

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THERON POSEY and DEPARTMENT OF THE NAVY,
NAVAL SURFACE WARFARE CENTER, Indian Head, MD

*Docket No. 00-2008; Oral Argument Held June 11, 2002;
Issued August 5, 2002*

Appearances: *Theron Posey, pro se; Miriam D. Ozur, Esq.,
for the Director, Office of Workers' Compensation Programs.*

DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issue is whether appellant has established that he sustained a recurrence of disability for intermittent periods beginning July 30, 1999 causally related to his accepted work-related September 15, 1992 injury.

On September 21, 1992 appellant, then a 32-year-old boiler plant operator, filed a traumatic injury claim alleging that on September 15, 1992 he injured his back after closing the blow down valve. He stopped work on the date of injury and returned to part-time light duty on November 10, 1992.¹

Appellant's initial treating physicians, Drs. Paul E. Pritchett, Sr., a Board-certified family practitioner, Arthur I. Kobrine, a Board-certified neurological surgeon, and Guillermo E. Sanchez, an orthopedic surgeon, initially diagnosed lumbosacral strain and right lumbar sciatica.

A December 8, 1992 computerized tomography scan of the lumbar spine performed by Dr. Whei-rung Fu, a Board-certified radiologist, showed that there was no evidence of herniation of the disc or spinal stenosis.

On September 15, 1992 the Office of Workers' Compensation Programs accepted the claim for lumbosacral strain and later lumbar radiculopathy.

¹ On September 9, 1994 appellant returned to a light-duty clerical position, working six hours a day, five days a week and received compensation for his loss of wage-earning capacity. The record reflects that on November 6, 1995 appellant was reemployed as a financial support assistant.

Subsequently, around July 1993, Dr. Sanchez indicated that appellant had a herniated disc and stated that it was associated with the September 15, 1992 employment injury. However, no explanation was provided regarding how this was causally related to the accepted employment injury or why it was not originally diagnosed.

In a September 25, 1996 decision, the Office determined that appellant's position as financial support assistant with the employing establishment represented his wage earning and adjusted his wage-loss benefits.

Appellant subsequently filed claims for recurrence disability for the period July 30 to September 26, 1999 and for intermittent periods from September 27 to October 22, 1999, October 23, 1999 to February 4, 2000 and for subsequent intermittent periods.

In an August 16, 1999 report, Dr. Shaheer Yousaf, a Board-certified orthopedic surgeon and appellant's treating physician, indicated that appellant had an L5-S1 disc herniation and lumbar radiculitis. He noted that repeat magnetic resonance imaging (MRI) scans at LS-spine revealed an L5-S1 disc herniation. Dr. Yousaf compared it to the last MRI scan and opined that there was further narrowing of the L5-S1 interspace.

By decision dated November 18, 1999, the Office rejected appellant's recurrence of disability claim on the grounds that he failed to establish that his claimed recurrent condition was related to his September 15, 1992 employment injury.

On January 6, 2000 appellant requested reconsideration. In support of his request, appellant submitted various documents including medical reports from Dr. Yousaf dated July to December 1999. The reports from Dr. Yousaf were similar in that he diagnosed an L5-S1 disc herniation and lumbar radiculitis and stated that appellant was disabled. Dr. Yousaf also discussed the epidural blocks that appellant was receiving. He did not indicate that appellant had a recurrence of total disability due to his accepted employment injury such that he could not perform light duty or explain how appellant now had an L5-S1 disc herniation that was related to the original employment injury when the initial reports showed lumbosacral strain and right lumbar sciatica. In his November 23, 1999 report, Dr. Yousaf's history and physical notes explained the physical evidence and medically objective evidence of the injury, but he did not explain causal relationship or how appellant was totally disabled due to the accepted employment injury.

By decision dated March 10, 2000, the Office denied modification of the prior decisions.

