

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MILBURN D. SHEPHERD and DEPARTMENT OF LABOR,
MINE SAFETY & HEALTH ADMINISTRATION, Harlan, KY

*Docket No. 00-1288; Submitted on the Record;
Issued May 17, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether appellant has met his burden of proof to establish that he sustained any disability as a result of his June 8, 1999 employment-related aggravation of cervical spondylitis.

The Board has duly reviewed the case record in this appeal and finds that this case is not in posture for decision.

On June 13, 1999 appellant, then a 54-year-old coal mine inspector, filed a traumatic injury claim (Form CA-1) alleging that on June 8, 1999 while wearing a hard hat, he struck his head on an overhead projection, pushing his head down and back and resulting in pain in his neck and shoulders. His claim was accompanied by factual and medical evidence.

By letter dated August 30, 1999, the Office of Workers' Compensation Programs requested that appellant's treating physician submit a detailed rationalized medical report containing appellant's current diagnosis and setting forth the extent to which these conditions are disabling, if at all.

On October 8, 1999 the Office accepted appellant's claim for temporary aggravation of cervical spondylitis. By decision dated October 22, 1999, however, the Office found the evidence of record insufficient to establish that appellant sustained any disability causally related to the accepted condition. Accordingly, the Office denied appellant's claim for continuation of pay and wage-loss compensation benefits.

An employee seeking benefits under the Federal Employees' Compensation Act¹ has the burden of establishing the essential elements of 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 limitations period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability or specific condition, for which

¹ 5 U.S.C. §§ 8101-8193.

compensation is claimed is causally related to the employment injury.² These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.³

In order to determine whether an employee actually sustained an injury in the performance of duty, the Office begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components, which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident, which is alleged to have occurred.⁴ In the present case, the Office accepted that appellant actually experienced the incident as alleged. The Board finds that the evidence of record supports this incident.

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence. To establish a causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence based on a complete factual and medical background, supporting such a causal relationship.⁵ In the instant case, the medical evidence of record was insufficiently developed to establish the second component of fact of injury that appellant sustained any disability causally related to his June 8, 1999 employment-related temporary aggravation of cervical spondylitis.

In support of his claim, appellant submitted treatment notes from Dr. Fazal H. Ahmad, a Board-certified general surgeon. In his initial report dated June 14, 1999, Dr. Ahmad noted that appellant had spasm of the neck muscles, with pain and additional spasm on flexion, extension, lateral flexion and rotational movements. He noted that x-rays of the cervical spine revealed degenerative joint disease, but were otherwise unremarkable and added that he would see appellant in one week. In a follow-up note dated June 29, 1999, he diagnosed questionable radiculopathy and scheduled appellant for magnetic resonance imaging (MRI) scan. On a July 1, 1999 attending physician's report, Form CA-16, Dr. Ahmad diagnosed degenerative disc disease and indicated by checkmarks that this condition was not causally related to the employment injury and that appellant could return to work.⁶ In a report dated July 13, 1999, Dr. Ahmad simply reiterated that appellant continued to have neck pain and was scheduled for an MRI scan. In a report dated July 20, 1999, he noted that the MRI scan revealed multilevel spinal stenosis at C5-6 and C7, and stated that it could be an old injury which may have been aggravated with the trauma. Dr. Ahmad concluded that he was going to get a consultation from a neurosurgeon and indicated on an accompanying form that appellant was excused from work from July 20 until August 5, 1999, the date of his scheduled consult.

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

³ *Daniel J. Overfield*, 42 ECAB 718 (1991).

⁴ *Elaine Pendleton*, *supra* note 2.

⁵ 20 C.F.R. §§ 10.115(f), 10.501(a); *see John M. Tornello*, 35 ECAB 234 (1983).

⁶ The Board notes that the accuracy of this report is questionable, as it also indicates that appellant had been discharged from treatment June 14, 1999, when he was clearly continuing to see Dr. Ahmad on an almost weekly basis.

