

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BARRY R. KECKLER and U.S. POSTAL SERVICE,
POST OFFICE, Harrisburg, PA

*Docket No. 99-1800; Submitted on the Record;
Issued February 1, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant met his burden of proof to establish that he sustained a recurrence of total disability on or after November 3, 1998 due to his July 20, 1991 employment injury; (2) whether appellant met his burden of proof to establish that he sustained a disabling lung condition due to his July 20, 1991 employment injury; and (3) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

The Board finds that appellant did not meet his burden of proof to establish that he sustained a recurrence of total disability on or after November 3, 1998 due to his July 20, 1991 employment injury.

On July 20, 1991 appellant, then a 49-year-old distribution clerk, sustained a cervical strain with radiculitis, a herniated nucleus pulposus (HNP) at C5-6 and right shoulder bursitis due to being struck by a mail cart at work.¹ He received compensation for various periods of work stoppage and returned to full-time limited duty for the employing establishment in mid 1997.² Appellant stopped work on November 3, 1998 and claimed that he sustained a recurrence of total disability due to his July 20, 1991 employment injury. He also claimed that his September 1992 neck surgery caused him to sustain paralysis of his right lung in March 1998. By decision dated March 11, 1999, the Office denied appellant's claims that he sustained an employment-related recurrence of disability on November 3, 1998 and that he sustained an

¹ In September 1992, appellant underwent a C5-6 discectomy and fusion procedure, which was authorized by the Office.

² The job did not require kneeling, bending, twisting or lifting more than 10 pounds. In November 1997, the Office determined that the position represented appellant's wage-earning capacity.

employment-related lung condition.³ By decision dated March 30, 1999, the Office denied appellant's request for merit review.

An individual 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 compensation is claimed is causally related to the accepted injury.⁴ 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 the employment injury and supports that conclusion with sound medical rationale.⁵ Where no such rationale is present, medical evidence is of diminished probative value.⁶

In support of his claim for recurrence of total disability, appellant submitted reports of Dr. Michael F. Lupinacci, an attending physician Board-certified in physical medicine and rehabilitation. In form reports dated December 21 and 22, 1998, Dr. Lupinacci diagnosed spondylosis at C6-7, checked a box indicating that the condition was due to the July 20, 1991 injury, and noted that appellant was totally disabled from November 3, 1998 to February 5, 1999. The Board has held, however, that when a physician's opinion on causal relationship consists only of checking "yes" to a form question, that opinion has little probative value and is insufficient to establish causal relationship.⁷ Appellant's burden includes the necessity of furnishing an affirmative opinion from a physician who supports his conclusion with sound medical reasoning. As Dr. Lupinacci did no more than check "yes" to a form question, his opinion on causal relationship is of little probative value and is insufficient to discharge appellant's burden of proof. Medical rationale is especially necessary in the present case in that it has not been accepted that appellant sustained a specific employment injury at C6-7.⁸ Dr. Lupinacci did not explain why appellant's condition at C6-7 was not solely due to his nonwork-related degenerative disc disease.⁹

Moreover, the record contains evidence, which indicates that appellant's problems on and after November 3, 1998 were not employment related. In a report dated February 19, 1999, an Office medical adviser indicated that the progression of appellant's neck condition, as evidenced by diagnostic testing, showed that his neck problems on and after November 3, 1998 were due to his nonwork-related degenerative disc disease.

³ The Office determined that appellant did not submit sufficient medical evidence in support of these claims.

⁴ *Charles H. Tomaszewski*, 39 ECAB 461, 467 (1988); *Dominic M. DeScala*, 37 ECAB 369, 372 (1986).

⁵ *Mary S. Brock*, 40 ECAB 461, 471-72 (1989); *Nicolea Brusco*, 33 ECAB 1138, 1140 (1982).

⁶ *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

⁷ *Lillian M. Jones*, 34 ECAB 379, 381 (1982).

⁸ Appellant sustained a cervical strain with radiculitis and a HNP at C5-6.

