

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EARL O. FANNING and U.S. POSTAL SERVICE,
POST OFFICE, Birmingham, AL

*Docket No. 97-2140; Submitted on the Record;
Issued January 14, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant met his burden of proof in establishing that he sustained a recurrence of disability on August 12, 1996 causally related to the October 19, 1995 employment injury.

The Office accepted appellant's claim for a herniated disc at L5-S1 which was assigned claim No. A6-0638621. The Office paid appellant temporary total disability compensation from January 5, 1996 to March 12, 1996 when appellant returned to limited duty.

On September 23, 1996 appellant filed a claim for a recurrence of disability, Form CA-2a, alleging that on August 12, 1996 he sustained a recurrence of disability of his October 19, 1995 employment injury. Appellant stated that he stopped working on August 13, 1996 and has not returned to work. He stated that he had lower back pain constantly and he picked up a heavy box and all the intense pain started again. Appellant's supervisor stated that appellant had been on light duty when he had another injury on May 7, 1996 and returned to limited duty after that injury on May 23, 1996 and also filed a CA-1 for the August 12, 1996 injury. The claim for a traumatic injury was assigned No. 06-660859.

On September 23, 1996 appellant also filed a claim, Form CA-8, for total disability from August 12 to September 28, 1996 due to his October 19, 1995 employment injury.

By letter dated September 18, 1996 from the employing establishment, the human resources specialist, Jean Prewitt, stated that appellant did not mention the August 12, 1996 employment injury to his supervisor when he returned to the branch after delivering his route. Ms. Prewitt stated that appellant's wife called the branch the next day and stated that appellant was off sick and would be in the hospital the next week but did not say why. She stated that she received a disability note from Dr. Herbert Evan Zeiger, a Board-certified neurological surgeon, dated August 14, 1996 but when she inquired as to why appellant was unable to work, his office told her appellant had a herniated disc based on an August 6, 1996 magnetic resonance imaging

(MRI) scan. She stated that she sent appellant a letter stating that his continuation of pay would expire on August 11, 1996 and a few days later when she got a response from him, he mentioned another injury.

A progress note dated August 12, 1996 stated that appellant had a back injury approximately seven months ago, that he started full duty "last week" and his back pain had increased since his return to full duty. In a report dated September 3, 1996, Dr. Zeiger stated that appellant tried to return to work full duty but could not handle it. He stated that appellant told him that the pain in his left leg was "so severe" that it made standing to case the mail "very difficult," and it took him 10 hours to walk his 6-hour route. Dr. Zeiger stated that appellant claimed that he had less agility and he "could not handle lifting and twisting even the lightest packages." He also stated that the MRI scan performed on August 12, 1996 showed a paracentral disc protrusion at C5-C6 on the left. He recommended cervical myelography and a computerized axial tomography (CAT) scan for further evaluation.

By letter dated October 17, 1996, the Office requested additional information from appellant including a narrative medical report from his treating physician containing a medical rationale regarding the causal relationship between the condition treated and the original injury.

In a report dated October 31, 1996, Dr. Zeiger noted that in the October 19, 1995 employment injury, appellant hit his head, buttocks and back and when tried to get up after falling, his leg gave way. He stated:

"Because [appellant's] initial pain was more severe in his back and the left leg than it was in his head and neck, his back was evaluated first. He was found to have a herniated nucleus pulposus; however, as this healed, his neck pain became more prominent and he was subsequently found to have a cervical disc herniation.

"Because the original injury was to his head and neck, as well as to his low back, I feel that [appellant's] cervical disc herniation is directly related to his on-the-job injury."

In an attending physician's report, Form CA-20a, dated September 25, 1996, Dr. Zeiger recommended a microlumbar discectomy.

On November 1, 1996 appellant underwent cervical surgery.

By letter dated November 3, 1996, appellant explained that the reason he filed several claim forms, the CA-1 and CA-8 as well as the CA-2a, was that the employing establishment had given him conflicting advice as to which form to file and he meant to file a claim for a new injury occurring on August 12, 1996. He stated that on that date he "picked up a heavy parcel" and his lower back "made a popping sound," and his neck "started to hurt as if a knife was stabbed in it."

On Form CA-20a dated November 15, 1996 Dr. Zeiger diagnosed herniated cervical disc and stated that appellant could perform light-duty work with restrictions on November 12, 1996.

In typed notes, the Office stated that on September 3, 1996 appellant filed a claim for a traumatic injury, Form CA-1, alleging that he sustained an injury on August 12, 1996 lifting a heavy parcel but the claim was denied on October 29, 1996.

By decision dated December 16, 1996, the Office denied the claim, stating that the evidence of record failed to demonstrate a causal relationship between the recurrence of disability on August 12, 1996 and the October 19, 1995 employment injury.

By letter dated January 7, 1997, appellant requested reconsideration of the decision and submitted additional evidence. In his request, appellant stated that he filed his claim form on September 3, 1996 because he was unable to go to work due to the August 12, 1996 employment injury. He stated that he told his doctors in the emergency room on August 12, 1996 that he was injured that day and how he was injured.

In a report dated January 15, 1997, Dr. Zeiger stated that appellant had recovered well from his surgery and was able to return to full-duty work. He stated that on August 12, 1996 appellant picked up a heavy parcel to carry onto a porch and felt a popping sound in his lower back and a knife-like pain in his neck. Dr. Zeiger opined that this incident “precipitated worsening of the cervical disc herniation at C5-C6 and necessitated the surgery. The fact that he is so improved and ready to return [to] work and full duty, indicates to me that this was a legitimate work-related injury.” He opined that appellant reached maximum medical improvement and was 10 percent permanently disabled based on his cervical disc rupture and subsequent surgery.

