

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WARREN H. BROWN and U.S. POSTAL SERVICE,
POST OFFICE, Philadelphia, PA

*Docket No. 98-2632; Oral Argument Held April 4, 2001;
Issued April 27, 2001*

Appearances: *Warren H. Brown, pro se; Miriam D. Ozur, Esq.,*
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant has met his burden of proof in establishing that his back condition and disability subsequent to December 23, 1996 are causally related to his position of automation clerk performed from September 23 through December 23, 1996; and (2) whether the Office of Workers' Compensation Programs' refusal to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) constituted an abuse of discretion.

On March 5, 1997 appellant, then a 32-year-old automation clerk, filed an occupational disease claim alleging that he aggravated his preexisting disc condition while working on the automation machine which required continuous bending and lifting. Appellant stopped work on December 26, 1996 and has not returned. By decision dated April 17, 1997, the Office denied the claim on the basis that the evidence of record failed to establish the claimed medical condition as being causally related to his federal employment.

A request for a hearing was filed and a hearing was held on December 8, 1997. At the hearing, appellant submitted a narrative statement indicating that he was discharged from the military in July 1991 with a 10 percent disability due to a herniated disc in the lumbar spine. He related that he worked for the employing establishment as a manual distribution clerk for approximately three-and-a-half years with no problems regarding his back. Appellant stated that prior to starting work as an automation clerk, he notified his supervisor of his prior back problems. Appellant described how he felt his back condition was aggravated by his work as an automation clerk and further described his subsequent course of medical treatment which eventually resulted in a laminectomy and discectomy for a herniated nucleus pulposus L5-S1 on May 15, 1997. Several medical reports were submitted along with copies of a lumbar x-ray dated August 22, 1991, showing normal vertebral bodies and alignment, a lumbar computerized axial tomography (CAT) scan, dated October 28, 1991 showing a probable left herniated nucleus

pulposus at L5-S1 and a possible focal protrusion at L4-5 laterally to the left in the neural foramen; a February 27, 1997 magnetic resonance imaging (MRI) scan of the lumbar spine, showing a broad-based herniated nucleus pulposus, L5-S1, eccentric to a left paramedian location; and a February 25, 1997 nerve conduction studies and electromyogram (EMG), which showed an extremely mild left L5 radiculopathy and a borderline slowed sensory and motor conduction velocities in both lower extremities.

In a March 3, 1997 medical report, Dr. David R. Pashman, a Board-certified orthopedic surgeon, stated that the current MRI showed a significant disc herniation at L5-S1 with left sided encroachment on the cord and nerve root. The February 25, 1997 EMG revealed a mild L5 radiculopathy on the left. Dr. Pashman indicated that from the review of records which appellant brought, it appeared that appellant had a former disc herniation at L4-5 while in the military and this current disc herniation at the L5-S1 level appeared to be new. Dr. Pashman opined that, since appellant was essentially asymptomatic from the time he had the disc problem in the military until the current work episode, appellant's current symptom complex was due to a new work-related episode in December 1996. Dr. Pashman noted that appellant had been working from 1993 until the episode in 1996.

In a May 15, 1997 medical report, Dr. Pashman reiterated that appellant had a former disc herniation at L4-5 and a new disc herniation at L5-S1. He further reiterated that appellant was asymptomatic from the time he had the disc problem in the military until the current work-related episode and opined that the current symptom complex was due to a new work-related disc herniation that occurred in December 1996. Dr. Pashman advised that appellant would be undergoing a laminectomy and disc excision at the L5-S1 level for this new work-related disc herniation.

In a September 23, 1997 medical report, Dr. Victor R. Frankel, a Board-certified orthopedic surgeon, stated that the March 3, 1997 report of Dr. Pashman, who initially cared for appellant, clearly stated that the prior history of disc herniation at L4-5 sustained in the military was different from and unrelated to appellant's symptomatic disc herniation at L5-S1, which required surgical intervention. Dr. Frankel stated that appellant's history defines a work incident of activities related to his duties of employment at the employing establishment that produced complaints of back and radicular pain that eventually prompted his herniated disc at L5-S1 and subsequent surgical treatment.

In a November 26, 1997 medical report, Dr. Frankel opined that it is his belief that the historical information offered by appellant related to the types of activities that were described in "information provided by [appellant], regarding claims for benefits, file #A3-224958," were consistent with the formation of a herniated disc. Objective studies further revealed a herniated disc that required surgical treatment. He opined that appellant's work-related duties, as described, were consistent with a mechanism of action and injury related to the formation of a lumbar herniated disc.

