U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH ASSANTE and U.S. POSTAL SERVICE,
POST OFFICE, New York, NY

Docket No. 01-2121; Submitted on the Record;
Issued August 20, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,
WILLIE T.C. THOMAS

The issue is whether appellant sustained a recurrence of disability on or after November 1, 1999 causally related to work-related-back injuries.

On May 10, 1993 appellant, then a 35-year-old sub-carrier, injured his lower back and left leg while unloading mail in the performance of duty. The Office of Workers' Compensation Programs accepted the claim for a herniated disc at L4-5. Appellant received compensation for intermittent periods of wage loss. He began working in a modified position effective June 29, 1993.

Appellant next sustained a traumatic back injury on January 29, 1998, which was accepted by the Office for lumbar radiculopathy. He was off of work from January 29 until June 26, 1998, when he returned to limited duty.

Appellant subsequently filed a claim for a recurrence of disability beginning November 1, 1999.

In a report dated May 4, 1999, Dr. Leonard Langman, a Board-certified neurologist, noted that appellant had been under his care for lumbar radiculopathy (herniated disc) and that appellant had been advised to perform "indoor" duties only. Dr. Langman stated appellant's work restrictions of no walking, pushing, pulling, carrying or lifting over five pounds. He stated that appellant suffered from a permanent recurring spasm in the upper back that radiated to the lower back and upper extremities. Dr. Langman opined that appellant's prognosis was fair and that he could return to work on May 5, 1999.

In a December 2, 1999 report, Dr. Langman opined that appellant was totally disabled for work beginning "November 1, 1999 to date." He requested authorization for a magnetic resonance imaging (MRI) scan and a surgical consult.

In a December 29, 1999 letter, the Office advised appellant of the medical and factual evidence required to establish his claim for compensation.

An MRI scan dated January 13, 2000, showed degenerative disc disease at L4-5 with slight disc space narrowing. There was no evidence of any disc herniation.

In a report dated February 3, 2000, Dr. Langman noted that appellant remained under his care for lumbar radiculopathy. He related that appellant was working on May 10, 1993 when he sustained an injury to his lower back and was diagnosed as having a herniation at L4-5. Dr. Langman then noted that appellant was working light duty when he sustained a recurrence of disability on November 1, 1999. He described appellant's symptoms on November 1, 1999 as lower back pain with radiation. Dr. Langman reported physical findings that included lumbar spasm, increased lumbar lordosis and weakness of dorsiflexion. He stated that appellant's back condition was a direct result of his prior work injuries and opined that appellant was disabled from work until he was able to complete a course of physical therapy.

The Office referred appellant for a second opinion evaluation with Dr. Kenneth Falvo, a Board-certified orthopedic surgeon. In a report dated April 13, 2000, Dr. Falvo recorded physical findings, reviewed a statement of accepted facts and the medical record. He diagnosed: (1) Chronic low back sprain, (2) degenerative disc disease at L4-5 and (3) herniation of L4-5 disc. Dr. Falvo opined that appellant's degenerative back condition had been aggravated by his work injuries. Work restrictions were listed as being no lifting over 10 pounds and no pushing of objects greater than 50 pounds. He opined that appellant could work limited duty eight hours per day within those restrictions for an eight-hour workday.

In a supplemental report dated May 4, 2000, Dr. Falvo opined that the physical findings could be due to a combination of degenerative disc disease and the prior work-related-back injuries. He stated, however, that there had been no change in appellant's condition to preclude him from performing his limited-duty job.

In a decision dated June 15, 2000, the Office denied appellant's claim for a recurrence of disability.

Appellant requested reconsideration on August 4, 2000. In conjunction with this request, he submitted two disability certificates from Dr. Langman dated June 6 and July 24, 2000. The certificates indicate that appellant was incapacitated beginning November 1, 1999, due to lumbar radiculopathy and severe lower back spasms.

In a report dated July 28, 2000, Dr. Langman related that appellant started having severe lower back pain on November 1, 1999 and that since appellant had no intervening trauma or illness, it should be considered that appellant's back problems on November 1, 1999 were an exacerbation of the May 10, 1993 work injury.

In a decision dated October 18, 2000, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted by appellant in support of his request was repetitive and not sufficient to warrant a merit review.

In a March 2, 2001 letter, appellant requested reconsideration and submitted a Form CA-20 attending physician's report dated February 27, 2001, that was completed by Dr. Langman, who indicated that appellant required a laminectomy of the lumbar spine with possible fusion. He check marked a box advising that the condition was caused or aggravated by appellant's employment. The date of injury was listed as May10, 1993.

