

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAUL D. SUDDUTH and U.S. POSTAL SERVICE,
POST OFFICE, Tampa, FL

*Docket No. 01-9; Submitted on the Record;
Issued November 2, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether appellant established that he sustained a recurrence of disability on December 12, 1997 causally related to the December 26, 1995 employment injury; and (2) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation effective July 20, 1999.

The Office accepted appellant's claim for a cervical strain, lumbar strain and contusion to the head. Appellant eventually returned to work full duty on August 5, 1997.

On January 15, 1998 appellant filed a claim for a recurrence of disability commencing December 26, 1997 causally related to the December 26, 1995 employment injury. Appellant stated that he had more pain and difficulty when he returned to full-duty work, then he improved and then regressed to a point where he was in too much pain to work. Appellant has not worked since December 26, 1997.

On January 26, 1998 appellant squatted to pick up a dog dish on the ground at home when he felt three pops in his lumbar area, experienced such extreme pain that he fell to the ground and his wife took him to the emergency room.

In a report dated March 13, 1998, appellant's treating physician, Dr. Robert H. Hall, a Board-certified family practitioner, submitted a series of progress notes dated from January 8, 1996 through January 30, 1998, in which Dr. Hall briefly identified appellant's complaint, diagnosis and treatment. On the notes through January 16, 1998 he identified cervical and lumbosacral strains. On January 30, 1998 Dr. Hall considered that appellant had a "reinjury" at home on January 26, 1998 when he squatted over to pick up a dish on the ground and that he felt three pops in the lumbar area with marked pain, fell to the ground and was taken to the emergency room. He stated that the magnetic resonance imaging (MRI) scan of the cervical spine showed moderate canal stenosis at the C6-7 level and the MRI scan of the lumbar spine showed herniated posterior to the left at the L3-3 level with significant neural canal of neural foraminal stenosis. Dr. Hall opined that appellant could not work.

By decision dated June 11, 1998, the Office denied appellant's claim for a recurrence of disability, stating that the medical evidence of record was not sufficient to establish that the claimed recurrence of disability dated December 26, 1997 was causally related to the December 26, 1995 employment injury.

By letter dated September 24, 1998, appellant requested an oral hearing before an Office hearing representative and submitted additional evidence. In a report dated July 29, 1998, Dr. Hall stated that appellant had recurring cervical and lumbar pain since the December 26, 1995 employment injury and his current symptoms were related to that injury. He stated that appellant's problem had been continuous and his symptoms were aggravated by the incident of bending forward to pick up the dog dish and that it was most unlikely that the event described caused the objective spinal problems. Dr. Hall stated that it was "more likely" that appellant's spinal problems occurred with the motor vehicle accident on December 26, 1995 which increased his problems. He reiterated that all appellant's subjective and objective findings were related to the original injury.

By decision dated December 4, 1998, the Office hearing representative opined that the case was not in posture for a hearing and required further development of the medical evidence. Specifically, the Office hearing representative stated that the Office should add the condition of lumbar strain to the list of accepted injury-related conditions. Further, the Office hearing representative determined that the case should be remanded for the Office to refer appellant to a second opinion physician to determine whether appellant's herniated disc was work related, whether appellant continued to have residuals from the December 26, 1995 employment injury and whether appellant sustained a recurrence of disability on December 26, 1997 due to the December 26, 1995 employment injury. The Office hearing representative instructed the Office to issue a *de novo* decision after further development of the record as it deemed necessary.

In a report dated February 22, 1999, a second opinion physician, Dr. Donald E. Pearson, a Board-certified orthopedic surgeon, considered appellant's history of injury, performed a physical examination and considered the results of two magnetic MRI scans of appellant's cervical spine and lumbar spine, x-rays dated January 27, 1998 and reviewed an electromyogram (EMG) and nerve conduction study. He diagnosed a cervical sprain and strain and lumbosacral sprain and strain, resolved chronic pain syndrome and depression. Based on a February 3, 1998 MRI scan, Dr. Pearson also diagnosed a herniated nucleus pulposus, posterior and to the left at L2-3 and moderate canal stenosis at C6-7.

Dr. Pearson noted that on July 9, 1997 Dr. William R. Greenberg, a Board-certified psychiatrist and neurologist, stated that there was no evidence of nerve damage or irritation and diagnosed that appellant had a soft tissue injury and, therefore, it was "hard for [him]" to determine at that point whether or not the MRI scan showing the lumbar herniated disc preexisted the injury or was caused at a later point. He stated that there may have been underlying degenerative changes that might have gradually caused him to have a herniated disc. Dr. Pearson stated that appellant was not having any significant radicular complaints at that time that one would consider doing an MRI scan to rule out any type of disc herniation.

