

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LUIS ABREU and DEPARTMENT OF VETERANS AFFAIRS, VETERANS
ADMINISTRATION MEDICAL CENTER, San Juan, PR

*Docket No. 99-548; Submitted on the Record;
Issued June 27, 2000*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant has met his burden of proof in establishing that he sustained a recurrence of disability on or about September 3, 1997 causally related to his November 16, 1995 accepted injury.

On November 16, 1995 appellant, then a patients assistant for the employing establishment, filed a claim for compensation benefits alleging that he sustained an injury to his lower back as a result of his federal employment. The Office of Workers' Compensation Programs accepted as compensable appellant's lumbosacral strain as a result of the alleged incident.¹

On November 20 and 30, 1995 Dr. Jose Asencio, appellant's attending physician, reported that appellant's regular work was compromised by the November 16, 1995 back injury, and Dr. Asencio restricted appellant to limited duties until he was cleared for full, unrestricted work duties on February 9, 1996.

On October 9, 1997 appellant filed a claim for recurrence of disability (Form CA-2a) alleging that the original injury caused additional disability on September 3, 1997. He alleged in a statement filed with the Office that he was working as a medical clerk at the Psychiatric Intervention Center of the employing establishment when he suddenly felt a great pain in his lower back and arms. He further claimed that it was very difficult to stand up and walk. Appellant also noted on the form that he was never capable of performing his original duties due, in part, to a loss of concentration from the prescription medication taken for his pain.

Dr. Hector J. Gallardo, a neurologist, submitted a report dated September 13, 1997, with appellant's claim which diagnosed him with the following: right median and bilateral tibial motor neuropathies; chronic bilateral C8 radiculopathies, acute bilateral L5-S1 radiculopathies;

¹ The Office accepted a prior claim by appellant for a back injury that occurred after heavy lifting at the same employing establishment on November 15, 1990. At that time, appellant's treating physician found acute onset of low back pain radiating into both legs associated with numbness of feet.

chronic moderate to severe cervical and lumbar paravertebral muscle spasms; spina bifida occulta; C4-5 herniated nucleus pulposus, by magnetic resonance imaging (MRI) and L4-5 herniated nucleus pulposus, by MRI. He reported that appellant was in his usual state of health until 1990, when he developed acute onset of low back pain radiating into both legs associated with numbness of feet, after an incident of heavy lifting at work at the Puerto Rico employing establishment. Dr. Gallardo further indicated that medical records showed that lumbosacral x-rays done on November 16, 1990 revealed minimal lumbar spondylosis and spina bifida occulta at S1. Physical therapy progress notes dated December 4, 1990 and December 20, 1995 revealed a very tender left S1 joint with ROM of the trunk being very limited with diminished pinprick sensation at the left L4-5 dermatome. Dr. Gallardo referred to a lumbosacral MRI dated January 14, 1993 that further evidenced spina bifida occulta and an electromyogram (EMG) nerve conduction velocity study of the four extremities done on October 10, 1994 that showed evidence of proximal conduction block and chronic bilateral C8 radiculopathies. Dr. Gallardo's report noted that appellant received physical therapy, nonsteroids, anti-inflammatory medications and muscle relaxants with some improvement but indicated that in 1995 when appellant fell off the chair at work, he reinjured his neck and back. He noted that appellant's condition was caused in part by the employment injury sustained in 1990, however, the cervical and lumbar HNP's were reported likely due to the trauma sustained in the recent injury. Dr. Gallardo further opined that, as of September 23, 1997, appellant should be considered permanently and totally disabled.

On October 16, 1997 the Office requested that Dr. Gallardo submit additional medical documentation. The Office specifically requested from the physician appellant's complete medical history; dates of all examinations and treatment; history of the injury given to him; and an opinion, supported by a medical explanation as to how the reported work incident caused or aggravated the claimed injury. In the October 16, 1997 letter, the Office particularly noted that it was unclear how the diagnosis of a herniated disc was made in view of the fact that the MRI reports in the file do not support the diagnosis. The Office further indicated that it was unclear how the condition resulted from the fall at work in 1995, considering that appellant had a preexisting condition of spina bifida; how the condition to appellant's cervical area was caused from a fall to his bottom; and how although, appellant shows no signs of muscle atrophy or positive neurological findings, appellant has been rendered totally disabled. The Office cautioned that speculative medical opinions and those not supported by clinical findings or test results could not be considered probative evidence in the evaluation of this claim.

