

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of CALVIN PETTIGREW, JR. and U.S. POSTAL SERVICE,  
POST OFFICE, Carol Stream, IL

*Docket No. 98-157; Submitted on the Record;  
Issued February 3, 2000*

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DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,  
BRADLEY T. KNOTT

The issues are: (1) whether appellant has met his burden of proof in establishing a recurrence of disability on or after June 9, 1995; and (2) whether appellant's actual earnings in a temporary limited-duty position fairly and accurately represented his wage-earning capacity.

On December 14, 1994 appellant, then a 44-year-old temporary casual mailhandler, sustained a back injury when a truck driver pulled a trailer away from the dock. The Office of Workers' Compensation Programs accepted his claim for a lumbar strain. Appellant lost no time from work, but returned with restrictions. On July 7, 1995 the employing establishment offered appellant the position of rehabilitation casual clerk which would commence July 18, 1995 and expire August 27, 1995. On July 8, 1995 appellant rejected the position, stating that it was not within his job limitations and stopped working.

On June 9, 1995 appellant filed a notice of recurrence of disability, alleging that after returning to work following the original injury, he was on limited duty with no standing, twisting, lifting over 20 pounds and no dispatching. He indicated that, after his injury, he had back pain on his left side and up and down his spine, numbness in both legs, and needle like pain in both feet which came and went. In describing the June 9, 1995 recurrence, he stated that, while casing mail, his whole left side began to tighten up causing pain in his chest, neck and whole left side and also his spinal area. Appellant returned to his limited-duty position the next day.

By report dated June 9, 1995, Dr. Robert Kempf, an emergency room physician, noted that appellant was seen and provided an impression of lumbar pain and restricted appellant to lifting no more than 20 pounds.

In an undated report, Dr. Jeffrey Williamson-Link, a physician from Occupational Medical Network, Inc., indicated that appellant was seen on June 9, 1995. He noted that appellant has a past history of sacral disc problems, has back pain on and off regularly, and was

currently on work restrictions of no more than 10 pounds. He noted that appellant was working on June 9, 1995 when he felt some pain in the left mid back and going down the flank. Dr. Williamson-Link diagnosed muscle strain, left mid back.

In a June 29, 1995 report, Dr. Gunnar B. Andersson, a Board-certified orthopedic surgeon, indicated that appellant's magnetic resonance imaging (MRI) scan revealed degenerative disc disease with circumferential disc bulging at the L4-5 and L5-S1 levels. He did not address the cause of appellant's condition and imposed lifting restrictions.

On July 7, 1995 the employing establishment offered appellant the position of rehabilitation causal clerk which would commence July 18, 1995 and expire August 27, 1995.

On July 8, 1995 appellant rejected this position stating that it was not within his job limitations. In an undated report, Dr. Chadwick C. Prodromos, a Board-certified orthopedic surgeon, indicated that he had no objection to appellant performing the offered position.

By letter dated July 12, 1995, the Office informed appellant of the type of evidence needed to support his claim. This included a physician's reasoned medical opinion regarding the causal relationship between the December 14, 1994 injury and the herniated disc condition and the causal relationship between the December 14, 1994 injury and the claimed recurrent disability beginning in June 1995.

In a July 13, 1995 report, Dr. Andersson opined that the description for a "manual distribution clerk" was consistent with the restrictions outlined in his report of July 29, 1995.

In an August 2, 1995 narrative statement, appellant described his physical symptoms on the morning of June 9, 1995. He stated that the duties he performed when he returned to work after his original injury of December 14, 1994 until July 11, 1995 consisted of continuous twisting, and reaching above the shoulders. He stated that he had to put mail in the far upper left and right sides of the upper portion of the letter case, had to perform continuous bending forward to pick up mail, and "due to medical reasons, [he] was unable to accept additional responsibilities on July 7, 1995 and, therefore, he was terminated."