In a March 30, 2001 decision, the Office denied appellant's reconsideration request, finding that the evidence was cumulative and not relevant to warrant a merit review.

Appellant filed a reconsideration request on May 23, 2001 and submitted another report from Dr. Langman dated April 27, 2001.

In his April 27, 2001 report, Dr. Langman opined that appellant sustained a recurrence of disability while working on November 1, 1999. He reiterated his prior physical findings. Dr. Langman related that the results of an electromyogram (EMG) performed on December 3, 1999 showed bilateral radiculopathy compared to an earlier EMG study on February 26, 1998, which showed radiculopathy only on the left side of level L4-5. He stated as follows:

> "Please note that the recurrence of November 1, 1999 resulted in a significant change in the nature and extent of the injury-related condition. This is evidenced by the change in the [EMG]/NCV [nerve conduction velocity] study performed on December 3, 1999 as compared to the prior study of February 26, 1998. The [EMG]/NCV of February 26, 1998 showed a unilateral lesion at the level of L4-5 only. The [EMG]/[NCV] study of December 3, 1999 shows *bilateral* lesions at L4-5 *and* L5-S1. Thus, there is an objective and significant change in [appellant's] condition as a result of the work-related-injury of [November 1, 1999]." (Emphasis in the original).

In a decision dated June 28, 2001, the Office denied modification of its prior decisions.

The Board finds that this case is not in posture for a decision.

An employee 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 recurrence of the disabling condition for which compensation is sought is causally related to the accepted employment injury.[1] As part of the burden of establishing a recurrence of disability the employee must submit rationalized medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the current disabling condition is causally related to the accepted employment-related condition and supports that conclusion with sound medical reasoning.[2]

[1] *Bernard Snowden*, 49 ECAB 144 (1977); *see also Jose Hernandez*, 47 ECAB 288 (1996); *Carolyn F. Allen* 47 ECAB 240 (1995).

[2] *Bernard Snowden*, *supra* note 1.

When an employee who is disabled from the job 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 and probative evidence, a recurrence of total disability and to show that he or she cannot perform such light duty. The employee must show either 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.[3]

In this case, Dr. Falvo, the Office referral physician, stated that appellant is capable of performing the duties of his limited-duty job despite the residuals of his work-related back injuries and degenerative disc disease. In contrast, Dr. Langman opined in a April 27, 2001 report, that appellant's injury-related condition had changed and he was unable to perform his limited-duty job because EMG/NCV studies performed on December 3, 1999 showed evidence of "bilateral lesions at L4-5 and L5-S1" that had not previously been seen. Dr. Langman's report suggests that appellant has developed an additional lesion and radiculopathy at L5-S1 due to the work injury and that he has sustained a recurrence of disability.

Although the Office only accepted the claim for a herniated disc at L4-5 with lumbar radiculopathy, a conflict exist in the record between the Office referral physician, Drs. Falvo and Langman as to whether the L5-S1 lesion and radiculopathy is causally related to the accepted work injuries and whether or not appellant has sustained a recurrence of disability.

Section 8103(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.[4] Where opposing medical reports of virtually equal weight and rationale exist and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently rationalized and based on a proper factual background, must be given special weight.[5]

On remand, the Office must send appellant along with a copy of the medical record and a statement of accepted facts to an impartial medical specialist to resolve the conflict in the medical evidence as to whether appellant sustained a recurrence of disability. After such further development of the medical record as the Office deems necessary, the Office shall issue a *de novo* decision on appellant's entitlement to compensation.

[3] *Sherry A. Hunt*, 49 ECAB 467 (1998); *Doris J. Wright*, 49 ECAB 230 (1997); *Terry Hedman*, 38 ECAB 222 (1986).

[4] 5 U.S.C. § 8123(a); *see Kimper Lee*, 45 ECAB 565 (1994); *Larry B. Guillory*, 45 ECAB 522 (1994).

[5] *Brady L. Fowler*, 44 ECAB 343 (1992).

The June 28, 2001 decision of the Office of Workers' Compensation Programs is hereby set aside and the case remanded for further development consistent with this decision of the Board.

Dated, Washington, DC
August 20, 2002

Michael J. Walsh
Chairman

Alec J. Koromilas
Member

Willie T.C. Thomas
Alternate Member