On November 12, 1997 the Office received an addendum report from Dr. Gallardo in response to the October 16, 1997 request for further documentation. In his report, he pointed to facts documented by appellant's medical records that he suffered a fall in November 1990; that appellant has bilateral L5-S1 radiculopathies which had been confirmed by electrodiagnostic testing; and that appellant also suffered a fall from his chair at work in 1995. Dr. Gallardo noted that, although appellant has spina bifida at L5-S1, any type of trauma could aggravate this condition. He further noted that it would not be uncommon for a patient, who fell on his bottom, to sustain a herniated disc in some area other than his lumbar back, since the shockwaves are transmitted throughout the spine and neural axis. Dr. Gallardo indicated that, although appellant shows no signs of muscle atrophy, this does not signify that there are no radiculopathies present, especially when there are photocopies of abnormalities seen on the EMGs available. He concluded his addendum by referring to his September 13, 1997 report where he indicated positive neurological signs on appellant's physical examination.

On July 29, 1997 Shelly Lipton, a claims examiner from the Office, recommended that the claim for recurrence of disability on September 3, 1997 be denied because it was not causally related to the initial injury of November 16, 1995. Ms. Lipton noted her basis for decision on Dr. Gallardo's medical conclusions of appellant's condition. According to her, the factual and medical evidence did not indicate any injury to his neck for the recurrence claim. Ms. Lipton reasoned that because medical conclusions given were based on an incorrect medical history and because appellant had not claimed any injury to his neck resulting from the employment incident in his claim, that Dr. Gallardo's medical conclusions cannot be used in support of appellant's claim for recurrence.

Based upon the above, the Office in a decision dated August 21, 1998 disallowed compensation benefits.

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

Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between his recurrence of disability commencing on or about September 3, 1997 and his November 16, 1995 accepted injury.² 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 employment factors and supports that conclusion with sound medical reasoning.³

The Board notes that, while Dr. Gallardo's report dated September 1997 refers to appellant's chief complaint as "neck and low back pain since 1990," this fact alone does not render his extensive medical history incorrect. Along with this reference to neck pain, appellant's medical reports also indicate that at some time prior to 1997 he experienced some shoulder pain. Further, appellant submitted with his CA-2a form a statement that he felt pain in his arms, in addition to his back during the recurrence. There is no evidence that such references made to pain in appellant's neck or arms diminishes the probative value of medical evidence necessary to establish a causal relationship between the employment incident and the injury sustained to appellant's lower back. Furthermore, the Office in its October 16, 1997 letter raised numerous questions to be answered by Dr. Gallardo regarding appellant's condition, after it reviewed the September 13, 1997 report that, among other things, made reference to the complaints of neck pain. The Office in its October 16, 1997 letter did not raise any questions on this issue. Dr. Gallardo reviewed the factors of employment identified by appellant as causing his neck and back conditions, and considered these factors as well as test findings and his medical history to determine whether these employment factors could have caused or aggravated appellant's condition. He outlined how medically appellant's 1995 employment incident could have caused or at least aggravated his neck and back conditions. Dr. Gallardo presented medical rationale for his opinion, which was generally supportive of appellant's claimed recurrence. He, however, did not explain, with sufficient medical rationale, why the medical conditions which he diagnosed and opined in 1997 were aggravated by the 1995 injury did not require medical treatment until 1997.

² *Dominic M. DeScala*, 37 ECAB 795 (1986).

³ *Nicolea Brusco*, 33 ECAB 1138 (1982).

There is substantial, uncontradicted medical evidence in support of appellant's claim that is sufficient to require further development of the claim.⁴ It is well established that proceedings under the Federal Employees' Compensation Act are not adversarial in nature nor is the Office a disinterested arbiter.⁵ While appellant has the burden to establish entitlement to compensation, the Office shares responsibility in development of the evidence.⁶

Accordingly, the case will be remanded to the Office for further evidentiary development regarding the issue of whether appellant sustained a recurrence of disability on September 3, 1997 due to the November 16, 1995 employment injury. After such development of the case record as the Office deems necessary, an appropriate decision should be issued.

The decision of the Office of Workers' Compensation Programs dated August 21, 1998 is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Dated, Washington, D.C.
June 27, 2000

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁴ *Cheryl A. Monnell*, 40 ECAB 545 (1989).

⁵ *William J. Cantrell*, 34 ECAB 1233 (1983).

⁶ *Dorothy L. Sidwell*, 36 ECAB 699, 700 (1985).