

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONNA MAE WELLS, claiming as widow of EDWIN WELLS and
DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, NATIONAL
RECREATION AREA, Cuyahoga Valley, OH

*Docket No. 99-346; Submitted on the Record;
Issued November 28, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant met her burden of proof to establish that the employee sustained a recurrence of disability commencing December 9, 1992 the day he was terminated from his position.

On July 26, 1989 the employee, then a 65-year-old electrician, sustained an L1 compression fracture and herniated discs at L3-5. He stopped work on July 26, 1989 and returned to his regular duties on June 3, 1991. On June 20, 1990 he underwent authorized laminectomy and discectomy procedures. The employee again stopped work on June 20, 1991 when he sustained a recurrence of disability causally related to his July 26, 1989 employment injury. On March 6, 1992 the employing establishment terminated his employment "because of physical disability" but he returned to light-duty work as a temporary dispatcher on November 2, 1992. The employing establishment terminated the employee on December 8, 1992 for cause unrelated to his disability.

On December 7, 1993 the employee filed a notice of recurrence of disability claim (Form CA-2a) alleging that on November 27, 1992 he sustained a recurrence of disability causally related to his July 26, 1989 employment injury. The employee alleged he stopped work on December 7, 1993 and that his pay stopped on December 9, 1993. On the claim form, the employee alleged that he was bending from a sitting position to reach files located on the floor when his supervisor told him he was not working fast enough. The employee further alleged that upon explaining his health problems, his supervisor stated that "everyone else did it that way and

the same was expected of me.” The employee noted that he sustained lower back pain and difficulty standing or sitting for more than an hour and a half.¹

On January 17, 1994 the employee began work as an electrical technician with Knutsen Machine Products. He died on July 8, 2000.

The record contains reports from Dr. G.E. Gustafson, a Board-certified surgeon specializing in occupational medicine, dated May 19, 1992 to March 9, 1993. In his May 19, 1992 report, he provided a history of the employee’s July 26, 1989 employment injury, treatment, and reported symptoms. Dr. Gustafson noted that the employee walked on his toes and heels without difficulty and that he could squat halfway before experiencing knee pain. He further noted that the employee stated that his condition was about the same as it was when he returned to work on June 3, 1991. Dr. Gustafson stated:

“Based upon the history, physical examination, and review of medical records, it is my opinion [that the employee] can do the job as dispatcher for the [employing establishment].”

In his January 14, 1993 report, Dr. Gustafson provided a history of the employee’s July 26, 1989 employment injury and treatment. He noted that the employee asserted that his back pain was aggravated by repetitiously bending to retrieve files that were 8 to 12 inches from the floor and that he was unable to work after December 8, 1992. Dr. Gustafson noted the employee’s reported symptoms and range of motion, measurements and test results. He noted that the employee experienced lower-back pain when he walked on his toes and heels and decreased sensation in the lateral aspect of his left thigh and left lower leg and foot. Dr. Gustafson stated:

“[The employee] has a chronic failed post laminectomy syndrome. Considering his age, education, previous job experience, it is my opinion that [appellant] is presently unable to engage in any form of sustained remunerative employment. It is my opinion that his condition has become permanent and total in nature.”

In his January 26, 1993 report, Dr. Gustafson noted that he learned that the employee did not stop work because of his low-back pain but because he was terminated by the employing establishment. He concluded that, based upon his review of his May 15, 1992 and January 13, 1993 examinations, his January 13, 1993 examination revealed greater impairment and he noted his impairment rating. Dr. Gustafson opined that a physical capacity evaluation would be helpful in assessing the employee’s ability to work.

Mary Ann Kirkner, a physical therapist, evaluated the employee’s physical capacity on February 8, 1993. In her report, Ms. Kirkner noted that, since examining the employee in

¹ By letter dated February 24, 1994, the Office advised the employee that it received his claim alleging that he sustained a recurrence of disability. The Office further stated that the evidence of record was insufficient to establish that he sustained a recurrence of disability and it requested additional factual and medical evidence to support his recurrence claim. The record, however, does not show that the employee’s December 7, 1993 recurrence claim was further adjudicated.