He stated:

“As far as his new injury at home on January 26, 1998 he was squatting over to pick up a dish on the ground when he felt [three] pops in the lumbar area and he had experienced marked pain and fell to the ground and was taken to the emergency room by his wife, the patient himself states that he was continuing to have back pain all the way until that time and when he was evaluated on that date that was just some increase of his overall symptoms. This could be some source of the problems with his back that he experienced later and could be the cause of the herniated disc at the L2-3 level.”

Dr. Pearson stated that he was unable to explain appellant’s continued residuals that he experienced since the December 26, 1995 employment injury. He stated that he did not understand appellant’s disability since December 26, 1995 due to these residuals. Dr. Pearson stated he would place restrictions on appellant consisting of no lifting more than 20 to 25 pounds, no repetitive pushing or bending and no pushing or pulling more than 25 pounds.

In an addendum dated May 2, 1999, Dr. Pearson stated that it was “hard to determine” which injury, *i.e.*, the one occurring on December 26, 1995 or January 26, 1998, might have caused his lumbar herniated disc or if it even preexisted the accidents. He stated that he “would lean toward the injury at home of January 26, 1998 from an orthopedic standpoint, since appellant had the MRI scan shortly after because of pain.” Dr. Pearson stated that the herniated disc did not require surgical intervention because appellant had no radicular complaints and only some occasional numbness in the feet. He stated that the soft tissue injuries appellant sustained on December 26, 1995 had resolved by December 26, 1997 and appellant could have continued to work. Dr. Pearson stated that appellant was capable of working. He found no explanation of appellant’s symptoms being worse on December 26, 1997.

In a notice of proposed termination of compensation for wage loss and medical benefits dated June 1, 1999, the Office stated that, relying on Dr. Pearson’s February 22 and May 2, 1999 medical reports, appellant’s cervical strain, lumbar strain and head contusion had resolved without residual.

By decision dated July 20, 1999, the Office terminated appellant’s compensation benefits, denied his claim for a recurrence of disability and rejected his claim for a herniated disc.

By letter dated September 30, 1999, appellant requested an oral hearing before an Office hearing representative, which was held on February 29, 2000. At the hearing, appellant described the circumstances of the December 26, 1995 employment injury, the history of his employment since the injury and the history of his medical treatment. Appellant stated that it was extremely difficult when he first returned to full-time work, that he improved somewhat and then began to regress until he stopped working due to neck and back pain on December 24, 1997. Regarding the dog dish incident, appellant stated that the dish may have weighed less than a pound and he stooped to pick it up without bending his back but when he stood up his back “went all the way out on” him and he fell to the ground.

Appellant submitted additional evidence. In a report dated July 28, 1999, Dr. Howard W. Sharf, appellant’s treating physician and a Board-certified orthopedic surgeon,

considered appellant's history of injury, performed a physical examination and reviewed x-rays. He also considered the results of two cervical MRI scans, one in 1997 and one in 1998, which showed a cervical herniated disc at C6-7 and the results of a lumbar MRI scan, which showed a herniated disc at L3-4. Dr. Sharf stated that the C6-7 herniated disc appeared to impinge on the left neuroforamen and put pressure on both the thecal sac as well as the nerve root. He stated that the L3-4 herniated disc did not "appear to impinge too significantly" on the neuroforamen, although Dr. Sharf stated that the quality of the film precluded him from having a complete opinion. Dr. Sharf diagnosed a cervical herniated nucleus pulposus with left-sided radiculitis and lumbar mechanical pain with herniated nucleus pulposus. He stated that appellant's neck injury "[was] certainly an on the job injury." Dr. Sharf stated that appellant's lumbar disc was "a red herring," because appellant was having "predominantly low back pain rather than leg pain."

In a report dated February 28, 2000, Dr. Sharf summarized appellant's medical history and treatment and opined that appellant's neck injury was causally related to the December 26, 1995 employment injury. He stated that the December 1995 employment injury caused a herniation of the C5-6 disc and to classify appellant's condition at the time as "merely a cervical strain [was] a misnomer at best."

Addressing appellant's lumbar herniated disc, Dr. Sharf stated:

"[In] the few months leading up to the episode of exacerbation at home, when [appellant] lifted the dog dish, it is noted throughout the medical records that his back pain had been increasing, the number of his emergency room visits had been becoming more frequent and that bending over [to] pick up the dog dish was most likely the last straw in the degeneration of an abnormal disc. It would be impossible for any physician to be able to state, with 100 [percent] certainty, whether or not bending over to pick up the dish was the primary only or partial cause of his herniated disc. With no prior MRI scan the condition of his disc since the time of his injury is, in fact, unknown."