By letter dated April 5, 2000, appellant requested reconsideration of his claim. He alleged that Dr. Yousaf, in his August 16, 1999 report, noted a disc herniation. Appellant also argued that his position was not clerical and stated that he was constantly standing and walking on cement for more than six hours a day. In support of his request, appellant submitted various documents, including: a narrative, a copy of a position description dated February 15, 1995, a letter from the employing establishment appointing appellant to the position of contract surveillance representative, MRI of the lumbar spine dated July 23, 1993 and August 13, 1999; and various medical reports from Dr. Yousaf.

In a preconference memorandum dated March 6, 2000, the Office requested information from the employing establishment regarding appellant's light-duty position and the physical requirements.

By letter dated March 7, 2000, the employing establishment described appellant's position. The description included:

- (1) Inspection of vehicles on ready line. Number of cars varies from 1 to 4 a day, at 20 minutes per car. Physical requirements: intermittent sitting, walking and standing.
- (2) Walk through contractor's maintenance facility (concrete floor) observing work one hour a day. Physical requirements: intermittent walking and standing.
- (3) Inspection of pest control services. Accompany the pest contractor to various buildings, which were being treated. Treatment could be inside or outside the building. Physical requirements: driving a vehicle, walking and standing typically one day a week at two to four hours.
- (4) Inspection of garbage and refuse services. This required driving a vehicle to the dumpsters positioned throughout the activity to verify trash has been picked up as scheduled. This job was completed one day a week at one, to one and one-half hour.
- (5) Prepared inspection reports and processed invoices which required use of computer and calculator. Physical requirements: sitting one to two hours a day.

In a March 6, 2000 reasonable accommodation addendum to the position description, the employing establishment added no lifting over 20 pounds on an intermittent basis, no walking or standing for more than 4 hours on an 8-hour shift.

In a May 22, 2000 merit decision, the Office denied modification of appellant's request for reconsideration.

The Board finds that appellant has not met his burden of proof in establishing that he sustained a recurrence of disability for intermittent periods beginning July 30, 1999 causally related to his accepted employment injury of September 15, 1992.

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

² *Richard E. Konnen*, 47 ECAB 388 (1996); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

The medical evidence required to establish causal relationship, generally, is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.³

In the instant case, appellant claims that, while performing the requirements of his light-duty position, he would exceed the limitations by being constantly required to stand and walk for six hours a day on a concrete floor beginning in April 1999. He also indicated that his position involved stooping, twisting, turning and constant kneeling in odd positions and even crouching. These allegations, however, are not supported by the evidence. The employing establishment submitted a March 7, 2000 letter describing the duties and the physical requirements of appellant's position during the July 1999 time frame including inspection of vehicles on the ready line, which required intermittent sitting, walking twenty minutes per day and standing; and observing work in the contractor's maintenance facility (concrete floor); requiring one hour of intermittent walking and standing per day; inspection of pest control services, two to four hours for one day a week; inspection of garbage and refuse services, requiring driving for one to one and one half hours, one day a week; and preparing inspection reports, which required sitting one to two hours a day. There is no evidence that appellant was required to work outside the required physical requirements set forth by his treating physician or that the employing establishment changed the requirements. Further, in his December 2, 1999 report, Dr. Yousaf indicated that appellant "reported back to [him] that constant sitting in fact aggravated his pain." He explained further that it was not uncommon to have disc aggravation with sitting since sitting produces excessive pressure over the disc spaces. However, appellant has not alleged that his light-duty position changed due to constant sitting, he has alleged standing as the factor. His allegations are unsupported by the record.

Appellant also alleged that the Office paid for the treatment of Dr. Yousaf's diagnosis of herniated disc and, therefore, this should be an accepted condition. However, the Board has held that the Office's payment of medical treatment expenses does not constitute acceptance of a specific injury or condition.⁴

Appellant has submitted various medical documents, however, none of these show that appellant's accepted medical conditions of lumbar strain and radiculopathy materially worsened, rendering him unable to perform his light-duty assignment for the various dates claimed beginning in July 1997.

Dr. Yousaf's August 2, 1999 report indicated that there was no change in appellant's "symptoms complex" and he did not indicate that appellant was disabled from work.

³ *Id.*

⁴ *Carolyn F. Allen*, 47 ECAB 240 (1995).