By decision dated February 17, 1998, the Office hearing representative found that appellant failed to supply sufficient medical evidence to support the development of the left herniated disc at L5-S1 in a way causally related to factors of his federal employment with sufficient medical rationale to support the opinion rendered. The hearing representative noted

that appellant's physicians failed to discuss the fact that the lumbar spine MRI scan of October 28, 1991 was interpreted as showing a probable left herniated disc at L5-S1.

By letter dated April 13, 1998, appellant's union representative requested reconsideration. Appellant submitted copies of the union representative's letter referencing the occupational health hazards experienced by mail processors; a National Institute for Occupational Safety and Health Hazard Evaluation Report dated July 1993, which evaluated potential for ergonomic hazards associated with three types of automated mail processing machines; and copies of union correspondence to the Postal Safety and Health Specialist outlining the union's equipment safety concerns.

In a February 18, 1998 medical report, Dr. Frankel stated that appellant had been under his care for displacement of intervertebral disc since January 23, 1997. He opined that, from January 23, 1997 to the present, appellant was not able to work at his occupation or any other occupation.

In a decision dated August 4, 1998, the Office denied reconsideration of appellant's claim on the grounds that the evidence submitted was immaterial or irrelevant and thus insufficient to warrant review of the prior decision.

The Board finds that this case is not in posture for decision and will be remanded for further evidentiary development.

An employee seeking benefits under the Federal Employees' Compensation Act¹ has the burden of establishing the essential elements of his or her claim, including the fact that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed is causally related to the employment injury.² As part of this burden, the claimant must present rationalized medical evidence, based on a complete and accurate medical background, showing causal relationship.³

In the present case, appellant has submitted evidence which suggests that the claimed back condition and subsequent disability from December 23, 1996 onwards, was aggravated by or causally related to his automation clerk position. Specifically, appellant submitted several reports by his treating physicians, Drs. Frankel and Pashman, both stated that appellant's herniated disc at L5-S1 and subsequent surgical intervention is causally related to appellant's work duties. In his September 23 and November 26, 1997 reports, Dr. Frankel diagnosed a symptomatic disc herniation at L5-S1 based on objective studies. He stated that appellant's work-related duties were consistent with a mechanism of action and injury related to the formation of a lumbar herniated disc. Dr. Frankel noted that the work activities produced complaints of back and radicular pain, which eventually prompted his herniated disc at L5-S1 and subsequent surgical intervention. He further related that appellant's prior history of disc

¹ 5 U.S.C. §§ 8101-8193.

² *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

³ *Joseph T. Gulla*, 36 ECAB 516 (1985).

herniation at L4-5 sustained in the military was different from and unrelated to appellant's symptomatic disc herniation at L5-S1. In his March 3 and May 15, 1997 reports, Dr. Pashman noted appellant's former disc herniation at the L4-5 level while in the military and opined that the current disc herniation was new at the L5-S1 level. He reasoned that the L5-S1 herniation was new as appellant was asymptomatic from the time he had the disc problem in the military and his work from 1993 until the new work-related episode in December 1996.

While the reports by Drs. Frankel and Pashman are not sufficient to carry appellant's burden of proof to establish that appellant's back condition at L5-S1 is causally related to his employment duties as an automation clerk, as neither physician appeared to be aware of the October 28, 1991 lumbar CAT scan, which showed a probable left herniated nucleus pulposus at L5-S1, the Board finds that this medical evidence raises an inference of causal relationship between appellant's December 1996 disability and his employment duties at the time and is sufficient to require further development of the case record by the Office.⁴ Drs. Frankel and Pashman were clearly aware of appellant's employment duties in 1996 and their opinions that appellant's current back condition is causally related to those employment duties and not to any intervening causes is unequivocal and uncontroverted.

On remand, the Office should further develop the medical evidence by referring appellant and a complete statement of accepted facts, to include appellant's prior history of disc herniation at L4-5 sustained in the military and the October 28, 1991 lumbar CAT scan showing a probable left herniated nucleus pulposus at L5-S1, to an appropriate Board-certified specialist for a rationalized medical opinion on the issue of whether appellant's current back condition at L5-S1 was aggravated by or causally related to his work duties as an automation clerk. After such development of the case record as the Office deems necessary, the Office should issue an appropriate decision.

⁴ *Reba L. Cantrell*, 44 ECAB 660 (1993); *John J. Carlone*, 41 ECAB 354 (1989).

The decisions of the Office of Workers' Compensation Programs dated August 4, 1998 and February 17, 1998 are set aside and the case is remanded for further proceedings consistent with this decision.

Dated, Washington, DC
April 27, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member