Dr. Sharf further stated that, with appellant's medical history of persistent and increasing back pain despite all reasonable treatments, the disc "was likely injured at the time of [appellant's] injury and that the treatments afforded to him did not improve this injury." He stated:

"[Appellant's] ongoing and current symptoms are typical of a patient with a painful disc, not necessarily a herniated disc, although a painful disc can be herniated. This painful disc, in all medical probability, was the result of his motor vehicle accident in December, 1995 and worsened over time and ultimately herniated due to an incidental activity at home."

Dr. Sharf recommended that appellant undergo cervical epidural steroid injections and if those failed, an anterior cervical discectomy and fusion. For his back, he recommended appellant undergo epidural steroid injections and if those failed, a discogram.

By decision dated June 14, 2000, the Office hearing representative affirmed the Office's July 20, 1999 decision.

The Board finds that the Office improperly terminated appellant's wage loss and medical benefits effective July 20, 1999. The Board further finds that the case is not in posture for decision regarding whether appellant sustained herniated cervical and lumbar discs and a recurrence of disability commencing December 26, 1997.

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits. After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.¹ The Office's burden of proof includes the necessity of furnishing rationalized medical evidence based on a proper factual and medical background.²

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.³ 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 reasoning.⁴ An award of compensation may not be made on the basis of surmise, conjecture, or speculation or an appellant's unsupported belief of causal relation.⁵

In this case, the Office relied on Dr. Pearson's February 22 and May 2, 1999 opinions that appellant's cervical and lumbar strain had resolved and that appellant was able to work with restrictions in terminating appellant's benefits on July 20, 1999. Dr. Pearson diagnosed a herniated disc at L2-3 based on the February 3, 1998 MRI scan and stated that underlying degenerative changes might have gradually caused appellant to have a herniated disc. He stated that it was difficult to determine whether the December 26, 1995 or January 26, 1998 injury might have caused appellant's herniated disc or if it even preexisted the accidents. Dr. Pearson stated that he was unable to explain appellant's continued residuals since the December 26, 1995 employment injury. Dr. Pearson's opinion that he was unable to explain appellant's continued residuals and that appellant was capable of working with restrictions does not establish that appellant's employment-related condition had resolved.

The record also contains the July 28, 1999 and February 28, 2000 reports of appellant's treating physician, Dr. Sharf, who opined that, based on the MRI scans of record, appellant had two herniated discs, one at C6-7 and another at L3-4, which were causally related to the December 26, 1995 employment injury. He stated that the lumbar herniated disc worsened over time and ultimately herniated due to an incidental activity, *i.e.*, the bowl lifting incident, at home.

¹ *Wallace B. Page*, 46 ECAB 227, 229-30 (1994); *Jason C. Armstrong*, 40 ECAB 907, 916 (1989).

² *Larry Warner*, 43 ECAB 1027, 1032 (1992); *see Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

³ *Dominic M. DeScala*, 37 ECAB 369 (1986); *Bobby Melton*, 33 ECAB 1305 (1982).

⁴ *See Nicolea Brusio*, 33 ECAB 1138 (1982).

⁵ *See William S. Wright*, 45 ECAB 498, 503 (1994).

Dr. Sharf's opinion creates a conflict with Dr. Pearson's opinion as to whether appellant's accepted injury increased in severity as to prevent him from further work commencing December 26, 1997 as well as the date appellant sustained his herniated disc and whether it is causally related to the December 26, 1995 injury. Dr. Sharf related appellant's cervical and lumbar herniated discs to the December 26, 1995 employment injury whereas Dr. Pearson did not find evidence of a cervical herniated disc and was unable to state whether the lumbar herniated disc was work related. Dr. Pearson found, however, that appellant had recovered from the accepted injuries of a lumbar and cervical restraint and could return to work with restrictions. Section 8123(a) of the Federal Employees' Compensation Act provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.⁶ The case must, therefore, be remanded for appellant, with a statement of accepted facts and the case record, to be evaluated by an impartial medical specialist to determine whether appellant sustained a recurrence of disability commencing December 26, 1997; whether he sustained a cervical herniated disc and a lumbar herniated disc based on the MRI scans of record and whether these herniated discs were related to the December 26, 1995 employment injury. After further development as it deems necessary, the Office shall issue a *de novo* decision.

The June 14, 2000 and July 20, 1999 decisions of the Office of Workers' Compensation Programs are hereby reversed with respect to termination of wage loss and medical benefits for the accepted conditions of cervical strain and lumbar strain; the rejection of appellant's recurrence of disability claim commencing December 26, 1997 is hereby set aside and the case remanded for further development consistent with this decision of the Board.

Dated, Washington, DC
November 2, 2001

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

⁶ *Henry W. Sheperd, III*, 48 ECAB 382, 385 n.6 (1997); *Wen Ling Chang*, 48 ECAB 272, 273-74 (1997).