

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LYNN R. MALTSBERGER and U.S. POSTAL SERVICE,
POST OFFICE, Tulsa, OK

*Docket No. 98-2044; Submitted on the Record;
Issued March 13, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether appellant has met his burden of proof to establish that he sustained an injury while in the performance of duty.

On June 9, 1997 appellant, a 45-year-old rural mail carrier, filed a claim alleging that as he was driving across a bridge on April 11, 1997 it started to collapse. He stated that he suffered increased pain in his lower back and legs which he was unable to control. In an employee statement of June 13, 1997, appellant stated that as he drove across the bridge, the ground separated and the bridge began to fall. He stated that he was going approximately 20 to 25 miles an hour and that he accelerated and ramped off the other side. Appellant stated that he had back trouble in the past, but the sudden jarring from the accident caused uncontrollable pain in his legs and back. He did not lose any time from work and continued to engage in his hobbies which included lengthy motorcycle trips.

In a July 15, 1997 response to the Office's request for additional information, appellant stated that he was driving on a country road and had begun to cross a county bridge when it began to fall. As it began to fall, he accelerated and ramped off the other side. He stated that the impact caused immediate severe pain in his lower back. Appellant stated that he sat and rested, checked the damage to the underside of his pickup and called Dwight Hoobler, the only person on duty at the employing establishment, on his cell telephone that the bridge had fallen. He stated that he missed work the next day, a Saturday, because he could not get out of bed. Appellant further stated that he informed his boss, Shelia Jennings, Postmaster, the following Monday and sought medical attention with Dr. Mark A. Hayes, a Board-certified orthopedic surgeon, within one week of the accident when the pain did not go away. He acknowledged that he has had back trouble for the past two years.

In a May 6, 1997 report, Dr. Hayes noted that appellant had back pain off and on for several years and that a year ago, Dr. Scott Anthony, an osteopath, did not feel that appellant was a good surgical candidate. Dr. Hayes noted that appellant's pain had worsened since the April 11, 1997 injury, in which appellant was crossing a county bridge when it fell three to four feet. After performing a physical examination, Dr. Hayes stated that appellant has a spondylitic

defect at L5-S1 based on the films available to him, but there also looks like there was a right-sided disc at L4-5 and a left-sided disc at L3-4. Appellant's discogram was positive at the three levels for low pressure failures. Dr. Hayes recommended that a psychological evaluation should be performed before proceeding with surgery. In a May 15, 1997 report, Edgar J. Kranau, Ph.D., a clinical psychologist, noted appellant had no significant psychological barriers for a successful outcome of spinal surgery.

In a June 19, 1997 report, Dr. Hayes stated that appellant was a reasonable surgical candidate at the L5-S1 level, but recommended against a three-level surgical fusion.

In a July 14, 1997 report, Dr. James A. Rodgers, a Board-certified neurologist, noted that appellant had prior back problems in 1995 for which he was treated conservatively. It was noted that, at that time, Dr. Anthony had decided that appellant was not a surgical candidate for his low pressure discs at L3-4, L4-5 and L5-S1. Dr. Rodgers stated that on April 11, 1997, while driving across a bridge outside Pawnee, Oklahoma, the bridge gave way three or four feet, with the truck barely getting across the bridge, hitting the front end hard and jarring appellant's body severely. Dr. Rodgers stated that, since the April 11, 1997 accident, appellant has had more disabling pain, though he has continued to work missing one or two days of work per week. After performing a physical examination, Dr. Rodgers diagnosed an internally disrupted disc at L3-4, L4-5 and L5-S1. A computerized tomography (CT) scan in the past hints of a disc protrusion towards the left at L3-4 and towards that right paracentral and lateral recess at L4-5, with no frank disc herniation seen at L5-S1, except bilateral spondylolysis. Dr. Rodgers opined that appellant also had mechanical back pain secondary to all three levels. A magnetic resonance imaging (MRI) scan of the lumbar spine and a three-level lumbar decompressive laminectomy and instrumentation and fusion was recommended.

