U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MUSA S. MUSA and DEPARTMENT OF VETERANS AFFAIRS, MEDICAL CENTER, Pittsburgh, PA

*Docket No. 99-1652; Submitted on the Record;*
*Issued July 21, 2000*

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant sustained a recurrence of disability on or after March 1, 1996 that was causally related to his employment-related hernias.

On April 15, 1989 appellant, a respiratory therapist, sustained an injury while in the performance of his duties when he lifted an oxygen cylinder. Alongside the incisional scar from a recent laparotomy for appendicitis, appellant developed a hernia. The Office of Workers' Compensation Programs accepted appellant's claim for incisional hernia and authorized surgery on June 7, 1989. Appellant sustained recurrences of disability when he underwent authorized repair surgeries on September 2, 1992 and September 6, 1995. Appellant retired on February 3, 1996.

On April 7, 1997 appellant filed a claim asserting that he sustained a gradual recurrence of disability beginning in March 1996 as a result of his April 15, 1989 employment injury. He explained that, within the first few months following his most recent surgery, he developed periodic abdominal pains and difficulty with bowel movements. Eventually, unable to maintain a full-time work schedule, he took retirement.

Appellant submitted a January 13, 1997 report from Dr. Mohammed Taqi, a specialist in internal medicine, who reported: "[Appellant] has recurrent abdominal wall hernia which first started at his job several years ago. Currently he has recurrence of the same and may require surgery."

Appellant also submitted a January 10, 1997 report from Dr. Arthur P. Fine, who stated as follows:

> "[Appellant] is a fifty-three-year-old male who initially presented on August 3, 1995 with a complaint of a recurrent abdominal bulge for one year. His history was that of an original exploratory laparotomy for appendicitis in 1989, followed by an incisional herniorrhaphy in 1992, both performed at McKeesport Hospital and utilizing mesh. Approximately one year prior to the above date of presentation it was exacerbated by work and the physical requirements of straining and lifting at his place of employment and he noted a recurrent bulge in this region. He was found on examination to have a recurrent inguinal hernia with two sites of recurrence noted on physical examination with findings at the time of surgery of visceral adhesions of the small bowel and colon to the under surface of the Marlex mesh as well as omental adhesions to the Marlex. The bowel was found to be entering several defined hernia sacs on the lateral aspect of the mesh, the largest of which was in the right upper quadrant which was a saccular area containing colon and small bowel. The adhesions of the bowel were taken down uneventfully albeit tediously and a repair was carried out with a large portion of Gortex. The date of this procedure was September 6, 1995. Following surgery the patient felt well when seen in the office. Approximately two months later he was noted to have an intact repair with some discomfort felt to be secondary to adhesions. In March 1996, the patient was found, however, to have right upper quadrant pain by the end of a normal workday which had been present for approximately one month. He was reported to have undergone an evaluation in Maryland along with CT [computerized tomography] scanning which was reported by the patient to be unremarkable and was also seen in an emergency room at Church Hospital in Baltimore where he underwent ultrasound examination, again reported by the patient as being normal. He is found on my examination on March 28, 1996 to have a small right lower quadrant reducible hernia at the margin of his repair. The patient was returning to Baltimore at that time and was next seen by myself on December 31, 1996. At that time the bulge noted previously was much larger, with a 10 centimeter fascial defect on the right side of the abdomen. At this time in the area of this protuberance there is continuous discomfort, which is exacerbated by lifting or by any length of time at work which is preventing him from, at this point in time, any type of gainful employment. The diagnosis is of a recurrent incisional hernia with visceral involvement with pain secondary to these diagnoses. The repair is possible but patients who have had incisional hernias are prone to develop recurrences and patients who have already had a recurrence are much more prone to develop further recurrent episodes of herniation. At this point, repeat repair is not planned and the patient is currently disabled from work."

The Office referred the case to its district medical adviser, who reported on May 19, 1997 that appellant's current condition was not related to his original injury of April 15, 1989, was not a result of prior hernia repairs authorized by the Office and was not the result of straining or lifting at work. The medical adviser reported:

> "The claimant certainly has a weakness of the abdominal wall which was repaired three times at [Office] expense, as a recurrent incisional hernia. The current hernia starts at the border of the last repair and extends 10 cm. [centimeters]from there. This is not a recurrence of the repaired hernia or a failure of the repair, but a new hernia. The need for surgical repair is best left to the decision of the surgeon but this condition, similar to what was accepted by [the Office], is a new occurrence. There is no medical record showing a persistence of a hernia at the time of retirement from the [employing establishment]. This problem started after retirement from the federal government."

