

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JEFFREY A. WIDDOWS and U.S. POSTAL SERVICE,
POST OFFICE, Cumberland, MD

*Docket No. 98-1581; Submitted on the Record;
Issued January 13, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether appellant met his burden of proof in establishing that he had a recurrence of disability causally related to his December 13, 1995 employment injury.

On December 13, 1995 appellant, then a 34-year-old postal clerk, was lifting a tray of mail out of a tub when he developed severe back pain which radiated down his left leg.¹ Appellant, who was working four hours a day on light duty, stopped working that day, returned to part-time light-duty work on January 2, 1996, stopped working again on January 26, 1996 and returned to full-time work at his regular position on April 13, 1996. A December 20, 1995 magnetic resonance imaging (MRI) scan report indicated that appellant had a small herniated disc at L4-5 on the right side with impingement of the right L5 nerve root and a small herniated disc at L5-S1 on the left with minimal displacement of the left S1 nerve root. Appellant underwent surgery on February 22, 1996 consisting of a left hemilaminectomy at L5-S1 with excision of a herniated L5-S1 disc. The Office of Workers' Compensation Programs accepted appellant's claim for a herniated nucleus pulposus at L5-S1 on the left and paid compensation for the periods that appellant did not work and did not use leave.

On September 10, 1997 appellant filed a claim for recurrence of disability. He indicated that the date of the recurrence was August 26, 1997 but noted that he had not stopped working. Employing establishment records shows that appellant worked part time on most workdays from August 26 through September 16, 1997 and stopped working completely effective September 17, 1997.

In a December 16, 1997 decision, the Office rejected appellant's claim for a recurrence of disability on the grounds that appellant had not met his burden of proof because the evidence of

¹ Appellant filed a claim for a recurrence of disability which he related to a February 22, 1995 employment injury. The case record submitted on appeal does not contain any records relating to the February 22, 1995 injury but begins with appellant's filing of a claim for recurrence of disability after the December 13, 1995 incident.

record did not establish that appellant had a recurrence of disability but showed that his disability was due to a new injury incurred while playing tennis.

The Board finds that the case is not in posture for decision.

Appellant has the burden of establishing by reliable, probative and substantial evidence that the recurrence of a disabling condition for which he seeks compensation was causally related to his employment injury. As part of such burden of proof, rationalized medical evidence showing causal relationship must be submitted.²

In support of his claim, appellant submitted reports and office notes from Dr. Kheder Ashker, a Board-certified neurosurgeon. In a September 24, 1996 report, Dr. Ashker indicated that appellant's back pain had improved greatly. He noted that appellant had no leg pain. Previous office notes had shown appellant had complained of left sciatica. He reported that appellant had normal motor and sensory examinations. In an August 26, 1997 office note, Dr. Ashker noted that appellant had done fairly well since his lumbar laminectomy. He related appellant developed back pain two weeks prior to the office visit while playing tennis. He indicated that appellant had severe left hip pain and pain down the posterior aspect of the left thigh. He diagnosed left sciatica and pointed out a need to rule out a disc herniation. In a September 8, 1997 office note, Dr. Ashker reported that an MRI scan was consistent with recurrent L5-S1 disc herniation, which was consistent with the old injury. He noted that appellant complained of left sciatic leg pain and pointed out that contralateral leg raising test was severely positive in that when he raised his right leg, he had severe left sciatica. In a September 22, 1997 report, Dr. Ashker stated that appellant had a recurrent disc herniation at L5-S1, which was the result of his old injury. In an October 27, 1997 report, Dr. Ashker again noted appellant's positive leg raising test, particularly the contralateral leg raising test. He diagnosed recurrent disc herniation with weakness of the extensor hallucis longus muscle. He reported pinprick sensation was diminished in appellant's entire left foot and leg. He commented that this finding could not be explained on the basis of a herniated disc because a herniated L5-S1 disc would affect only the lateral aspect of the foot.

The Office based its decision on Dr. Ashker's note that appellant's complaints began in August 1997 when he played tennis. Dr. Ashker, however, stated that appellant's condition was a recurrent herniated disc, which was a result of his prior employment injury. Dr. Ashker's reports would indicate, therefore, that appellant's recurrent herniated disc was a consequential injury. These reports, while not sufficiently rationalized to meet appellant's burden of proof, are sufficiently rationalized in the circumstances of this case to require further development.³ In the case of *John R. Knox*,⁴ regarding consequential injury, the Board stated:

“It is an accepted principal of workers’ compensation law and the Board has so recognized, that when the primary injury is shown to have arisen out of and in the

² *Dominic M. DeScala*, 37 ECAB 369 (1986).

³ *John J. Carlone*, 41 ECAB 354 (1989).

⁴ 42 ECAB 193 (1990).

course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause which is attributable to the employee's own intentional conduct. As is noted by Professor Larson in his treatise: '[O]nce the work-connected character of any injury, such as a back injury, has been established, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause.... [S]o long as it is clear that the real operative factor is the progression of the compensable injury, associated with an exertion that in itself would not be unreasonable [under] the circumstances. A different question is presented, of course, when the triggering activity is itself rash in the light of claimant's knowledge of his condition.'"⁵ (Citations omitted.)

The Office did not fully consider the issue of whether the recurrent herniation of the L5-S1 disc was a consequential injury or was due to an independent, intervening cause due to appellant's intentional conduct. Such a determination must be based on further development of the medical evidence on the cause of the recurrent herniated disc, particularly on whether the herniated disc arising from playing tennis in August 1997 was a consequence or result of the December 13, 1995 employment injury or whether playing tennis under these circumstances would be considered an independent, intervening cause of appellant's disability as an activity that would be considered rash given appellant's knowledge of his condition. An examination of the latter proposition would depend on what restrictions appellant's treating physician place on appellant's activities as of August 1997, particularly whether appellant was restricted from participating in athletic exercise such as tennis. After such further development as the Office may find necessary, the Office should issue a *de novo* decision on whether appellant's disability was causally related to his December 13, 1995 employment injury.

⁵ *Id.* at 196.

The decision of the Office of Workers' Compensation Programs, dated December 16, 1997, is hereby set aside and the case remanded for further action in accordance with this decision.

Dated, Washington, D.C.
January 13, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member