January 1992, he required more frequent pain medication and resting due to back pain, and had decreased flexibility. Ms. Kirkner also completed a work restriction evaluation dated February 8, 1993 in which she noted his activity restrictions and stated that he could work for four hours daily.

In his March 9, 1993 report, Dr. Gustafson opined that, based on Ms. Kirkner's evaluation, the employee was capable of part-time work.

By decision dated February 9, 1996, the Office of Workers' Compensation Programs denied appellant's recurrence of disability claim on the grounds that the evidence of record did not establish that the employee's alleged disability was causally related to his July 26, 1989 employment injury.

By letter dated March 5, 1996, the employee, through his attorney, requested a review of the written record. He submitted a March 24, 1994 report in which Dr. Jeffrey A. Biro, an osteopathic physician, stated that the employee sustained severe exacerbation of low-back pain and instability with bilateral lower extremity muscle weakness. The employee also submitted reports dated June 16 and 27, 1994 from Dr. John Collis, a Board-certified neurosurgeon, who treated the employee since 1989 and performed the June 20, 1990 laminectomy procedure. He diagnosed multiple degenerated discs with osteoarthritis and spondylolisthesis and a previously fractured vertebrae. Dr. Collis advised that "all these difficulties are the direct result of an accident on July 26, 1989." He further stated:

"Furthermore, had [the employee] not had that accident on July 26, 1989, he would not be suffering, would not have required surgery, and would be able to participate in any activity he so did before that. I strongly recommend that [the employee] avoid all strenuous exertion and all activities that required [sic] prolonged standing or sitting. If he attempts to do this, he will only suffer."

By decision dated April 10, 1996, an Office hearing representative denied the employee's request for a review of the written record on the grounds that it was untimely filed. The hearing representative found that the employee's request, postmarked March 11, 1996, was not made within 30 days of the Office's February 9, 1996 decision. The hearing representative, however, exercised his discretion and considered the employee's request but further denied it on the grounds that the issue presented could be equally addressed by requesting reconsideration of the Office's February 9, 1996 decision.

By letter dated April 19, 1996, the employee appealed to this Board.

On August 13, 1996 the Director of the Office filed a motion requesting that the Board set aside his February 9, 1996 decision and remand the case for further development. The Director asserted that the employee's request for a review of the written record was timely filed as it was date stamped received on March 11, 1996 within 30 days of his February 9, 1996 decision.

On November 27, 1996 the Board granted the Director's motion to remand the case for further development and merit review for reasons set forth in the Director's motion.

By decision dated May 7, 1997, an Office hearing representative found that the case was not in posture for decision. The hearing representative also found that Dr. Gustafson's reports supported the employee's allegation that there was a change in the nature and extent of his employment-related condition and that he could not perform full-time light-duty work, but his opinion was not sufficiently rationalized. Accordingly, the hearing representative further found that Dr. Gustafson's reports were sufficient to warrant further development by the Office.

On July 14, 1997 the employee, together with a statement of accepted facts and instructions, was referred to Dr. Moses Leeb, a Board-certified orthopedic surgeon, for a second opinion evaluation. In his report dated July 21, 1997, he provided a history of the employee's July 26, 1989 employment injury and noted the findings of his physical examination. Dr. Leeb noted the employee's symptoms, gait and range of motion. He stated:

"Based on the history and present objective findings [the employee] had successful surgery to his lumbar spine with present residuals of moderate restriction of lumbar motion, principally due to pain, with no objective findings it is my opinion that [the employee] could not return to his initial job as an electrician inasmuch as he states that this required prolonged weight bearing activities as well as bending and lifting. [The employee] could return to his job of dispatcher and could perform this job eight hours per day. Inasmuch as the job description of dispatcher indicates that this is a light exertion type of job.

Dr. Leeb advised the employee to limit bending and lifting to less than one third of the workday and to lift no more than 30 pounds.

