

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SUKHWINDER SINGH GILL and U.S. POSTAL SERVICE,
POST OFFICE, San Jose, CA

*Docket No. 98-714; Submitted on the Record;
Issued January 10, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether appellant met his burden of proof in establishing that he sustained a recurrence of disability, due to his August 17, 1989 injury, beginning November 5, 1996.

The Office of Workers' Compensation Programs accepted appellant's claim for a low back strain with L4-5 disc herniation, surgery on November 1, 1990 consisting of a lumbar laminectomy with disc removal at L4-5 and L5-S2 and an epidural on October 10, 1994. On November 22, 1996 appellant filed a notice of a recurrence of disability, Form CA-2a, alleging that on November 5, 1996 he sustained a recurrence of disability of the August 17, 1989 employment injury. Appellant stated that he worked as a mail carrier prior to the August 17, 1989 employment injury and that, after the surgery on his lower back in November 1991, he gradually worked back to full time as a window clerk on limited duty. He stated, however, that the excessive standing aggravated his back and since May 17, 1993 he performed limited duty as a carrier. Appellant stated that the pain never completely went away since the November 1991 surgery and that sometimes it was very severe and sometimes "regular" or pain he had to live with. He stated that the pain in his buttock "never went away completely," was related to his back injury and sometimes traveled down his leg. In an additional statement, appellant stated that he took sick or annual leave to see his doctor when he needed rest. He also stated that even performing light duty which involved being on his feet or sitting or walking was hard on his back and he needed to lie down every two hours to obtain relief which his job did not permit. Appellant stopped working on November 18, 1996.

To support his claim, appellant submitted the medical reports of his treating physician, Dr. Ralph Pietrobono, a Board-certified orthopedic surgeon, dated November 5, November 20 and December 5, 1996 and January 6, 1997. In his November 5, 1996 report, Dr. Pietrobono stated that he had not seen appellant since December 4, 1995 and appellant came in "with more pain in his low back and left leg." He stated that there had been no additional injury. On physical examination Dr. Pietrobono found the straight leg raising was 70/70 degrees producing discomfort in appellant's left buttock. He also found that appellant had an abnormal sensation

along the outer aspect of his left lower leg. Dr. Pietrobono prescribed physical therapy and pain medication. In his November 20, 1996 report, Dr. Pietrobono stated that appellant's condition had worsened in that he had much more pain in his back and left leg and had to take time off from work due to the pain. He also stated that appellant was becoming increasingly depressed. Dr. Pietrobono noted that appellant's squat was 20 percent of normal, his low back flexion was 20 degrees and the straight leg raising was "20/20." He stated that, "with the aggravation of his symptoms, [appellant] was only able to sit, stand and walk for short distances," that he was unable to bend or squat and could not drive.

In his December 5, 1996 report, Dr. Pietrobono stated that appellant was in worse pain, had marked restriction of motion, was 30/30 degrees on the straight leg raising and walked with a slight limp to favor his left lower extremity. He stated that blood tests performed on November 5, 1996 were within normal limits. Dr. Pietrobono stated that appellant did not completely recover from his original injury. He stated that the present condition "probably" represented an exacerbation of the preexisting condition and that there was no evidence of an additional injury. In his January 6, 1997 report, Dr. Pietrobono stated that appellant emotionally had improved but he was still experiencing pain, was disabled and received only transient relief from the physical therapy. On physical examination he found appellant walked without a limp, that his low back flexion was limited to 10 degrees with muscle spasm in his low back and his straight leg raising was 60/10 degrees with a positive Lasegue's on the left side. Dr. Pietrobono stated that appellant continued to have an abnormal sensation along the lateral aspect of his left lower leg.

By decision dated February 20, 1997, the Office denied the claim, stating that appellant failed to establish a causal relationship between his present disability and his August 17, 1989 employment injury.

By letter dated August 29, 1997, appellant requested reconsideration of the Office's decision and submitted additional medical evidence including a magnetic resonance imaging (MRI) scan dated February 7, 1997 and medical reports from Dr. Pietrobono dated February 19, March 4, June 9, July 8 and August 18, 1997. The February 7, 1997 MRI scan showed no residual or recurrent disc herniations although the interpreter recommended that the results be compared with appellant's MRI scan performed on September 27, 1994. In his February 19, 1997 report, Dr. Pietrobono noted that the February 7, 1997 MRI scan showed desiccation but no disc herniation and only slight scarring at the L4-5 level with minimal changes at the L5-S1 level. He noted that appellant continued to complain of intermittent discomfort in his back and left leg but the symptoms were tolerable. Dr. Pietrobono recommended that appellant return to his limited-duty work on February 24, 1997 with restrictions. In his March 4, 1997 report, he reiterated his opinion that he felt that appellant had not completely recovered from his August 17, 1989 employment injury and that his present condition was "probably" an exacerbation of the preexisting condition.