In an August 2, 1995 report, Dr. Andersson noted that appellant was referred to him by Dr. Prodromos and that he first saw appellant on May 30, 1995. He stated that appellant provided a history of the December 14, 1994 injury and was returned to light duty, but had continued symptoms. He noted that the computerized tomography (CT) scan obtained in April 1995 was suggestive of a herniated disc at L5-S1 and a bulging disc at L4-5. He stated that he reviewed the CT scan and felt that it was indicative of a large disc herniation at the L5-S1 level, primarily on the left side. Since appellant's symptoms and signs were moderate, he decided to perform an MRI scan. A June 26, 1995 MRI scan revealed degenerative disc disease with circumferential disc bulges at L4-5 and L5-S1. Dr. Andersson stated that, based on this and appellant's presentation, symptoms and signs, he diagnosed lumbar strain. Dr. Andersson stated that he did not believe that there was a disc herniation nor that there had been one, nor did he believe that the bulging discs were caused by the trauma experienced on December 14, 1994. He stated that with bulging discs, the possibility of an aggravation did exist but, in this particular case, it was not very likely based on the clinical presentation and, even if so, the aggravation

would be considered temporary and responsible for the symptoms for a limited period of time, possibly three to six months. Dr. Andersson stated that appellant had been released with restrictions, which included lifting of 20 pounds maximum with frequent lifting and/or carrying of objects weighing up to 10 pounds. He stated that he has reviewed the job description for a manual distribution clerk which falls within those restrictions. Dr. Andersson further stated that there was no reason to expect that appellant's problem should become permanent.

In a September 7, 1995 report, Dr. Andersson noted appellant's status, stated that testing was normal and opined: "I do not know what the cause of this patient's pain is. I do believe that he can safely work as a manual distribution clerk. I do believe that this patient will recover without residual. I have explained to him that at this time, I have no further specific treatment to offer."

By decision dated September 20, 1995, the Office denied appellant's claim finding that the evidence failed to demonstrate a causal relationship between the accepted injury and appellant's claimed condition or disability. The Office terminated authorization for medical benefits.

In a May 15, 1996 report, Dr. John Oldershaw, a Board-certified neurologist, opined that, based on the findings of the imaging studies and physical examination done on November 13, 1995, appellant had the condition of lumbar spondylosis which was aggravated by the injury described as the proximate cause. The various objective tests Dr. Oldershaw referred to included: a November 14, 1995 CT scan report which indicated appellant had a lateral disc herniation to the left at L4-5; a November 14, 1995 whole body bone scan which ruled out a lesion at L2; a December 22, 1995 MRI scan report which indicated a probable hemangioma at L2, spondylosis at L4-5 and L5-S1, a disc herniation to the left at L5-S1, and lipomatosis from L5 to S1; and a February 9, 1996 cervical x-ray report which indicated no abnormalities.

Appellant requested a hearing and submitted additional evidence along with his testimony.<sup>1</sup>

Evidence submitted at the hearing indicated that appellant had been treated for back pain in September 1979. This evidence indicated that appellant's preemployment medical review revealed that appellant had a back injury years prior to his employment with the employing establishment.

A December 14, 1994 x-ray report indicated minimal disc space narrowing at the L5-S1 level and mild extrascoliosis visualized with an apex and L2-3.

An April 11, 1995 report of Dr. Prodromos stated that appellant suffered a back injury on December 14, 1994 and needed to have a CT scan to rule out a herniated disc.

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<sup>1</sup> Duplicate evidence and evidence not relevant to this claim included: duplicate copies of a May 19, 1996 Office letter, and physician reports dated April 28, 1995 from Dr. Fuld; medical reports dated May 30, June 29, July 13 and September 7, 1995 from Dr. Andersson. Copies of various letters appellant wrote concerning his termination and claim process were submitted along with copies of physician's bills and requests for records.

A May 5, 1995 Form CA-110 indicated that appellant telephoned the Office requesting authorization for surgery on herniated disc.