In a decision dated June 10, 1997, the Office denied appellant's claim on the grounds that the evidence of record failed to establish that the claimed recurrence was causally related to the injury of April 15, 1989.

Appellant requested a hearing before an Office hearing representative. At the hearing, which was held on May 18, 1998, appellant appeared and testified.

Following the hearing, appellant submitted additional medical evidence to support his claim. In a May 15, 1998 report, Dr. Fine reviewed appellant's medical course through June 3, 1997. In a supplemental report dated May 26, 1998, he stated: "[Appellant's] present recurrence of herniation in all probability is a natural recurrence related to past injury and surgery and not related to any new incident."

In a May 13, 1989 report, Dr. W.H. Schraut, a professor of surgery, reported that a herniation had indeed recurred at the site of the previous three surgeries for hernia repair and that until the defect was repaired appellant was unable to perform the duties necessary to maintain substantial and gainful employment. In a supplemental report dated May 21, 1998, Dr. Schraut stated: "[Appellant's] current herniation is in the same area where herniations occurred following exploratory surgery in 1989 due to a perforated appendix."

In a decision dated July 29, 1997, the Office denied appellant's claim of recurrence. The hearing representative noted that none of the medical evidence provided an explanation as to how the hernia noted after appellant's retirement was causally related to the prior work injury and prior surgeries. With respect to the additional reports submitted after the hearing, the hearing representative noted: "These additional reports do not explain why the claimant's current herniation is not due simply to the 1988 appendectomy and laparotomy, rather than the April 15, 1989 work injury. Further, no report addresses the Office [m]edical [a]dviser's observation that the current herniation is in a different location."

Appellant requested reconsideration and submitted additional evidence. In an August 20, 1998 report, Dr. Fine stated as follows:

> "This is in response to your questions regarding [appellant] and his recurrent hernias. It is certainly true he would not have had a hernia develop without having had the 1988 appendectomy by a laparotomy on April 15, 1989. This diagnosis of abdominal pain at that time certainly had nothing to do with work. Incisional hernias are not that terribly unusual after midline laparotomy, the site chosen by [appellant's] surgeon for that surgery. They are more likely to occur with several factors. Among them, physical strain and obesity. Both of these factors, that is physical strain at work and the patient's body habitus itself, certainly contributed to the first incisional hernia. Once this had occurred, a recurrence became very likely. Standard surgical texts indicate anywhere from a 30 to 40 percent recurrence rate following repair of incisional hernias. Pursuing this further at the present time would not be helpful in that, given the patient's abdominal girth, recurrence would be almost certain again. In my estimation the original hernia, following the midline laparotomy and appendectomy, was again multi-factorial and based on the patient's size as well as exertion at work, each to some degree."

In a decision dated January 14, 1999, the Office reviewed the merits of appellant's claim and denied modification of its prior decision.

The Board finds that this case is not in posture for decision. There is a conflict in medical opinion necessitating referral to an impartial medical specialist pursuant to 5 U.S.C. § 8123(a).

Appellant has submitted medical opinion evidence to support his claim of a recurrent incisional hernia. Dr. Fine explained that patients who have had incisional hernias are prone to develop recurrences and patients who have already had a recurrence are much more prone to develop further recurrent episodes of herniation. He reported that appellant's current recurrence of herniation in all probability was a natural recurrence related to past injury and surgery and not related to any new incident. The Office medical adviser disagreed, stating that appellant's current condition was not related to his original injury, prior repair surgeries or straining or lifting at work. He stated this was not a recurrence or a failure of a repair but a new hernia, a new occurrence.

Section 8123(a) of the Federal Employees' Compensation Act provides in part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[1]

To resolve the conflict in opinion between appellant's physicians and the Office medical adviser, the Office shall refer appellant, together with the medical record and a statement of

[1] 5 U.S.C. § 8123(a).

accepted facts, to an appropriate impartial specialist for a well-reasoned opinion, supported by the medical record, on whether the hernia that Dr. Fine found on March 28, 1996 was causally related to appellant's accepted employment injury and authorized surgeries. After such further development of the evidence as may be necessary, the Office shall issue an appropriate final decision on appellant's claim of recurrence.

The January 14, 1999 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Dated, Washington, D.C.
July 21, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member