Appellant also submitted an August 5, 1999 report from Dr. Russell L. Travis, a Board-certified neurosurgeon to whom he was referred by Dr. Ahmad. Dr. Travis noted that appellant had been off work for three weeks, and did not feel he was capable of returning to any normal work activity. He performed a complete examination and reviewed the recent test results, noting that the MRI scan revealed moderately severe degenerative spondylitic changes with multilevel changes particularly at C5-6 and C7-T1, with considerable decreased signal of C5 on the T2 sequence and marked osteophyte changes at C5-6. Dr. Travis gave his impression as cervical spondylosis with superimposed injury and with no evidence of a fracture at C5 and no subluxation, prolapse or other problem associated to suggest a fracture. He concluded that he would keep appellant off work for three more weeks and schedule physical therapy, a bone scan and additional x-rays.⁷ On August 26, 1999 Dr. Travis released appellant for surface or office work, but not for underground work.

By letter dated August 30, 1999, the Office asked Dr. Travis to submit a complete rationalized report discussing, among other things, appellant's current diagnosis relative to his cervical condition and his level of disability, if any.

In a response dated September 29, 1999, Dr. Travis stated that the bone scan revealed severe degenerative changes through the cervical spine and gave his current diagnosis as severe cervical spondylitis. He stated that he was sure appellant's spondylitis predated the June 8, 1999 employment injury, but that the injury had severely aggravated the condition. Dr. Travis further stated that he did not feel that appellant would ever be able to return to any underground or labor activity, as his severe cervical spondylitis would prevent him from any significant bending, stooping or flexion of the cervical spine in that capacity.

The Board finds that the medical evidence of record fails to provide sufficient medical rationale explaining whether appellant sustained any disability causally related to his June 8, 1999 employment-related neck condition. While appellant was off work for a period of time, and for part of that time was under work release orders from his physicians, the medical evidence of record is insufficiently rationalized to discharge appellant's burden of proving by the weight of the reliable, substantial and probative evidence that he was actually totally disabled during these periods, and that his total disability was causally related to his June 8, 1999 employment-related temporary aggravation of cervical spondylitis. The medical evidence does raise, however, an uncontroverted inference that appellant was either partially or totally disabled due to his employment-related injury and, therefore, requires further development of the case record by the Office.⁸

On remand, the Office should prepare a new statement of accepted facts and refer appellant, together with the statement of accepted facts, the complete case record and questions, to a Board-certified specialist for a rationalized medical opinion on whether appellant sustained any disability causally related to his June 8, 1999 employment-related temporary aggravation of cervical spondylitis and if so, identify the periods of partial or total disability. After such further

⁷ On an accompanying prescription slip dated August 5, 1999, Dr. Travis actually released appellant from work for four additional weeks.

⁸ See *Gary L. Fowler*, 45 ECAB 365 (1994); *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 821 (1978).

development of the case record as the Office deems necessary, a *de novo* decision shall be issued.⁹

The October 22, 1999 decision of the Office of Workers' Compensation Programs is hereby set aside and the case is remanded for further development in accordance with this decision.¹⁰

Dated, Washington, DC
May 17, 2001

Michael J. Walsh
Chairman

Bradley T. Knott
Alternate Member

Willie T.C. Thomas, Member, dissenting:

The appellant herein, an underground coal mine inspector, filed this appeal with the Board contending that, due to his work-related injury sustained on June 8, 1999 while working, he sustained temporary aggravation of cervical spondylitis. He further stated that his treating physician reported his condition to be permanent and totally disabling in terms of returning to any coal-mining activity or significant labor activity; that the Office initially accepted his claim and later rejected his claim. Finally, appellant asked the Board to reinstate his sick leave used due to the employment injury.

The record reveals that on October 8, 1999 the Office of Workers' Compensation Programs accepted the claim for temporary aggravation of cervical spondylitis. Appellant was informed that bills for medical expenses related to the accepted condition would be paid including medication prescribed for the condition. He was further informed that physical therapy

⁹ The dissent in this case assumes the Office rescinded its acceptance of injury (temporary aggravation of cervical spondylitis). The majority finds that the record does not support this assumption. While the Office has accepted injury it has declined to award wage-loss (disability). The burden of proving injury and wage-loss disability lies with the appellant. *Paul Fiedor*, 32 ECAB 1364 (1981). In this case, the majority has remanded on the basis the evidence is sufficient to warrant further development on the issue of disability. This does not disturb the Office's acceptance of injury and in no way effects existing law as to rescission.