An October 17, 1996 report from Dr. Richard Egwele, a Board-certified orthopedist, indicated that appellant had chronic low back syndrome, disc herniation at L5-S1, and bilateral sacroiliitis. Dr. Egwele noted appellant's history of being thrown from a truck and sustaining an injury to his lower back but did not opine whether the conditions resulted from the December 14, 1994 injury or whether they were disabling for work. A June 24, 1996 report diagnosed epidural lipomatosis from L4 to S1, old L5-S1 herniation, lumbar spondylosis greatest at L4-5 and L5-S1, and probable L2 hemangioma. Dr. Egwele opined: "In the absence of history of low back dysfunction prior to the injury, it is apparent that there was a likely causal relationship between the accident and the L5-S1 disc herniation."

A December 20, 1994 report from Dr. B. Kawadry indicated that appellant injured his right ring finger at work on December 7, 1994 and also complained of low back pain. An x-ray of the lumbosacral spine was negative. An acute lumbar strain and old soft tissue injury of the right ring finger was diagnosed.

Other medical records submitted at the hearing noted appellant's treatment for back complaints in 1995 and 1996 and that he had degenerative disc disease.

Copies of the employing establishment's medical unit records were also submitted. A December 7, 1994 entry indicated that appellant injured his right hand at work. A December 14, 1994 entry indicated that appellant fell on a dock and would be sent to the emergency room for evaluation. Further entries indicated that appellant did not have any back complaints on January 3, 1995, but complained of low back and left flank pain on February 10, 1995. Back complaints were documented on February 22, 1996, March 18, 1995 and included pain to his left flank on April 21, 1995. On May 27, 1995 appellant complained of back pain shooting down both legs and across both shoulder blades and into the neck. On June 9, 1995 he complained of left-sided backache and pain of the left neck. The diagnosis was "lumbar pain ... bending and twisting aggravated condition." A June 10, 1995 diagnosis was muscle strain of the left mid back and noted that appellant was on modified work with lifting restrictions no greater than 10 pounds.

After the hearing, appellant added some comments and concerns pertaining to the June 17, 1996 hearing transcript. He also submitted additional copies of correspondence he had with the employing establishment concerning his termination. The employing establishment submitted a July 9, 1996 statement indicating that at all times appellant's work was within his physician's listed restrictions. The employing establishment disputed appellant's contentions that his duties exceeded his physician's restrictions. Appellant replied to the employing establishment's comments, essentially reiterating his prior arguments.

In a September 30, 1996 decision, an Office hearing representative found that there was no indication that appellant was claiming wage-loss compensation for the few hours of work he missed on June 9, 1995 and, even if that were the case, he would not be entitled to any wage-loss

compensation under section 8117.<sup>2</sup> The Office hearing representative found that appellant had not established entitlement to wage-loss compensation on and after June 9, 1995 as his work stoppage was not due to any change in his injury-related condition affecting his ability to work within the light-duty job requirements or on the suitability of the job offer. The Office hearing representative also noted that appellant's actual earnings for more than 60 days of limited duty fairly and reasonably represented his employment. Lastly, the Office hearing representative found that appellant was entitled to continuing medical benefits for the treatment of the accepted condition of lumbar strain and reversed the prior denial.<sup>3</sup>

In a December 18, 1996 reconsideration request, appellant repeated some of his previous arguments and contended that the July 8, 1995 job offer was invalid.

By decision dated February 12, 1997, the Office denied modification of the prior decision, after merit review, on the grounds that the evidence submitted was insufficient to warrant modification.

In a May 9, 1997 letter, appellant again requested that the Office reconsider his claim and presented his arguments.

By decision dated July 7, 1997, the Office denied modification of the prior decision, after merit review, on the grounds that the evidence submitted in support of the request for review was not sufficient to warrant modification of the prior decision.

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 establish 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 requirements.<sup>4</sup> Furthermore, appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between his recurrence of disability commencing June 9, 1995 and his December 14, 1994 employment injury.<sup>5</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

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<sup>2</sup> 5 U.S.C. § 8117 (an employee is not entitled to compensation for the first three days of temporary disability). The Office hearing representative further noted that although appellant stopped working on July 11, 1995, he was paid his salary through August 27, 1995. Accordingly, no compensation is payable for this period as an employee may not receive wage-loss compensation while also receiving wages.

