

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CARLOS VAUGHN and DEPARTMENT OF THE NAVY,
U.S. NAVAL ACADEMY, Annapolis, MD

*Docket No. 00-2106; Submitted on the Record;
Issued May 18, 2001*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether appellant has met his burden of proof in establishing that he had a recurrence of disability beginning November 17, 1997 that was causally related to his September 14, 1994 employment injury.

On September 14, 1994 appellant, then a 51-year-old plasterer, developed acute low back pain after pouring concrete, screeding and troweling. He stopped working on September 29, 1994. An Office of Workers' Compensation Programs' claims examiner noted that appellant had undergone a lumbar fusion in 1976.

In an October 4, 1994 report, Dr. Vernon R. Croft, a Board-certified orthopedic surgeon, stated that a computerized tomography scan showed a small laminectomy site on the left at L4-5 with a fusion that extended from L4 to S1. He indicated that postoperative changes at the L4-5 level probably represented scarring on the left side. Dr. Croft found a mild degree of spinal stenosis related to moderate annular bulging and hypertrophic posterior element ligamentous hypertrophy.

In an October 25, 1994 report, Dr. Paula Decandido, a radiologist, reported that a magnetic resonance imaging scan showed a postoperative fusion from L4 through S1. She noted associated hypertrophy and fibrous scarring around the posterior elements of the region. The scan showed disc desiccation with loss of disc signal at L4-5 and, to a lesser extent, at L5-S1. Dr. Decandido stated that there was no evidence of a herniated nucleus pulposus. She indicated that there was a slight posterior clumping of nerve roots at L3-4. Dr. Decandido commented that there was evidence of epidural scarring surrounding the L5 nerve root. She reported a lateral disc bulge on the left at L4-5 and a diffuse disc bulge at L3-4 without focal herniated nucleus pulposus.

The Office accepted appellant's claim for lumbar strain. Appellant received continuation of pay for the period September 29 through November 12, 1994. The Office began payment of temporary total disability compensation effective November 13, 1994.

Appellant returned to light-duty work on February 15, 1995 as an information receptionist. In an October 19, 1995 decision, the Office determined that the job fairly and reasonably represented his wage-earning capacity and concluded that he did not have a loss of wage-earning capacity.

A rehabilitation nurse employed by the Office referred appellant to Dr. Charles M. Narrow, a Board-certified physiatrist, for an examination and second opinion. In a May 15, 1995 report, Dr. Narrow diagnosed lumbar facet-driven pain syndrome, status postlumbar fusion in 1976 and low back strain secondary to work-related duties on September 14, 1994. He stated that appellant was not disabled from his position as a supervisor for the masonry department at the employing establishment. Dr. Narrow indicated that appellant's current pain complaints from the employment injury did not correlate to a lumbar strain while doing one episode of laying concrete. He commented that appellant did have a significant amount of facet-driven pain and recommended a course of treatment for the back pain. Dr. Narrow concluded that appellant's pain complaints were not related to the lumbar strain sustained on September 14, 1994.

On April 2, 1996 appellant filed a claim for a recurrence of disability beginning March 29, 1996. He claimed that he had continuing pain since the employment injury. He returned to work on April 29, 1996.

In an April 30, 1996 report, Dr. Robert S. Ellis, a Board-certified orthopedic surgeon, stated that appellant reinjured his back pouring concrete at work on September 14, 1994. He indicated that appellant had been under constant care since that time due to back pain and discomfort. Dr. Ellis noted his recommendation in March 1995 for a permanent light-duty restriction. He concluded that all of appellant's treatment since September 14, 1994 was causally related to "the reinjury."

In a May 28, 1996 decision, the Office rejected appellant's claim on the grounds that the evidence of record failed to demonstrate a causal relationship between the injury and the claimed condition or disability.

Appellant requested a hearing before an Office hearing representative. In an October 21, 1996 decision, issued without a hearing, an Office hearing representative found that appellant had not met his burden of establishing that he had a recurrence of total disability effective March 29, 1996. She noted, however, that the Office had terminated appellant's medical benefits. She found that there existed a conflict in the medical evidence between Drs. Narrow and Ellis on whether appellant continued to have residuals related to the September 14, 1994 employment injury. She, therefore, remanded the case for referral of appellant to an appropriate impartial medical specialist.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. D. Burke Haskins, a Board-certified orthopedic surgeon. In a March 14, 1997 report, Dr. Haskins stated that straight leg raising was negative bilaterally. He reported that sensation and strength appeared to be normal in the legs. X-rays were consistent with lumbar spondylosis at L3-4 and to a lesser degree at L4-5 and showed an attempted fusion of the transverse process from L4 to S1 which appeared to be incomplete on the left side. Dr. Haskins

diagnosed recurrent low back syndrome, status post-lumbar disc surgery and status post attempted lumbar fusion. He stated that, based on the objective findings, appellant had continued residuals of the employment injury as well as the lumbar fusion. Dr. Haskins indicated that appellant was capable of performing the job of an information receptionist. He commented that appellant's lumbar complaints, as well as loss of mobility, strength and endurance, would require modification of his position as a plasterer. Dr. Haskins restricted appellant to no lifting over 20 pounds and no twisting or bending over 2 hours a day.