On February 5, 1997 Dr. Michael G. Gibson, a general surgeon, placed permanent light duty restrictions on appellant.

On February 6, 1997, Dr. Stephen K. Gremmels, a chiropractor, also opined that permanent restrictions on excessive lifting and walking should be placed on appellant.

On April 3, 1997 the employing establishment gave appellant notice of his proposed removal due to his inability to physically perform the duties of the position for which he was hired.

By decision dated January 6, 1997, the Office denied appellant’s request for modification of the denial of his claim, No. 06-660859, for a new injury on August 12, 1996.

On February 10, 1997 appellant requested reconsideration of the Office’s decision and submitted a letter dated April 18, 1997, further describing the history of his injury. In his April 18, 1997 letter, appellant stated that after the October 19, 1995 employment injury, his back pain was so severe that no one paid attention to his neck. He stated that he was given so many strong medications that he did not distinguish between pain in his neck and lower back as he just felt he was hurting all over.

Appellant also stated that after his supervisor, Helen Slater, gave him a “letter or write up” for failure to report an accident, she lost the grievance he filed. He stated that her charge was dismissed in an official discussion. Appellant reiterated that on August 12, 1996 after lifting

a large parcel, he felt and heard a popping sound in his lower back and “a knife-like feeling” in his neck. He also reiterated that he went to the emergency room that day and told everyone there his neck and back were injured on the job.

By decision dated May 5, 1997, the Office denied appellant’s request for modification.

The Board finds that appellant did not meet his burden of proof in establishing that he sustained a recurrence of disability on August 12, 1996 causally related to the October 19, 1995 employment injury.

The only evidence of record appellant submitted which addresses causation is Dr. Zeiger’s October 31, 1996 and January 15, 1997 reports. In these reports, Dr. Zeiger diagnosed a cervical disc herniation at C5-C6 which necessitated the surgery on November 1, 1996. Appellant’s claim for the October 19, 1995 employment injury was accepted for a herniated disc at L5-S1. Appellant repeatedly stated that on August 12, 1996, the alleged date of the recurrence of disability, he picked up a heavy parcel causing his lower back to “make a popping sound,” and his neck to start hurting “as if a knife was stabbed in it.” In his September 23, 1996 CA-2a, appellant stated that he had constant lower back pain and when he picked up a heavy box, the intense pain started again. In his October 31, 1996 report, Dr. Zeiger stated that because appellant’s initial pain after the October 19, 1995 employment injury was more severe in his back and left leg and than his head and his neck, appellant’s back was evaluated first and appellant was found to have a herniated nucleus pulposus. He stated that as this healed, appellant’s neck pain became more prominent and was subsequently found to have a cervical disc herniation. Dr. Zeiger stated that because appellant’s original injury was to his head and neck, as well as to his low back, he believed that appellant’s cervical disc injury was directly related to the October 19, 1995 employment injury. In his January 15, 1997 report, Dr. Zeiger stated that on August 12, 1996 appellant picked up a heavy parcel on August 12, 1996 which caused him to feel a popping sound in his lower back and a knife-like pain in his neck. He opined that this incident “precipitated worsening of the cervical disc herniation at C5-C6 and necessitated the surgery.”

There are no bridging symptoms, however, between appellant’s October 19, 1995 employment injury and his current condition of a cervical disc herniation. The medical evidence since that injury and antecedent to the August 12, 1996 incident documented ongoing back and leg pain. The August 12, 1996 progress note stated that appellant had returned to full duty the past week and his back pain had increased. Dr. Zeiger’s January 12, 1997 report in which he stated that appellant had a lifting incident on January 15, 1997 which precipitated worsening of the cervical disc herniation at C5-C6 and necessitated surgery described an aggravation of the October 19, 1995 employment injury and not a recurrence of that injury. An aggravation of a

preexisting condition is compensable as an original or new injury,¹ not a recurrence of disability.² Dr. Zeiger's October 31, 1996 and January 15, 1997 reports do not provide a rationalized explanation as to how the change in appellant's condition on August 12, 1996 constituted a recurrence of disability of the October 19, 1995 employment injury. The record does not contain any rationalized medical evidence explaining how appellant's cervical disc herniation resulted from the October 12, 1995 employment injury which was accepted for a herniated disc.

Although the Office advised appellant of the medical evidence necessary to establish his claim, appellant did not submit the requisite evidence. He therefore has failed to meet his burden that he sustained a recurrence of disability on August 12, 1996 causally related to the October 19, 1995 employment injury.

The decisions of the Office of Workers' Compensation Programs dated May 5, 1997 and December 16, 1996 are hereby affirmed.

Dated, Washington, D.C.
January 14, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

¹ See *Willia J. Clements*, 43 ECAB 244, 247 n. 8 (1991).

² A recurrence of disability is defined in part as a work stoppage caused by: (1) a spontaneous material change, demonstrated by objective findings, in the medical condition which resulted from a previous injury or occupational illness without an intervening injury; or (2) a return or increase of disability due to an accepted consequential injury. Federal (FECA) Procedure Manual, Part 2, -- Recurrences, Chapter 2.150.3.b(1).