By decision dated August 1, 1997, the Office denied appellant's claim finding that the medical evidence of record was insufficient to establish that the April 11, 1997 incident caused appellant's current medical condition because appellant's physicians failed to provide any medical rationale demonstrating how the incident aggravated his preexisting back condition.

By letter dated August 30, 1997, appellant requested reconsideration.¹ A duplicative copy of Dr. Rodgers's July 14, 1997 report was received in addition to new medical reports.

In an August 5, 1997 report, Dr. Rodgers noted that the most recent MRI scan of appellant's spine dated July 28, 1997 showed lumbarization of S1 with disc herniation, S1-2 towards the left, and disc herniation, L5-S1 midline towards the right. Varying degrees of degenerative changes were noted at the levels above up to L2. Dr. Rodgers noted that Dr. Hayes

¹ Subsequent to appellant's request for reconsideration, the Office received an October 29, 1997 letter from the employing establishment in which they stated they were proposing to remove appellant for cause. They alleged that appellant misrepresented his use of leave after the accident and made false statements to his physicians which were not consistent with the surrounding facts, circumstances and evidence. It was alleged that photocopies of pictures taken from the accident scene show that the bridge did not fall three or four feet, and if it did, then there would have been recognizable damage to the front of appellant's vehicle, of which there was none. The employing establishment further maintained that appellant worked his regular assignment, maintained his usual work habits for the next several weeks, which included two extensive motorcycle excursions and other extracurricular activities. An October 10, 1997 U.S. Postal Inspection Service memorandum was submitted. In an October 8, 1997 statement, appellant asserted that he confused the days he took off after the accident, took annual leave to save his sick leave and admitted to riding his motorcycle before and after the scheduled back surgery.

felt that appellant is a surgical candidate for discectomy and fusion at the bottom two levels, L5-S1 and S1-2, if indeed S1-2 moves. He noted that appellant was scheduled for surgery. Dr. Rodgers performed a physical examination and stated that appellant has multi-level lumbar degenerative disc problems from L2 through S2 and possible disc herniation at S1-2 towards the left and L5-S1 towards the right. He opined that appellant has discogenic pain coming from these levels of motion with disc herniation and recommended surgery with stabilization. A copy of the August 6, 1997 operative report provided a postoperative diagnosis of herniated disc at L5-S1 right, with spondylolisthesis S1-2, Grade 1, S1-2 autofused.

In his August 14 and 18, 1997 reports, Dr. Rodgers noted that there was a question as to whether the April 11, 1997 injury was enough to cause the need for appellant's surgery which was performed on August 6, 1997. He noted appellant's previous back history and noted that on April 11, 1997, appellant was driving across a bridge, when it gave way three or four feet, with appellant's truck barely getting across the bridge, hitting the front end hard and jarring his body severely. Since that time, appellant has had more disabling pain, though he has continued to work missing one or two days of work per week. Dr. Rodgers noted that the lumbar discography performed prior to the April 11, 1997 incident showed pain with injection at L3-4, L4-5 and L5-S1. He stated that the new MRI scan of appellant's lumbar spine, obtained after appellant was seen on July 28, 1997 and reviewed prior to the surgery, showed a lumbar disc herniation at L5-S1 towards the right. Dr. Rodgers noted that the previous study did not show disc herniation at L5-S1. He stated that "it seems to me, with preoperative findings, intraoperative findings and postoperative improvement so far, [appellant] had a disc herniation at L5-S1 towards the right. Previous studies had not shown that it had herniated until after his injury on April 11, 1997." Dr. Rodgers stated that the injury causally brought about appellant's needed back surgery.

