

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TOMMY E. THURMAN and TENNESSEE VALLEY AUTHORITY,
DIVISION OF FOSSIL FUEL & HYDRO POWER, Chattanooga, TN

*Docket No. 98-2098; Submitted on the Record;
Issued February 15, 2000*

DECISION and ORDER

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

The issue is whether appellant sustained a recurrence of disability commencing June 12, 1996, causally related to his August 22, 1991 cervical strain injury.

The Office of Workers' Compensation Programs accepted that on August 22, 1991 appellant, then a 42-year-old electrician, sustained cervical strain while in the performance of duty. Concurrent conditions not due to injury were noted to include cervical osteoarthritis and degenerative disc disease.¹ Appellant returned to regular duties on December 11, 1991.

By report dated December 6, 1991, Dr. Dale E. Solomon, a Board-certified internist, noted that appellant was doing quite well, that he had complete resolution of all residual hypesthesia in his left hand and that he had full range of cervical spine motion without induction of pain and with no residual sensory deficit and he opined that appellant had "fully recovered from his cervical radiculopathy." He opined that appellant was "at risk for recurrent problems in the coming months and years," but noted that no further formal job restrictions would be imposed.

On July 18, 1996 appellant filed a claim for recurrence of disability commencing June 12, 1996, causally related to his accepted August 22, 1991 cervical muscle strain injury. He claimed that his symptoms including headaches, neck pain, left arm numbness and dizziness had been continual since the August 1991 injury and that working overhead, lifting and pulling increased

¹ A cervical magnetic resonance imaging scan done on September 4, 1991 reported degenerative change in the cervical spine with mild anterior compression of C4, thickening of the posterior longitudinal ligament and a posteriorly bulging C5-6 disc.

the symptoms. Appellant did not stop work and hence did not experience disability, but asked to recover all of his personal and medical insurance expenses.²

In support of his claim, appellant submitted an April 30, 1996 report from Dr. Michael S. Dew, a Board-certified neurologist, which noted that he had persistent headaches since 1991 and which diagnosed “chronic daily headache, tension type [and] neck pain.”

A July 1, 1996 note from Dr. Dew stated that appellant was under his care for a “work[-]related injury in 1991.” He noted that appellant had a “history of neck pain and headaches due to this injury.” A July 1, 1996 report from Dr. Dew stated that appellant had experienced chronic headaches with neck pain since his 1991 fall.³ He diagnosed “headaches, tension type, [and] neck pain.” An August 28, 1996 report from Dr. Dew noted mild improvement, as did an October 24, 1996 report.

By decision dated March 17, 1997, the Office rejected appellant’s recurrence claim finding that the evidence of record failed to establish that the claimed recurrence was related to the August 22, 1991 injury. The Office found that Dr. Dew provided no rationalized medical opinion relating appellant’s headaches in 1996 to his August 22, 1991 cervical spine soft tissue muscle strain injury which had resolved by December 6, 1991.

On March 1, 1998 appellant requested reconsideration of the March 17, 1997 decision.

In support of his request appellant submitted further medical reports from Dr. Dew. In a December 30, 1996 report, he indicated that appellant was being followed for a mixed headache syndrome and that he had fairly good improvement with Prozac and Atenolol. In a February 27, 1997 note, Dr. Dew noted that recently appellant had experienced a worsening of his neck pain and reiterated his recommendations for the “chronic nature of his degenerative neck disease.” A

² As appellant did not lose any time from work, he did not experience a recurrence of disability as defined by the Federal Employees’ Compensation Act. As used in the Act, 5 U.S.C. §§ 8101-8193, the term “disability” means incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury. *Richard T. DeVito*, 39 ECAB 668 (1988); *Frazier V. Nichol*, 37 ECAB 528 (1986); *Elden H. Tietze*, 2 ECAB 38 (1948); 20 C.F.R. § 10.5(17). Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages; see *Fred Foster*, 1 ECAB 21 at 24-25 (1947) (finding that the Act provides for the payment of compensation in disability cases upon the basis of the impairment in the employee’s capacity to earn wages and not upon physical impairment as such). An employee who has a physical impairment causally related to his federal employment, but who nonetheless has the capacity to earn the wages he was receiving at the time of injury, has no disability as that term is used in the Act and is not entitled to compensation for loss of wage-earning capacity. See *Gary L. Loser*, 38 ECAB 673 (1987) (although the evidence indicated that appellant had sustained a permanent impairment of his legs because of work-related thrombophlebitis, it did not demonstrate that his condition prevented him from returning to his work as a chemist or caused any incapacity to earn the wages he was receiving at the time of injury). When, however, the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his employment, he is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity. *Bobby W. Hornbuckle*, 38 ECAB 626 (1987). Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn, not upon actual wages lost. *George W. Coleman*, 38 ECAB 782 (1987).

³ The record indicates that appellant did not fall in 1991 but strained his neck trying to regain control of a falling ladder.

May 22, 1997 report added nothing new. A September 11, 1997 report noted the diagnoses of mixed headache disorder, chronic neck pain and dizziness. In a January 13, 1998 report, Dr. Dew reported that appellant claimed his symptoms began after a fall while working on a ladder in 1991. He noted, however, that, according to appellant's primary physician, he initially improved, which broke the temporal chain of causation between his current symptoms and that injury. Dr. Dew opined that there were no objective findings to correlate with appellant's subjective complaints of persistent pain and stiffness.