<sup>3</sup> The Office hearing representative further found that, as the Office never accepted that the December 14, 1994 injury caused a herniated disc, it remained appellant's burden to prove that the condition of a herniated disc was causally related to the work injury.

<sup>4</sup> *Terry R. Hedman*, 38 ECAB 222 (1986).

<sup>5</sup> *Dominic M. DeScala*, 37 ECAB 369, 372 (1986); *Bobby Melton*, 33 ECAB 1305, 1308-09 (1982).

disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.<sup>6</sup>

In the present case, the medical evidence is not sufficient to establish a period of disability on or after June 9, 1995 that is causally related to the accepted employment injury. The Office had accepted that appellant sustained a work-related lumbar strain on December 14, 1994. The record reflects that appellant did not lose time from work following the work injury, but was released to work with medical restrictions, which the employing establishment accommodated by providing limited-duty appointments. The position of rehabilitation casual clerk, the last job offer by the employing establishment, was rejected by appellant on July 8, 1995. The Board notes that appellant was originally hired as a temporary casual mailhandler which was scheduled to end August 21, 1995. Because of the limitations imposed by appellant's physician for the work-related injury of December 14, 1994, the employing establishment provided appellant with two 89-day casual clerk assignments. At the end of the second 89-day casual clerk assignment, appellant's employment with the employing establishment expired August 27, 1995. When appellant claimed a recurrence of disability on June 9, 1995, he had been working the same limited-duty position he had been performing since his job injury. Appellant was terminated from employment on or about July 11, 1995 for rejection of a suitable job offer without medical justification.<sup>7</sup>

Appellant has not submitted sufficient medical evidence to establish that he sustained a recurrence of disability on or after June 9, 1995 due to his employment injury. None of the medical evidence submitted demonstrates that appellant's work stoppage was due to any change in his injury-related condition such that he could not perform his light duty. Additionally, the medical evidence supports that appellant was physically able to perform the limited-duty position offered on July 7, 1995. In his August 2, 1995 report, Dr. Andersson stated that he had reviewed the job description for a manual distribution clerk and appellant's restrictions of being able to perform light-duty work with frequent lifting or carrying of objects weighing up to 10 pounds, but not to exceed 20 pounds were consistent with the job description. Although, in his June 24, 1996 report, Dr. Egwele opined that there was a causal connection between appellant's accident and the L5-S1 disc herniation, he based this opinion on the absence of history of low back dysfunction prior to the injury. As the record indicates that appellant had a back injury years prior to employment with the employing establishment, Dr. Egwele's report is of diminished probative value as it is based on an inaccurate medical history.

Appellant also has not shown that there was a change in the nature and extent of his light-duty job requirements. The record is unclear whether appellant is alleging that his limited-duty work prior to the July 7, 1995 job offer was outside his work restrictions. At the hearing, appellant testified that his limited-duty assignment prior to the July 7, 1995 job offer required no physical effort outside his work restrictions. However, in his August 2, 1995 statement, appellant wrote that the duties he was given to perform after he returned to work following his

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<sup>6</sup> See *Nicolea Brusco*, 33 ECAB 1138, 1140 (1982).

<sup>7</sup> Appellant's temporary appointment ended close of business August 27, 1995. The record reflects appellant was paid his salary through August 27, 1995.

original injury consisted of continuous twisting and reaching above the shoulders, and continuous bending forward to pick the mail up off the ledge where it was stored before it was cased. He additionally wrote he was able to perform his duties by loading his work stations with large quantities of mail to minimize the amount of walking and handling of mail. The employing establishment has generally denied all allegations that appellant was ever asked to do or did do work outside of his work restrictions. They stated that no bending or continuous twisting was involved in either the distribution or dispatching duties and only intermittent reaching above the shoulder was involved. Appellant did not submit any evidence corroborating that he was required to perform work beyond his physical restrictions.