By letter dated August 1, 1997, the Office requested that Dr. Leeb address the issue of whether appellant was disabled from performing his dispatcher duties on December 2, 1992.

In response, Dr. Leeb submitted a report dated August 30, 1997 in which he stated that, based on the information available to him and his objective findings, there was no indication that the employee was disabled on December 8, 1992. Dr. Leeb noted that Dr. Collis' 1994 reports indicated only that the employee experienced low-back pain secondary to arthritis, which was aggravated by his July 26, 1989 employment injury.

By decision dated September 9, 1997, the Office denied the employee's claim on the grounds that the evidence of record did not establish that his alleged recurrence of disability commencing December 9, 1992 was causally related to his July 26, 1989 employment injury.

By letter dated September 12, 1997, the employee, through his attorney, requested an oral hearing before an Office hearing representative. At the June 23, 1998 hearing, the employee testified that he had lower-back pain and had difficulty sitting for long periods of time. Regarding Dr. Leeb's examination, and the employee testified that the doctor did not obtain x-rays or use any measurement instruments. The employee further testified that Dr. Gustafson determined that he was unable to work but later opined that appellant could work light duty only when he learned that appellant was fired.

By decision dated September 30, 1998, the hearing representative affirmed the Office's September 9, 1997 decision denying the employee's claim for wage-loss compensation on the grounds that the medical evidence of record did not establish that the employee sustained a recurrence of disability on or after December 9, 1992 causally related to his July 26, 1989 employment injury. The hearing representative found that the employee did not stop work because of a change in the nature or extent of his work-related condition or his light-duty job requirements. The hearing representative further found that the employee was entitled to continued medical benefits for his residual condition related to his July 26, 1989 employment injury.

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

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative, and substantial evidence a recurrence of total disability and show that he cannot perform such light duty. As part of this burden the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.²

Under the Act, the term "disability" means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury. Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn the wages. An employee who has a physical impairment causally related to a federal employment injury, but who nonetheless has the capacity to earn wages he was receiving at the time of injury, has no disability as that term is used in the Act.³

As part of this burden, the employee must present rationalized medical opinion evidence from a physician who, on the basis of a complete and accurate factual and medical background, concludes that the current disabling condition is causally related to the accepted employment-related condition,⁴ and supports that conclusion with sound medical reasoning.⁵ However, it is well established that proceedings under the Act are not adversarial in nature, and while the employee has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.⁶

Section 8123 of the Federal Employees' Compensation Act provides that, if there is disagreement between the physician making the examination for the United States and the

² *Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Terry Hedman*, 38 ECAB 222, 227 (1986).

³ *Maxine J. Sanders*, 46 ECAB 835 (1995).

⁴ *Kevin J. McGrath*, 42 ECAB 109, 116 (1990).

⁵ *Lourdes Davila*, 45 ECAB 139, 142 (1993).

⁶ *Richard E. Konnen*, 47 ECAB 388 (1996); *William J. Cantrell*, 34 ECAB 1233 (1983).

physician of the employee, the Secretary shall appoint a third physician who shall make an examination.⁷

In the present case, the employee's treating physician, Dr. Gustafson, opined that the employee was only capable of part-time work. The Office medical adviser, however, opined that the employee could return to his full-time dispatcher position. The Board finds that these opinions are of approximately equal value as they are rationalized and based on a complete factual and medical backgrounds. Therefore, a conflict exists on the issue of whether the employee sustained a recurrence of disability causally related to his employment injury. The case, therefore, shall be remanded for referral of the case record to an appropriate Board-certified specialist, accompanied by a statement of accepted facts, for a rationalized medical opinion based on a review of the case record as to whether the employee sustained a recurrence of disability commencing November 27, 1992. After such further development as deemed necessary, the Office shall issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs dated September 30, 1998 is set aside and the case is remanded to the Office for proceedings consistent with this opinion.

Dated, Washington, DC
November 28, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

⁷ 5 U.S.C. § 8123; *see Shirley L. Steib*, 46 ECAB 309 (1994).