In his June 9, 1997 report, Dr. Pietrobono found that appellant had improved markedly. He decreased appellant's lifting restrictions from 20 to 10 pounds and increased the length of time he could case mail to 5 hours a day. In his August 18, 1997 report, Dr. Pietrobono summarized the findings in his past reports and emphasized that his findings showed that a

change occurred in appellant's condition which precluded him from working. He stated that, as noted in his November 20, 1996 report, the aggravation of appellant's pain in his back, buttock and left leg was so severe that appellant was only able to sit, stand and walk for short distances, that he could not bend or squat and could not drive. Dr. Pietrobono stated that, in his January 6, 1997 report, he noted that muscle spasms was present in appellant's back and there was evidence of nerve root pressure with a straight leg raising of 60/10 degrees and a positive Lasegue's on the left side.

By decision dated November 20, 1997, the Office denied appellant's request for modification.¹

The Board finds that the case is not in posture for 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.² When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that she 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.³ 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 job requirements.⁴ 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.⁵ An award of compensation may not be made on the basis of surmise, conjecture, or speculation or an appellant's unsupported belief of causal relation.⁶

¹ The Board has jurisdiction on the merits over the November 20, 1997 decision because in that decision the Office evaluated whether Dr. Pietrobono's August 18, 1997 report constituted a rationalized medical opinion, stating that his physical findings were not objective but were based on appellant's subjective complaints and his opinion that appellant's accepted condition of a herniated lumbar disc was exacerbated without any intervening cause was speculative and lacking in probative value. Thus, despite using language pursuant to 5 U.S.C. § 8128 that the evidence appellant submitted was cumulative in nature and insufficient for review, the Office actually weighed the medical evidence and therefore Board review of the merits of the November 20, 1997 decision is necessary. *See Rosie Esquivias*, 41 ECAB 243, 253 (1989).

² *Dominic M. DeScala*, 37 ECAB 369 (1986); *Bobby Melton*, 33 ECAB 1305 (1982).

³ *George DePasquale*, 39 ECAB 295, 304; *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

⁴ *Id.*

⁵ *See Nicolea Brusco*, 33 ECAB 1138 (1982).

⁶ *See William S. Wright*, 45 ECAB 498, 503 (1994).

Dr. Pietrobono's reports dated from November 5, 1996 through June 9, 1997 document that appellant's pain in his back, buttock and left leg, which appellant had since the August 17, 1989 employment injury, worsened to the point where appellant was unable to work, to sit, stand and walk for short distances and was unable to bend or squat and could not drive. Dr. Pietrobono consistently stated that there was no additional injury and he did not believe appellant had recovered from the August 17, 1989 employment injury. He returned appellant to his limited-duty work on February 24, 1997 and found that, by June 9, 1997, appellant's condition had sufficiently improved to warrant a slight decrease in his work restrictions. In his December 5, 1996 and March 4, 1997 reports, Dr. Pietrobono was speculative in that he stated that appellant's present condition was "probably" an aggravation or exacerbation of his preexisting back condition. In his most recent report dated August 18, 1997, however, Dr. Pietrobono specifically stated that, as noted in his January 6, 1997 report, he found objective symptoms consisting of muscle spasms and nerve root pressure that appellant's physical condition had worsened. There is no evidence in the record contrary to Dr. Pietrobono's findings in this regard.

Dr. Pietrobono's reports are not sufficient to discharge appellant's burden of proving by the weight of reliable, substantial and probative evidence that appellant's present condition is causally related to the August 17, 1989 employment injury. Because, however, Dr. Pietrobono consistently stated in his reports that there was no additional injury, that appellant's pain in his back, left leg and left buttock significantly worsened after November 5, 1996 but then improved and he noted objective evidence of muscle spasms and nerve root compression, his opinion is sufficient to require further development of the record. It is well established that proceedings under the Federal Employees' Compensation Act are not adversarial in nature and, while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.⁷ The Office has an obligation to see that justice is done.⁸

The Office should prepare a statement of accepted facts and refer appellant, along with the statement of accepted facts and the medical records, to an appropriate specialist for an examination of appellant and a rationalized medical opinion as to whether appellant's medical condition is causally related to the August 17, 1989 employment injury. After such further development as it deems necessary, the Office shall issue a *de novo* decision.

⁷ See *March A. Cacchione*, 46 ECAB 148, 152 (1994); *Lourdes Davila*, 45 ECAB 139, 143 (1993).

⁸ See *March A. Cacchione*, *supra* note 7 at 152; *Gary L. Fowler*, 45 ECAB 365, 373 (1994).

The decisions of the Office of Workers' Compensation Programs dated November 20 and February 20, 1997 are hereby set aside and the case remanded for further proceedings consistent with this decision.

Dated, Washington, D.C.
January 10, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member