There is no evidence showing that appellant was doing any limited-duty work outside his work restrictions when he stopped work on or about July 8, 1995. Due to this insufficiency of the evidence of appellant's allegation, including the employing establishments denial that appellant was working outside his medical restrictions. The Board finds that appellant's work stoppage was not due to any change in his injury-related condition affecting his ability to work.

As the present case involves the situation where an employee returns to a limited-duty position, after having been disabled by an employment-related condition, he has the burden to establish a recurrence of total disability upon a subsequent work stoppage. For the reasons noted above, appellant has not met this burden of proof.

The Board notes that the Office had never accepted the condition of a herniated disc and therefore it remains appellant's burden to prove that if he has a herniated disc that it is causally related to the employment injury. In his October 17, 1996 report, Dr. Egwele opined that appellant had a herniated disc caused by the work injury, but based his opinion on the incorrect history that appellant had no low back dysfunction prior to the work injury. In his May 15, 1996 report, Dr. Oldershaw opined that, based on the findings of the imaging studies and physical examination, appellant's lumbar spondylosis was aggravated by the work injury, but failed to provide a rationale on causal relation. Medical reports not containing rationale on causal relation or an inaccurate history are entitled to little probative value and are generally insufficient to meet an employee's burden of proof.<sup>8</sup> Reports from Dr. Andersson clearly indicate that there was no disc herniation caused or aggravated by the employment. Consequently, appellant has not met his burden of proof in establishing a causal relationship.

The Board also finds that the Office properly determined the limited-duty position which appellant performed fairly and accurately represented his wage-earning capacity.

Section 8115(a) of the Federal Employees' Compensation Act provides that in determining compensation for partial disability, "the wage-earning capacity of an employee is determined by his actual earnings if his earnings fairly and reasonably represent his wage-earning capacity."<sup>9</sup> Office procedures indicate that a determination regarding whether actual wages fairly and reasonably represent wage-earning capacity should be made after a claimant

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<sup>8</sup> *Ceferino L. Gonzales*, 32 ECAB 1591 (1981).

<sup>9</sup> 5 U.S.C. § 8115(a).

has been working in a given position for more than 60 days,<sup>10</sup> and the Office may determine wage-earning capacity retroactively after claimant has stopped work,<sup>11</sup> actual earnings will be presumed to fairly and reasonably represent wage-earning capacity only in the absence of contrary evidence.<sup>12</sup>

In the present case, appellant was a temporary employee whose term of temporary employment expired on August 27, 1995. Appellant had been working limited duty which was found suitable by his physicians since his injury. As appellant was a temporary employee, the job itself was a temporary position and, therefore, he need only to have worked limited duty for 60 days to make a formal finding of wage-earning capacity. As the evidence supports that appellant's work stoppage did not occur because of any change in his injury-related condition affecting his ability to work, appellant's actual wages are assumed to be the best measure of an employee's wage-earning capacity in the absence of substantial evidence to the contrary. In this case, appellant's actual earnings equaled his date-of-injury earnings. As such appellant had no loss of wage-earning capacity and thus no entitlement to compensation for wage loss once his temporary employment appointment ended.

Although appellant later alleged that the July 7, 1995 job offer was invalid, this contention is irrelevant as this was not the position on which his loss of wage-earning capacity was based. Inasmuch as appellant has not submitted any evidence to establish that his condition had worsened, there can be no finding that the limited duty appellant was previously performing was invalid.

There is no substantial evidence that appellant's actual wages from the limited-duty employment did not fairly and reasonably represent his loss of wage-earning capacity, of which none was found. Furthermore, appellant's work stoppage was not due to any change in his injury-related condition affecting his ability to work.

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<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7a (April 1995); see *William D. Emory*, 47 ECAB 365 (1996).

<sup>11</sup> *Id.* at Chapter 2.814.7e (April 1995).

<sup>12</sup> See *Mary Jo Colvert*, 45 ECAB 575 (1994).

The decisions of the Office of Workers' Compensation Programs dated July 7 and February 12, 1997 are hereby affirmed.

Dated, Washington, D.C.  
February 3, 2000

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member