By decision dated November 12, 1997, the Office denied modification of its previous decision finding that the new evidence submitted did not establish that the worsening of appellant's condition and resulting back surgery were related to the reported incident.²

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

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon a complete factual and medical background, showing a causal relationship between

² Subsequent to the Office's November 12, 1997 decision, appellant submitted medical reports along with a December 13, 1997 authorization letter stating that Ryan Y. Cunningham was his attorney of record. The Board's jurisdiction extends only to evidence before the Office at the time of its decision; therefore, the Board has no jurisdiction to review this evidence; *see* 20 C.F.R. § 501.2(c).

the claimed condition and identified factors. The belief of a claimant that a condition was caused or aggravated by the employment is not sufficient to establish causal relation.³

In this case, appellant alleged that his existing back condition worsened and resulted in back surgery when he was involved in the April 11, 1997 incident when a bridge collapsed as he was crossing it. It is not disputed that the event on April 11, 1997 (*i.e.*, a bridge collapsing as appellant drove over it) occurred; the only discrepancy is how far the bridge fell. Inasmuch as appellant's account of accelerating his vehicle to get to the other side of the bridge is consistent with the history of injury given to his physician, the exact distance the bridge actually fell is not a relevant factor as the factual information supports that appellant made it to the other side of the collapsing bridge. Moreover, from the Office's decisions, the Office apparently accepted that the reported incident occurred as the sufficiency of the medical evidence was analyzed.

As previously noted, part of an appellant's burden of proof includes the submission of rationalized medical evidence based upon a complete factual and medical background showing causal relationship between the claimed injury and employment factors.⁴ The May 6, 1997 report from Dr. Hayes and the July 14, 1997 report from Dr. Rodgers each noted that appellant had a preexisting back condition and that his pain had worsened since the April 11, 1997 incident. However, each physician failed to provide a medical explanation as to whether and to what degree the April 11, 1997 incident resulted in appellant's current back condition which required surgical intervention. In his August 5, 1997 report, Dr. Rodgers noted the July 28, 1997 MRI scan showed lumbarization of S1 with disc herniation, a left S1-2 disc herniation, and a right L5-S1 disc herniation along with degenerative changes at the levels above up to L2. However, Dr. Rodgers failed to provide a medical explanation as to how and why these findings related to or are the result of the April 11, 1997 incident. As such, these reports are insufficient to meet appellant's burden of proof. However, in his August 14 and 18, 1997 reports, Dr. Rodgers noted that the lumbar discography performed prior to the April 11, 1997 incident showed pain with injection at L3-4, L4-5 and L5-S1 while the July 28, 1997 MRI scan showed lumbar disc herniation at L5-S1. Dr. Rodgers opined that as the previous studies did not show that the L5-S1 disc herniated until after the April 11, 1997 incident, the incident causally brought about appellant's needed surgery. While Dr. Rodgers' reports support that the April 11, 1997 incident resulted in a herniated disc at L5-S1, a more rationalized medical opinion is needed to establish that the April 11, 1997 incident caused or contributed to appellant's back conditions which resulted in surgical intervention. While the reports by Dr. Rodgers are not sufficiently rationalized to establish causal relationship, in the absence of medical evidence to the contrary, they are sufficient to warrant further development of the evidence.⁵

It is well established that proceedings under the Federal Employees' Compensation Act⁶ are not adversarial in nature,⁷ and while the claimant has the burden to establish entitlement to

³ *Lourdes Harris*, 45 ECAB 545, 547 (1994).

⁴ *See Mary J. Briggs*, 37 ECAB 578 (1986); *Joseph T. Gulla*, 36 ECAB 516 (1985).

⁵ *John J. Carlone*, 41 ECAB 354 (1989).

⁶ 5 U.S.C. §§ 8101-8193.

⁷ *See, e.g., Walter A. Fundinger, Jr.*, 37 ECAB 200 (1985).

compensation, the Office shares responsibility in the development of the evidence.⁸ On remand, the Office should refer appellant along with an updated statement of accepted facts, which includes a history of appellant's extracurricular activities which he engaged in after the April 11, 1997 incident and prior to his surgery, to an appropriate Board-certified specialist for a rationalized medical opinion on the issue of whether appellant's back condition which resulted in surgical intervention was adversely affected by the April 11, 1997 incident. After such development of the case record as the Office deems necessary a *de novo* decision shall be issued.

The decisions of the Office of Workers' Compensation Programs dated November 12 and August 1, 1997 are set aside and the case is remanded for further proceedings consistent with this decision.

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

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

⁸ See *Dorothy L. Sidwell*, 36 ECAB 699 (1985).