

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROLAND ERWIN and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Ann Arbor, MI

*Docket No. 02-300; Submitted on the Record;
Issued June 13, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

On March 20, 1984 appellant, then a 50-year-old supervisor of hematology/coagulation/urinalysis, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1), alleging that on March 13, 1984 he was moving containers of Isoton II from lab storage and injured his back, right and left legs and muscles in the course of his federal employment duties. Appellant stopped work and returned to light duty on May 29, 1984 and full duty on August 25, 1984. The Office eventually accepted the claim for ruptured disc, right L5-S1 interspace.

On October 29, 1996 appellant filed a claim for recurrence of disability (CA-2a), indicating he was no longer able to work.

In an October 17, 1996 letter, Dr. Michael J. Worzniak, a Board-certified family practitioner and appellant's treating physician, indicated that appellant was experiencing severe and chronic back pain, had developed weakness in his right leg and walked with the support of a cane. He opined that appellant was incapacitated by the pain and must stop working. Dr. Worzniak indicated that the problem dated back to an injury sustained in 1984 when appellant was lifting containers in the laboratory and felt a sharp pain in the lower back. He determined that an x-ray taken at that time showed a reduced interspine at L5-S1, position and the diagnosis was herniated nucleus pulposus. Dr. Worzniak stated that, since that time, there has been a progressive deterioration in his back. Further, he noted that the lumbosacral spine showed an S-shaped scoliosis and marked disc space narrowing at virtually every level with the exception of the L1-2 disc space. Additionally, Dr. Worzniak indicated that there were "degenerated" changes involving the facet joint, which could be causing a degree of lumbar stenosis.

By letter dated November 25, 1996, appellant submitted additional information including a copy of his position description and a letter from his physician, Dr. Toni M. Cutson, a Board-certified family practitioner.

In a November 23, 1996 report, Dr. Cutson indicated that appellant was experiencing chronic severe back pain dating back to the beginning of his symptoms related to an accident that occurred in 1984. He noted that while lifting heavy containers in the laboratory, he experienced a sharp pain in his lower back and stated radiographs revealed reduced interspinous space at L5-S1 consistent with a herniated nucleus pulposus. Dr. Cutson opined that, over the ensuing years, appellant continued to experience pain and decline with worsening of findings on radiographs. He diagnosed marked scoliosis with marked disc space narrowing throughout his thoracic and lumbar spine, with a vacuum phenomena with the lower discs and evidence of spinal stenosis in the lower back. Dr. Cutson determined that appellant currently had moderate to severe back pain with objective weakness in the right leg requiring gait with a cane for support and determined that appellant must discontinue work.

In a February 4, 1997 decision, the Office denied appellant's claim for recurrence of total disability as the evidence of file failed to demonstrate a causal relation between the March 13, 1984 injury and the claimed recurrent condition or disability beginning October 7, 1996.

By letter dated February 18, 1997, appellant requested a hearing, which was held on January 29, 1998.

In a January 8, 1998 report, Dr. John C. Shelton, an internist, stated appellant's problem began in March 1984, when he injured his lower back while lifting heavy containers at the employing establishment in Ann Arbor. He indicated that, prior to that injury, his treatment was for hypertension and some episodes of paroxysmal atrial tachycardia and noted that there was no treatment for any form of back problems. After examinations and evaluations, it was concluded that appellant had a ruptured disc at L5-S1 which Dr. Shelton felt could be treated medically since appellant responded fairly well to bedrest and the nonsteroidal anti-inflammatory agents. He noted that appellant improved to the point that he could return to work by August 1984, but the treatment had to be continued, because the discomfort never fully left. Dr. Shelton indicated that the pain continued, weakness developed in appellant's right leg, which required the use of a cane to assist ambulation. He noted that the x-rays showed progression of his degenerative disc disease with deformity, observing that the condition progressed and worsened to show marked degenerative disc disease, narrowing of the vertebrae, and evidence of spinal stenosis. Dr. Shelton opined that appellant did not have these symptoms prior to March 1984, before his back injury and concluded that this was an occupation related injury, which resulted in his current disability, with continued pain and deformity which began in March 1984.