¹⁰ Subsequent to the Office's October 22, 1999 decision, appellant submitted new medical reports from Drs. Ahmad and Travis. The Board cannot consider this evidence; however, as it was not before the Office at the time of the final decision; see *Dennis E. Maddy*, 47 ECAB 259 (1995); 20 C.F.R. § 501.2(c).

may be authorized if prescribed by his physician and noted in the medical report submitted to the Office.

On August 5, 1999 appellant's treating physician, Dr. Russell L. Travis, a Board-certified neurologist, reported the following:

"I reviewed a cervical MRI [magnetic resonance imaging] scan. He has moderately, severe degenerative spondylotic changes with multilevel changes particularly at C5-6 and C7-T1. He has considerable decreased signal of C5 on the T2 sequences and marked osteophyte changes at C5-6.

"**IMPRESSION:** Cervical spondylosis with superimposed injury. I do not think this represents a fracture at C-5, although I am going to schedule a bone scan. There is no subluxation, prolapse or other problem associated to suggest a fracture. I think this part of his significant spondylotic changes.

"**Recommendation:** I am going to try him on physical therapy. He will be off work for three more weeks. We will schedule a bone scan and flexion extension cervical spine x-rays and then see him back in follow-up."

On September 29, 1999 Dr. Travis submitted a follow-up report wherein he stated the following:

"[Appellant's] bone scan showed severe degenerative changes through the cervical spine. His current diagnosis is severe cervical spondylitis. I am sure his spondylitis predated the injury of June 8, 1999, but with (sic) was severely aggravated.

"I do not feel [appellant] will be able to go back to any underground or labor activity. He has severe cervical spondylitis that is not amenable to surgical treatment at this point. I think it will prevent him from any significant bending, stooping or flexion extension of the cervical spine in that capacity."

After the Office accepted the above claim on October 8, 1999 and authorized payment of medical expenses, authorized physical therapy and prescriptions prescribed by appellant's physician, the Office issued a decision dated October 22, 1999 denying continuation of pay and any time loss compensation and directed the employing establishment to charge the previously paid continuation of pay to sick or annual leave, or declare the amount received an overpayment if appellant had used all his leave.

The Office noted the following:

"**BASIS FOR DECISION:** Dr. Travis replied to our request on September 29, 1999, stating that your general condition predated the incident of June 8, 1999, but that the incident did aggravate the condition. He further stated that you will not be able to continue underground activity; however, at no time did Dr. Travis provide objective rationale you are or have been totally disabled and unable to resume work with restrictions. Further, he does not opine that the fact you are unable to work underground is due to the incident of June 8, 1999, but that your

condition, which was preexisting, was the cause of your inability to work underground.”

It is axiomatic under Board precedent that, once the Office accepts a claim, the Office has the burden of establishing that disability has ceased or lessened before it may terminate benefits. The Office in the instant claim did not attempt to meet its burden of proof. Instead, the Office simply ignored its October 8, 1999 acceptance of this claim and issued an October 22, 1999 letter decision disallowing the same claim without any consideration of lost time from work due to medical appointments, x-ray examinations and MRI scans, weeks of physical therapy authorized by appellant’s treating physician and the fact that appellant was permanently precluded from returning to his underground coal mine inspector’s job.

The majority in the instant claim, as did the Office, chose to ignore the Office’s acceptance of this claim and the shifting of the burden of proof back to the claimant by stating:

“In the instant case, the medical evidence of record was insufficiently developed to establish the second component of fact of injury that appellant sustained any disability causally related to his June 8, 1999 employment-related temporary aggravation of cervical spondylitis”

The majority further ignored the Office shifting of the burden of proof back to appellant after accepting the claim on October 8, 1999, using the following reasoning:

“The medical evidence does raise, however, an uncontroverted inference that appellant was either partially or totally disabled due to his employment-related injury and, therefore, requires further development of the case record by the Office.”

The instant claim changes existing case law. The Office no longer must rescind its prior acceptance of a claim through new and different evidence or legal argument. It simply has to issue a later decision disallowing the claim and ignore the earlier acceptance of the claim and authorization of medical treatments, specialized MRI or x-ray examinations, medical bills and prescription incurred by the appellant as well as leave used for medical treatment, physical therapy or medical appointments.

Because I believe the majority’s decision is contrary to Board precedent and fail even to address the acceptance of this claim by the Office of Workers’ Compensation Programs, I feel compelled to record this dissent.

Willie T.C. Thomas
Member