

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN C. REESE and DEPARTMENT OF VETERANS AFFAIRS,
MEDICAL CENTER, Biloxi, MS

*Docket No. 99-184; Submitted on the Record;
Issued November 3, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant sustained a recurrence of disability on October 8, 1992 causally related to his February 16, 1990 accepted injury.

On February 16, 1990 appellant, then a 38-year-old medical supply technician, filed a notice of traumatic injury alleging that he injured his back on that same date while pulling a cart in the course of his federal employment. The Office of Workers' Compensation Programs accepted the claim for lumbar strain on March 7, 1990. Appellant returned to regular work duties on March 7, 1990.

On August 4, September 1 and September 21, 1992, Dr. M. Rao, a Board-certified internist, completed duty status forms, Form CA-17, in which he diagnosed chronic low back strain. He recorded in his progress notes that a chiropractor had treated appellant for his back condition.

On October 8, 1992 Dr. M.F. Longnecker, Jr., a Board-certified orthopedic surgeon, completed a Form CA-17 (duty status report) diagnosing a chronic lumbar strain and indicating that appellant was disabled from October 7, 1992. On October 22, 1992 he diagnosed a herniated nucleus pulposus (HNP), L4-5 on a Form CA-17.

On November 2, 1992 appellant filed a notice of recurrence of disability alleging that he had continuing back problems. In this regard, appellant stated that his lower back pain never subsided after the original injury. He noted that the medical evidence now showed he had a ruptured disc. Appellant stopped working on October 8, 1992.

On November 11, 1992 the Office requested additional evidence, including a physician's opinion, with medical rationale, addressing the causal relationship between the condition treated and the accepted injury. The Office also requested treatment notes from all the physicians who attended to appellant.

On December 1, 1992 Dr. Richard E. Buckley, a neurological surgeon, reviewed appellant's history, performed a physical examination and interpreted a magnetic resonance imaging (MRI) scan of appellant's spine. He diagnosed an HNP, L4-5 with sciatica on the left. Following a partial hemilaminectomy L4 left with diskectomy that he performed on April 20, 1993, Dr. Buckley confirmed his previous diagnosis. On September 22, 1993 he opined that appellant's HNP L4-5 was caused by his February 16, 1990 injury.

By decision dated January 8, 1993, the Office rejected appellant's claim on the basis that the claimed condition was not established as related to the accepted employment injury. In an accompanying memorandum, the Office found that the medical evidence failed to explain the progression of appellant's condition from a low back strain to an HNP.

On February 8, 1993 appellant requested an oral hearing, which was held on September 22, 1993.

By decision dated December 1, 1993, the Office hearing representative affirmed the Office's January 8, 1993 decision rejecting appellant's claim. The hearing representative found that appellant failed to submit rationalized medical evidence, based on a complete background, explaining how the herniated disc stemmed from the accepted employment injury. In this regard, the hearing representative noted that appellant failed to submit complete records from Dr. Longnecker and from a chiropractor that he evidently received treatment from. The hearing representative also indicated that the record was devoid of an opinion explaining how the herniated disc was due to the February 16, 1990 injury.

On November 29, 1994 appellant requested reconsideration. He completed an affidavit stating that he could not remember visiting a chiropractor and that he could not find any records of doing so. Appellant also stated in the affidavit that he had submitted all the medical records accumulated since his original injury. He submitted a February 16, 1994 report from Dr. Buckley opining that appellant's HNP L4-5 was caused by the February 16, 1990 injury. Appellant also submitted a November 28, 1994 report from Dr. Buckley in which he stated that the markedly thickened ligament and annulus, which he found in surgery, was consistent with the conclusion that appellant sustained a ruptured disc in February 1990. Consequently, he opined that, based on his visual inspection and appellant's history, appellant's HNP at L4-5 was caused by the February 16, 1990 injury.

By decision dated February 3, 1995, the Office denied modification of its prior decisions. In an accompanying memorandum, the Office stated that Dr. Buckley provided medical reasoning to support his conclusion, but that the medical record was incomplete without records of appellant's chiropractic treatment. The Office indicated that appellant had the burden of obtaining or making a valid effort to obtain the records in question. It further stated that appellant must submit evidence showing his attempts to obtain the medical evidence and the reasons for his failure to obtain the evidence.

On February 2, 1996 appellant requested reconsideration. In support, he submitted an affidavit stating that he had diligently searched all his records, including insurance forms, cancelled checks and medical records and was unable to find any records of chiropractic

treatment. Appellant stated that he exhausted all possible ways of obtaining records related to his injury and that he did not remember seeing any chiropractor.

By decision dated March 1, 1996, the Office found that the evidence submitted in support of the application for review was repetitious and insufficient to warrant review of its prior decision. In an accompanying memorandum, the Office indicated that appellant failed to submit new or additional evidence.

Appellant subsequently appealed to the Board.

By decision dated March 12, 1998, the Board found that appellant had advanced a fact not previously considered by the Office in his reconsideration request and accompanying affidavit. In this regard, the Board stated that appellant's request for reconsideration and affidavit concerning his search for chiropractic records, in response to the Office's previous decision, presented a factual matter which obligated the Office to review the merits of appellant's claim. The Board, therefore, remanded the case to the Office to conduct a merit review.

By decision dated June 26, 1998, the Office reviewed the merits of the case. The Office stated that appellant's affidavit was insufficient to warrant modification of its prior decisions.

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

A person 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 he claims compensation is causally related to the accepted injury. This burden of proof requires that a claimant furnish 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.¹

In the present case, an Office hearing representative had determined if appellant had not established the disabling condition of HNP at L4-5 was causally related to the employment injury. On reconsideration, appellant submitted additional evidence, including a November 28, 1994 report from Dr. Buckley, who stated that during the April 1993 surgery he found markedly thickened ligament and annulus, which occurs over a period of time as a result of scar tissue formation. Dr. Buckley stated:

“The appearance of the herniation and surrounding structures, as seen by me upon visual inspection during surgery, support the conclusion that [appellant] sustained a ruptured disc in February 1990 and that his symptoms from this condition waxed and waned over the following two years until finally being seen by me in December 1992. The degree of thickened ligament and annulus would not have existed with an injury more acute in time.”

¹ *Robert H. St. Onge*, 43 ECAB 1169 (1992); *Dennis J. Lasanen*, 43 ECAB 549 (1992).

He concluded that based on a reasonable degree of medical certainty that the HNP was causally related to the employment injury.

The Office apparently determined that the medical record was not complete without chiropractic evidence. In this regard, the Board notes that Dr. Buckley does not base his opinion on chiropractic evidence. Moreover, appellant asserted in his February 2, 1996 affidavit that he was unable to find any records documenting chiropractic treatment.

The Board finds that the uncontroverted evidence from Dr. Buckley is sufficient to require further development of the evidence.² The Office should secure additional medical evidence that is sufficient to determine whether appellant had an employment-related disabling condition on or after October 8, 1992. After such development as the Office deems necessary, it should issue an appropriate decision.

The decision of the Office of Workers' Compensation Programs dated June 26, 1998 is set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Dated, Washington, DC
November 3, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

² See Cheryl A. Monnell, 40 ECAB 545 (1989).