

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VINCENT WHEELER and DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION, Salt Lake City, UT

*Docket No. 01-1989; Submitted on the Record;
Issued August 19, 2002*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant has met his burden of proof in establishing that he sustained a recurrence of disability after January 1, 1993 causally related to his 1974 employment injury.

This case has previously been on appeal before the Board. In its January 25, 1992 decision, the Board remanded the case for additional development of appellant's schedule award determination.¹ In an October 5, 1995 decision, the Board found that appellant had no more than six percent permanent impairment of his right lower extremity and that appellant had not established that he sustained a recurrence of disability on or after December 26, 1990 causally related to his 1975 employment injuries.² The facts and the circumstances of the case as set out in the prior decisions are adopted herein by reference.³

In a letter dated May 9, 2001, appellant informed the Office that he had developed low back pain as a complication from his accepted spinal fusion. Appellant submitted a notice of recurrence of disability dated May 20, 2001 alleging that since February 28, 1987 he had experienced back problems. Appellant related his work history in the private sector noting that he stopped work in January 1998. He stated that he began a physical rehabilitation program on February 26, 2001 consisting of 25 minutes on the treadmill and 20 minutes on a bicycle 3 times a week. Appellant stated that he began to experience low back pain in April 2001.

¹ Docket No. 92-1015.

² Docket No. 94-819 (issued October 5, 1995).

³ Following the October 5, 1995 decision, the Office of Workers' Compensation Programs granted appellant a schedule award for 50 percent permanent impairment of his penis.

The Office requested additional factual and medical information in a letter dated June 18, 2001. By decision dated July 11, 2001,⁴ the Office denied appellant's claim for recurrence of disability finding that he had not submitted sufficient factual and medical evidence to establish a spontaneous return or increase in disability due to the previously accepted work injury.⁵

The Board finds that this case is not in posture for decision and will be remanded for further development.

Section 10.121⁶ of the Office's regulations provides:

"If a claimant submits supportive factual evidence, medical evidence or both, but [the Office] determines this evidence is not sufficient to meet the burden of proof, [the Office] will inform the claimant of the additional evidence needed. The claimant will be allowed at least 30 days to submit the evidence required."

In this case, the Office failed to allow appellant the specified 30 days within which to submit additional evidence. As noted above, the Office advised appellant of the deficiencies in his claim on June 18, 2001 and properly stated that he would be allowed 30 days to submit supportive factual or medical evidence. However, on July 11, 2001, only 23 days later, and less than the 30 days specified by the implementing federal regulations, the Office issued its decision denying appellant's claim for benefits.

The Board will set aside the Office's July 11, 2001 decision and remand the case for further appropriate development. On remand, the Office shall again advise appellant of the defects in this claim and allow him at least 30 days in which to submit responsive evidence. Following this and such other development as the Office deems necessary, it shall issue an appropriate decision.

⁴ Following the July 11, 2001 decision, appellant submitted additional new evidence. As the Office did not consider this evidence the Board may not consider the evidence for the first time on appeal. 20 C.F.R. § 501.2(c).

⁵ In a letter dated August 10, 2001 and addressed to both the Office and the Board, appellant requested either an appeal or reconsideration of the July 11, 2001 decision. The Board received this letter on August 14, 2001 and docketed an appeal. The Office issued a decision on August 29, 2001 denying modification of the July 11, 2001 decision. The Board notes that, under its applicable rules and procedures, the Board and the Office may not have simultaneous jurisdiction over the same issue. *Jimmy W. Galetka*, 43 ECAB 432, 433 (1992). Therefore, the August 29, 2001 decision of the Office is null and void.

⁶ 20 C.F.R. § 10.121.

The July 11, 2001 decision of the Office of Workers' Compensation Programs is hereby set aside and the case remanded for further development and proceedings consistent with this opinion of the Board.

Dated, Washington, DC
August 19, 2002

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member