⁹ The record contains other reports of Dr. Lupinacci from this period and a February 25, 1999 report of Dr. Roger Ostdahl, an attending Board-certified neurosurgeon, but these reports do not contain an opinion on causal relationship.

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's claimed condition became apparent during a period of employment nor his belief that his condition was aggravated by his employment is sufficient to establish causal relationship.¹⁰ Appellant failed to submit rationalized medical evidence establishing that his claimed recurrence of disability is causally related to the accepted employment injury and, therefore, the Office properly denied his claim for compensation.

The Board further finds that appellant did not meet his burden of proof to establish that he sustained a disabling lung condition due to his July 20, 1991 employment injury.

An employee seeking benefits under the Federal Employees' Compensation Act¹¹ has the burden of establishing the essential elements of his or her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, 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 are causally related to the employment injury.¹² The medical evidence required to establish a causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence.¹³

Appellant did not submit sufficient medical evidence to show that his claimed lung condition was due to his July 20, 1991 employment injury. In a report dated August 18, 1998, Wilson S. Morris, an attending Board-certified internist, stated that appellant exhibited elevation and paralysis of his right hemidiaphragm in March 1998. Dr. Morris stated:

"I believe this was probably secondary to major neck surgery he had done anteriorly for a cervical disc back in 1992. The only way to prove that would be to get his x-rays prior to 1992 and see them subsequently to 1992 to see if that is what occurred. Otherwise he has no reason for diaphragmatic paralysis other than idiopathic."

Dr. Morris' report is of limited probative value regarding appellant's claim for an employment-related lung condition, because it contains an opinion on causal relationship, which is speculative and equivocal in nature.¹⁴ Medical rationale is particularly necessary in the present case in that appellant's accepted employment-related cervical condition relates to another part of the body and his lung condition did not manifest itself until almost six years after his 1992 neck surgery. Moreover, the record contains a February 19, 1999 report in which an Office medical adviser indicated that appellant's lung problems were not employment related. The

¹⁰ See *Walter D. Morehead*, 31 ECAB 188, 194-95 (1986).

¹¹ 5 U.S.C. §§ 8101-8193.

¹² *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

¹³ See *Donna Faye Cardwell*, 41 ECAB 730, 741-42 (1990).

¹⁴ See *Leonard J. O'Keefe*, 14 ECAB 42, 48 (1962); *James P. Reed*, 9 ECAB 193, 195 (1956) (finding that an opinion which is equivocal or speculative is of limited probative value regarding the issue of causal relationship).

Office medical adviser indicated that diagnostic testing did not show appellant had lung problems contemporaneous with his employment-related cervical condition and noted that his lung problems were more likely due to his smoking.

The Board further finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,¹⁵ the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.¹⁶ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.¹⁷ When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.¹⁸

Appellant requested reconsideration in a letter dated May 25, 1999. In support of his request, he submitted an April 19, 1999 report of Dr. Lupinacci. In this report, Dr. Lupinacci noted that an attending neurosurgeon had indicated in a November 1996 report that appellant's herniation at C6-7 "probably has been aggravated" by the fusion at C5-6. Dr. Lupinacci stated, "The records clearly demonstrate that there is a direct causal relationship between his injury of October of 1991 and his present symptoms related to the C6-7 cervical disc problem."¹⁹ The Board finds that this report constitutes relevant and pertinent new evidence not previously considered by the Office, which requires that the case be remanded to the Office for the performance of a merit review.

¹⁵ Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

¹⁶ 20 C.F.R. §§ 10.606(b)(2).

¹⁷ 20 C.F.R. § 10.607(a).

¹⁸ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

¹⁹ Dr. Lupinacci inadvertently indicated that appellant's employment injury occurred in October 1991 rather than July 1991.

The decision of the Office of Workers' Compensation Programs dated March 11, 1999 is affirmed. The decision of the Office dated June 30, 1999 is reversed and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Dated, Washington, DC
February 1, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member