Appellant also submitted a December 18, 1997 letter from his supervisor stating that appellant had advised him on different occasions that he was still experiencing neck pain and had returned to his physician for treatment. The supervisor advised appellant not to perform any work that would irritate his condition.

In a March 1, 1998 personal statement, appellant provided a history of symptoms and treatment and claimed that the medical records supported that he never recovered from his original injury. He alleged that he still had a compressed vertebra and a bulging disc. Appellant attributed his recurrent headaches and left upper extremity numbness to the August 1991 cervical muscle strain.

In addition to resubmitted evidence previously of record, appellant submitted an April 10, 1992 medical progress note from Dr. Solomon which indicated that as of that date appellant had no significant exacerbations of cervical pain or related radiculopathy. An October 12, 1992 progress note from him indicated that appellant had done well with reference to his neck and prior radiculopathy with infrequent stiffness and no recurrent radicular symptoms. An April 16, 1993 note reported that appellant had only occasional slight cervical occipital headaches with some neck tenderness and opined that his symptoms were pretty much quiescent over the preceding year. In a June 3, 1994 note, Dr. Solomon opined that appellant's episodic cervical symptoms were due to underlying degenerative disc disease and some mild hypertrophic arthritis, which might be triggering typical muscle contraction headaches.

By decision dated March 27, 1998, the Office denied modification of its March 17, 1997 decision finding that the evidence submitted in support was insufficient to warrant modification. The Office found that none of the medical evidence submitted contained a rationalized medical opinion relating appellant's chronic headaches and neck pain in 1996 to his 1991 accepted medical condition and that none of the medical evidence contained objective medical findings to support appellant's subjective symptoms.

The Board finds that appellant has failed to establish that he sustained a recurrence of disability commencing June 12, 1996, causally related to his August 22, 1991 cervical strain injury.

An individual who claims a recurrence of disability due to an accepted employment 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. 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 Causal relationship is a medical issue and can be established only by medical evidence.⁵

Appellant has not met this burden in this case. He claimed that the accepted cervical soft tissue muscular strain injury sustained in 1991, which the medical evidence of record supported, had resolved by December 6, 1991 after which he returned to regular duties, recurred at some point after October 12, 1992, when Dr. Solomon had opined that appellant had done well with reference to his neck and required further medical treatment. However, the medical evidence from him in 1994 indicated that appellant's episodic cervical symptoms were due to underlying degenerative disc disease and some mild hypertrophic arthritis which might be triggering his muscle contraction headaches, neither of which were accepted as employment-related conditions. Consequently, none of Dr. Solomon's reports support that appellant sustained a 1996 recurrence of disability causally related to his August 22, 1991 cervical soft tissue muscular strain injury.

Medical reports from Dr. Dew beginning in 1996 were based upon an inaccurate history of injury provided by the appellant, who claimed that he fell in 1991 and experienced symptoms continuously since that time. However, the reports and evidence of record support that appellant did not fall, but strained his neck restraining a falling ladder and that he had a complete resolution of symptoms four months after the injury. As Dr. Dew's reports are based on this inaccurate history of injury, they are of diminished probative value.⁶ Furthermore, he diagnosed chronic daily tension-type headaches and neck pain, but failed to explain how cervical muscular strain which resolved in 1991 caused tension in 1996 resulting in a headache or caused neck pain. Therefore Dr. Dew's reports are insufficient to support that appellant had a recurrence of symptoms causally related to his 1991 muscle strain injury. Additionally he noted on January 13, 1998 that appellant had no objective findings to correlate with appellant's subjective complaints of persistent pain and stiffness and that, since he had experienced an improvement following injury, the temporal chain of causation was broken. This most recent report clearly does not support appellant's alleged recurrence of injury-related symptomatology.

Although appellant alleged in his personal statement that his headaches were the result of radiculopathy, a compressed vertebra and a bulging disc, none of these conditions were accepted as being employment related, nor was the condition of chronic tension-type headaches. He has submitted no rationalized medical evidence supporting that any of his conditions on and after June 12, 1996 were in any way causally related to his 1991 cervical soft tissue muscle strain injury. Consequently he has failed to establish that he experienced a recurrence of symptomatology on June 12, 1996, causally related to his August 22, 1991 cervical soft tissue muscle strain injury.

⁴ *Stephen T. Perkins*, 40 ECAB 1193 (1989); *Dennis E. Twardzik*, 34 ECAB 536 (1983); *Max Grossman*, 8 ECAB 508 (1956); 20 C.F.R. § 10.121(a).

⁵ *Mary J. Briggs*, 37 ECAB 578 (1986); *Ausberto Guzman*, 25 ECAB 362 (1974).

⁶ *See, e.g., Billie C. Rae*, 43 ECAB 192 (1991); *Daniel J. Overfield*, 42 ECAB 718 (1991); *Ruthie M. Evans*, 41 ECAB 416 (1990).

Accordingly, the decision of the Office of Workers' Compensation Programs dated March 27, 1998 is hereby affirmed.

Dated, Washington, D.C.
February 15, 2000

Michael J. Walsh
Chairman

George E. Rivers
Member

Bradley T. Knott
Alternate Member