U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES S. PERRY and U.S. POSTAL SERVICE,
GENERAL MAIL FACILITY, West Palm Beach, FL

Docket No. 00-284; Submitted on the Record;
Issued September 13, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether appellant has sustained a recurrence of total disability on and after October 1997 causally related to his accepted employment injuries.

On May 9, 1991 appellant, then a 40-year-old clerk, filed an occupational disease claim (Form CA-2) alleging that on December 20, 1989 he first realized that fibromyalgia, right sacroilitis and right trochanteris bursitis were due to his employment duties. On the back of the form, the employing establishment noted that appellant worked four hours per day in light-duty assignments. The Office of Workers' Compensation Programs accepted the claim for aggravation of trochanteric bursitis and chronic lumbosacral strain.

By decision dated September 23, 1993, the Office determined that the light-duty position of clerk fairly and reasonably represented appellant's wage-earning capacity.

On September 15, 1995 appellant was offered a modified limited-duty job, which he accepted.

Appellant filed a claim alleging that he sustained a recurrence of disability on October 24, 1997.

In a report dated March 11, 1998, Dr. Neal H. Isil, an attending Board-certified anesthesiologist, opined that appellant's recurrence of disability was due to his original injury. In support of his conclusion, the physician noted:

> "The fact that patient had been on 'limited duty' can not stop further deterioration of tissues involved in the process of pain. Limited duty may, with any luck on the patient's part, slow down deterioration of the lumbar spine and other related issues pertinent to [appellant's] case, but can not stop the process of the 'healing-injury-healing' cycle. When repetitive *micro-trauma* levels remain the same, as with [appellant] on a limited[-]duty work, it is only a matter of time before something happens." (Emphasis in the original.)

On April 6, 1998 the Office medical adviser reviewed Dr. Isil's report and concluded that he did not substantiate his finding of a ruptured disc, there was no objective evidence of a herniated nucleus pulposus (HNP) and there was no evidence that appellant's condition had worsened due to employment factors.

In a June 8, 1998 report, Dr. Isil responded to the Office medical adviser's opinion as well as submitting his Algology reports for the period May 28, 1996 through March 13, 1998 and references he relied on. He indicated that appellant's HNP was at the L4-5 level and noted that the January 9, 1992 magnetic resonance imaging (MRI) test showed no disc herniation while a November 6, 1997 MRI scan showed disc herniation.

By decision dated June 30, 1998, the Office denied appellant's recurrence claim.

Appellant requested an oral hearing by letter dated July 28, 1998. A hearing was held on March 26, 1999 at which appellant and Dr. Isil testified. Dr. Isil noted the repetitive nature of appellant's job causes a constant strain on his back muscles and spine and aggravates his fibromyalgia.

By decision dated July 2, 1999, the hearing representative affirmed the Office decision denying appellant's recurrence claim.

The Board finds that the case is not in posture for a decision, due to an unresolved conflict of medical opinion. There is a conflict in medical opinion necessitating referral to an impartial medical specialist pursuant to 5 U.S.C. § 8123(a).

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence, a recurrence of total disability and to show that he or she 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]

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence, a recurrence of total disability and to show that he or she 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.[2]

Appellant has submitted medical opinion evidence to support his claim that his condition had worsened. Dr. Isil explained why he believed appellant's condition had worsened noting that appellant had an HNP at L4-5 level and a November 6, 1997 MRI scan showed the disc

[1] *Linda Thompson,* 51 ECAB ___ (Docket No. 99-1164, issued September 26, 2000); *Robert Kirby,* 51 ECAB ___ (Docket No. 98-2428, issued April 13, 2000); *Kim Kiltz,* 51 ECAB ___ (Docket No. 98-1907, issued March 9, 2000).

[2] *Albert C. Brown,* 52 ECAB ___ (Docket No. 98-2320, issued November 29, 2000); *Barry C. Peterson,* 52 ECAB ___ (Docket No. 98-2547, issued October 16, 2000).

herniation. He reported that appellant's condition had worsened and explained that "the slow down deterioration of the lumbar spine and other related issues pertinent to [appellant's] case, but can not stop the process of the 'healing-injury-healing' cycle. When repetitive *micro-trauma* levels remain the same, as with [appellant] on a limited-duty work, it is only a matter of time before something happens." (Emphasis in the original.) The Office medical adviser disagreed, stating that appellant's current condition was not related to his original injury and that there was no evidence that his condition had worsened.

Section 8123(a) of the Federal Employees' Compensation Act provides in part: "If there is 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."[3]

To resolve the conflict in opinion between appellant's physicians and the Office medical adviser, the Office shall refer appellant, together with the medical record and a statement of accepted facts, to an appropriate impartial specialist for a well-reasoned opinion, supported by the medical record, on whether appellant's condition had worsened such that appellant was disabled from performing his light-duty work as Dr. Isil found was causally related to appellant's accepted employment injury. After such further development of the evidence as may be necessary, the Office shall issue an appropriate final decision on appellant's claim of recurrence.

The July 2, 1999 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Dated, Washington, DC
September 13, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

[3] 5 U.S.C. § 8123(a).