 1994. He may have sustained stress fractures or acute fractures, now healed radiographically, of the pars region of the L5 vertebrae bilaterally. However, he continues to have mechanical and/or discogenic back pain and is undergoing further work-up and treatment. His pain is disabling at this time. I believe that within a reasonable degree of medical certainty he is unemployable at this time, he cannot work at all. Because of the persistence of these symptoms for the foreseeable future and his disability impairment, this can be anticipated to be permanent.”

On January 30, 1997 the Office issued a statement of accepted facts and requested that the district medical adviser refer appellant to an orthopedist for a second opinion examination in order to make a determination on his recurrence claim. The district medical adviser arranged an appointment for appellant with Dr. Joseph R. Sgarlat, a Board-certified orthopedic surgeon, to clarify the cause and extent of his impairment residual to the work-related injury.

On June 16, 1997 the Office received Dr. Sgarlat’s report of appellant’s orthopedic evaluation conducted on June 10, 1997. Dr. Sgarlat related the facts of appellant’s work-related injury and past medical history. He noted appellant’s previous back injury while hunting in 1994 and that his symptoms persisted at least until January 6, 1995 when he was reevaluated for pain. Dr. Sgarlat then noted that, appellant’s alleged recurrence of low back pain and numbness in his right leg was identical in symptomatology to his previous injury. Dr. Sgarlat further noted Dr. Heintz’s mistake in referring to the December 4, 1994 hunting incident as appellant’s work injury. Dr. Sgarlat opined that appellant’s current complaints were not attributed to his work-related injury in May 1995, but to the congenital narrowing of the lumbar bony canal plus the degenerative changes at the facet joints that gradually occurred over a period of years. He further opined that, much of his persisting symptoms were aggravated by his excess weight. Dr. Sgarlat referred to previous tests, which revealed a congenital, relatively mild stenosis of the lumbar spine made worse with degenerative spurs that occurred over a long period of time at mostly the facet joints. In terms of appellant’s disability, Dr. Sgarlat concluded that a sprain of his back would normally have been relieved by the time that he was permitted to return to work at least on a part-time basis, a couple of months after the incident. He further concluded that the effects of appellant’s work injury were no longer present and that the disabilities reported at that time were unrelated.

By decision dated July 21, 1997, the Office denied appellant's claim on the grounds that the weight of the medical opinion evidence failed to support that appellant's current condition was causally related to the May 23, 1995 employment injury.

In a letter dated July 20, 1998, Mr. Polishan requested reconsideration, on behalf of appellant and the Office, in a decision dated December 18, 1998, which denied modification of its July 21, 1997 decision.

The Board finds that there is a conflict in the medical evidence between the second opinion physician and appellant's physician, Dr. Heintz, on the issue of whether appellant sustained a recurrence of disability in November 1995 causally related to his May 23, 1995 employment injury. Dr. Heintz, in reports dated from January 23, 1995 through July 10, 1996, indicated that, appellant was disabled due to his back condition. He explained that appellant's mechanical back condition related to an injury in December 1994 and that the May 1995 work injury aggravated or resulted in a recurrence of previous mechanical back pain sustained in 1994.¹ In contrast, Dr. Sgarlat reviewed appellant's history and concluded that his current complaints of back pain were not attributed to the work-related injury in May 1995, but to the congenital narrowing of the lumbar bony canal, plus the degenerative changes at the facet joints that gradually occurred over a period of years. He further concluded that much of his persisting symptoms were aggravated by his excess weight. Consequently, the case must be referred to an impartial medical specialist to resolve the conflict in the medical opinion evidence.

Section 8123(a) of the Federal Employees' Compensation Act provides 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."² "When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence."³

Appellant has also alleged that his emotional state and diagnosed depression is causally related to his May 23, 1995 work incident. The Board finds that the reports of Drs. John Tomedi, a Board-certified family practitioner, and David Liskov, a Board-certified psychologist, are not sufficient to establish that appellant's depression is causally related to his accepted injury. The record contains an October 31, 1995 medical note from Dr. Tomedi who opined that appellant suffered from possible depression, which related to his back pain. Dr. Tomedi referred appellant to Dr. Liskov, who offered a report dated December 4, 1996. Appellant reported to Dr. Liskov that day that, in February and March 1996, he had suicidal thoughts. During a session on July 23, 1996, appellant reported "good and bad days." He indicated continued difficulties with falling asleep and that, due to pain in his back, it was difficult to find a comfortable position. On September 3, 1996 appellant reported some anxiety regarding his job

¹ The Board notes that Dr. Heintz has related appellant's current condition to both his previous 1994 hunting injury and his May 1995 work-related injury and at times had mistaken one for the other.

² 5 U.S.C. § 8123(a).

³ *William C. Bush*, 40 ECAB 1064 (1989).

situation, he reported that he was involved in litigation and that he may be removed from his position, which would create a “catastrophic financial stress.” On October 1, 1996 appellant reported continued work-related stress. He indicated that he was involved in the appeals process regarding his work situation and that he was somewhat financially stressed. Appellant also indicated additional stress due to family matters. On October 30, 1996 he reported continued difficulties coping and although he had been losing weight, he stated, “I’m losing it.” He also reported financial stress, worrying about bills and the future. In his December 4, 1996 report, Dr. Liskov diagnosed appellant with major depression, single episode and opined that his condition “is indeed causally related to his fall, with subsequent back injuries and the development of chronic pain.”

The psychiatric reports of Drs. Tomedi and Liskov offered no causal relationship evidence that, appellant’s emotional state of anxiety and depression can be attributed to the employment incident on May 23, 1995. The reports of record establish that appellant had a significant amount of stress separate from his back pain, which was never related or discredited as a cause of his psychological condition, such as his financial and family matters, the pending litigation at work and his relationship with his supervisor. Dr. Liskov’s psychiatric report dated December 4, 1996 did indicate that appellant’s depression “is indeed causally related to his fall, with subsequent back injuries and the development of chronic pain”; however, he did not support his opinion with sound medical reasoning. The Office, therefore, properly found that appellant had not established a recurrence of disability due to his psychiatric condition.

On remand, the Office should refer appellant, along with the case file and the statement of accepted facts to an appropriate specialist for an impartial medical evaluation and report including a rationalized opinion on whether appellant sustained a recurrence of disability in November 1995 causally related to his May 23, 1995 employment injury. After such further development as the Office deems necessary, the Office should issue a *de novo* decision regarding appellant’s claim.

The decision of the Office of Workers' Compensation Programs dated December 18, 1998 is affirmed, in part in finding appellant did not establish his depression is related to his accepted injury. The decision is set aside, in part and the case is remanded for further action consistent with this decision of the Board.

Dated, Washington, D.C.
August 23, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member