The first report in which Dr. Yousaf reported temporary total disability was dated August 16, 1999. He noted that a repeat MRI scan “reveals L5-S1 disc herniation. Dr. Yousaf compared it to the last MRI scan noting “further narrowing of the L5-S1 interspace.” He opined that appellant had an L5-S1 disc herniation and lumbar radiculitis. In a September 9, 1999 report, he noted that appellant was capable of performing sedentary work. Dr. Yousaf did not report on appellant’s ability to work in his October 4 or October 14, 1999 reports other than to note that he took off work occasionally “when the pain gets intense.” In the November 2, 1999 report, Dr. Yousaf indicated that appellant’s examination remained unchanged and he was totally disabled until November 30, 1999. In the November 23 and December 2, 1999 reports, Dr. Yousaf did not comment on appellant’s condition but indicated that he was totally disabled. He referred to the Office’s request to provide detailed objective medical evidence supporting that appellant stopped work because of a worsening of his lumbosacral strain and radiculopathy. Dr. Yousaf opined that his history, medical notes and physical objective evidence were already forwarded to the Office. He did not render any opinion that appellant suffered a recurrence of total disability on or about July 7, 1999, that is causally related to the September 15, 1992 injury. These reports failed to identify factors of appellant’s employment or address the causal relationship between appellant’s job duties and his alleged recurrence beginning July 30, 1999.

Appellant also submitted copies of MRI scans of the lumbar spine dated July 23, 1993 and August 13, 1999. The report dated July 23, 1993 provided an impression of “small posterior disc L5-S1 slightly right paracentral in location and adjacent to the right S1 root.” The MRI dated August 13, 1999 provided an impression of “broad-based central disc herniation at L5-S1 without clear evidence of nerve root impingement. No discussion of causal relationship was made in any of these reports.

In a February 3, 2000 report, Dr. Yousaf indicated that appellant had finished two epidural blocks and was to undergo a third block in the future. He stated:

“In response to claim examiner’s questions regarding the causation of [appellant’s] disc herniation. The etiology was already discussed in the initial visit June 28, 1999. I will repeat the history. [Appellant] injured his back in 1992 while he was opening a valve. The valve got stuck producing a torque in [appellant’s] back. At the time he sustained L5-S1 disc herniation. Since then his symptoms continued, however, they were tolerable and allowed him to work. The symptoms did flare with time to time in the same location and same anatomical distribution 1992. In June 1999, the same symptoms without any anatomic or symptomatic variation intensified requiring treatment at the office. This history should be sufficient to establish the causation and anatomical continuity of [appellant’s] symptoms complex.”

Dr. Yousaf indicated that appellant’s back condition and symptoms that were causally related to the initial injury of record flared up from time to time. However, he did not provide a rationalized statement, indicating that appellant suffered a recurrence of total disability causally related to the September 15, 1992 injury.

In a February 17, 2000 report, Dr. Yousaf stated that appellant had over an 85 percent reduction in his symptoms and had only one episode of pain since the last evaluation. He returned appellant to return to full work immediately.

In a report dated February 24, 2000, Dr. Yousaf indicated that appellant's examination showed functional motion, positive extension test and no gross root tension signs. He indicated that appellant was limited to lifting of 20 pounds and limited to standing and walking of 4 hours each. Dr. Yousaf opined that "[a]ccording to [appellant] he could very well tolerate these limits."

As shown above, there is no new substantial and probative evidence which establishes that appellant suffered a recurrence of total disability on or around July 7, 1999, that is causally related to the September 15, 1992 injury.

Appellant has not provided any medical reports, based on objective findings, which establish that there has been a change in the nature and extent of his condition such that he can no longer perform his light-duty job and also has provided no evidence to establish that there has been a change in the nature and extent of his light-duty job requirements.

The decisions of the Office of Workers' Compensation Programs dated May 22 and March 10, 2000 and November 18, 1999 are hereby affirmed.

Dated, Washington, DC
August 5, 2002

Michael J. Walsh
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member