In an August 12, 1997 report, Dr. Ellis reviewed appellant's medical history, noting the September 14, 1994 employment injury, the prior surgery for spinal fusion and appellant's return to light-duty work in February 1995. He stated that, after appellant's return to work, his symptoms deteriorated on a weekly and monthly basis. Dr. Ellis reported that, by March 1996, appellant was only able to work six hours a day. He noted that appellant sustained numerous episodes of exacerbation and reinjury. Appellant lost time from work weekly due to pain and discomfort and required pain medication on a regular basis. Dr. Ellis indicated that appellant, therefore, opted for disability retirement. He stated that, based on appellant's previous history of back disorder and spine fusion, lack of response to prolonged conservative treatment and his worsening condition despite treatment, he recommended and concurred in the decision to seek disability retirement.

On November 31, 1997 appellant filed a claim for compensation beginning November 20, 1997, the date of his retirement. The Office requested medical evidence in support of appellant's claim. In response, appellant submitted reports from Dr. Charles M. Ruland, an orthopedic surgeon. In an October 24, 1997 report, Dr. Ruland noted appellant's medical history. He related that appellant was losing time from work and had failed to respond to treatment. Dr. Ruland diagnosed lumbar disc syndrome. He noted that appellant's restrictions at work were for a strictly administrative position.

In a January 19, 1998 report, Dr. Ruland diagnosed lumbar disc syndrome and lumbosacral strain with a possible lumbar muscle strain. He explained he had been seeing appellant since Dr. Ellis' retirement. Dr. Ellis stated that appellant had persistent low back pain since the September 14, 1994 employment injury. He concluded that appellant's condition was a continuation of his chronic low back pain or possibly exacerbations of the chronic condition.

In a June 21, 1999 decision, the Office rejected appellant's claim for compensation after November 20, 1997 on the grounds that the medical evidence failed to support that appellant's lost time from work after that date was causally related to the September 14, 1994 employment injury.

Appellant requested a hearing before an Office hearing representative, which was conducted on November 23, 1999. In a February 11, 2000 decision, the Office found that the Office had paid appropriate compensation benefits through June 27, 1999. He concluded that the Office had properly terminated appellant's entitlement to compensation after that time. He, therefore, affirmed the Office's June 21, 1999 decision.

The Board finds that appellant has not met his burden of proof in establishing that he had a recurrence of disability after November 20, 1997 causally related to his September 14, 1994 employment injury.

When an employee, disabled from the job he held when injured due to employment-related residuals, returns to a light-duty position, or the medical evidence of record establishes that he can perform the light-duty position, he has the burden to establish that he has a recurrence of total disability and, therefore, 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.¹

In resolving a prior conflict in the medical evidence, Dr. Haskins, acting as an impartial specialist, concluded that appellant could perform the duties of an information receptionist, the light-duty position he assumed after he returned to work from the employment injury. Dr. Ellis, in his August 12, 1997 report, stated that appellant's condition was deteriorating and was not responding to treatment. He indicated that appellant was unable to work eight hours a day and had reduced his hours to six hours a day. Dr. Ellis supported appellant's claim for disability retirement. He, however, did not explain how the September 14, 1994 employment injury caused the deterioration of appellant's condition to the point where he was unable to work. Dr. Ellis' report, therefore, did not address the central point of appellant's claim, that his recurrence of disability, effective the date of his retirement, was causally related to the employment injury. Dr. Ruland also noted the deterioration of appellant's condition. He stated that appellant's condition appeared to be a continuation of his chronic low back problem or possibly an exacerbation of it. Dr. Ruland, however, also failed to discuss how appellant's disability retirement was caused by the effects of the September 14, 1994 employment injury. The reports of Drs. Ellis and Ruland have limited probative value and are insufficient to show that appellant's condition, due to the employment injury, had changed to the point that he was no longer able to perform the light-duty position he had held after the employment injury. Appellant, therefore, has not met his burden of proof.

¹ *George DePasquale*, 39 ECAB 295 (1987); *Terry R. Hedman*, 38 ECAB 222 (1986).

The decisions of the Office of Workers' Compensation Programs, dated February 11, 2000 and June 21, 1999, are hereby affirmed.

Dated, Washington, DC
May 18, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member