In an April 25, 1997 report, Dr. Cutson reviewed appellant's history of injury and treatment from 1983 to the present. He noted that the March 1984 lifting injury to his back was discovered to be a herniated disc with radicular pain into the right lower extremity and x-rays of his back in March 1984 demonstrated a loss of lordosis indicative of paraspinal muscle spasm and slight reduction of the L5-S 1 intervertebral space (20 percent). Dr. Cutson also stated that there were no indications in the medical record of previous complaints of low back pain until March 1984. Dr. Cutson noted that appellant's symptoms of pain in the lower back and right leg

subsided without fully disappearing to the point he was able to return to full duty by August 1984. However, he also noted that multiple entries in the medical record indicating continued and recurrent back pain managed with pain medications and nonsteroidal anti-inflammatory agents as well as intermittent use of a cane throughout the following years. Dr. Cutson also observed serial x-rays of the lower back demonstrating a progression of degenerative disc disease and mild deformity (April 1986 and March 1991). Additionally, he noted that the latest radiographs of November 1996 showed marked scoliosis with marked disc space narrowing throughout his thoracic and lumbar spine with vacuum phenomena and evidence of spinal stenosis in the lower back. Dr. Cutson indicated that appellant continued with moderate to severe back pain with objective weakness in the right lower extremity requiring the use of an assistive device, his cane, for ambulation. He concluded that since appellant had no previous complaints of back pain until the injury; the fact that the continued deterioration was physically in the same location (lower back and right lower extremity) as the initial injury; and that he has had continued pain and problems beginning with the inciting injury temporally, it was his opinion that his current disability and symptoms were secondary to and a direct consequence of the original injury sustained in March 1984.

In a February 20, 1998 report, Dr. William E. Barrie, Board-certified in internal medicine and an employee health physician, noted that he had reviewed appellant's hearing transcripts, medical records and x-ray reports. He indicated that serial x-rays demonstrated gradual progression of degenerative changes, first noted at the time of his initial back injury. Dr. Barrie concluded that the injury did not cause those degenerative changes, nor their progression, and/or eventual scoliosis. He further explained that acute back injury could go on to cause chronic back pain, however, a herniated disc generally responds to conservative treatment as appellant's did in 1984. Dr. Barrie also explained that a herniated disc would not go on to cause generalized degenerative/arthritis changes as seen on his subsequent radiographs. He opined that appellant's chronic back pain and degenerative changes might be unrelated, as many people with degenerative changes on x-rays have no pain.

In a February 12, 1998 report, Dr. Cutson stated that appellant's original back injury was "certainly worsened and exacerbated by his continuing to work." He noted that the symptoms of pain in the lower back and right leg subsided without fully disappearing to the point that appellant was able to return to full duty by August 1984. Dr. Cutson also indicated that the medical record showed that appellant continued to have recurrent back pain managed with pain medications and nonsteroidal anti-inflammatory agents as well as intermittent use of a cane throughout the years. He determined that the serial x-rays confirmed the progressive abnormalities in appellant's back.

Appellant's representative provided closing arguments by letter dated February 24, 1998. He also referenced diagnostic reports, which were provided, however, these tests did not address the cause of the claimed recurrence of disability.

By decision dated April 14, 1998, the hearing representative denied appellant's claim for recurrence as the evidence of record did not support a causal relationship between his condition on or after October 7, 1996 and the accepted employment injury.

By letter dated April 8, 1999, appellant requested reconsideration and enclosed additional medical evidence.

In an October 12, 1998 report, Dr. Steven C. Harwood, Board-certified in physical medicine and rehabilitation, noted appellant's history of injury and treatment. He indicated that appellant currently lives in Ann Arbor, was presently not working and had retired from the Veterans Administration Hospital since October 1996. Dr. Harwood stated that appellant's problems began with his 1984 employment injury. He reviewed the x-rays taken from 1986 to the present and indicated that the most recent x-ray revealed lumbar scoliotic curve at 50 to 60 degrees with degenerative disc disease and collapse at multiple levels. Dr. Harwood indicated that the previous x-rays did not reveal problems with degeneration of the disc at multiple levels, but mainly at the last level. He further noted that there was no significant curvature noted as was indicated recently. Furthermore, his physical examination revealed that appellant stood with forward flexed posture slightly tilting to the right, that he had accentuation of the lumbar spine, lost his lordosis, had left scoliosis and used a cane in the right hand. Dr. Harwood diagnosed mechanical back pain with underlying significant lumbar scoliosis. He further opined that he did not find any definitive evidence of lumbar radiculopathy.

In a September 11, 2001 decision, the Office denied merit review of appellant's request for reconsideration on the grounds that the request neither raised substantive questions nor included new, relevant medical evidence and, therefore, was insufficient to warrant review.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.¹ As appellant filed his appeal with the Board on February 5, 2002, the Board lacks jurisdiction to review the Office's most recent merit decision dated April 14, 1998. Consequently, the only decision properly before the Board is the Office's September 11, 2001 decision denying appellant's request for reconsideration.

The Board finds that the Office properly denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his or her own motion or on application. The Secretary in accordance with the facts found on review may --

- (1) end, decrease, or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”

¹ 20 C.F.R. §§ 501.2(c), 501.3(d)(2) (1998) and 20 C.F.R. § 10.607(a) (1999).

Under 20 C.F.R. § 10.606(b)(2) (1999), a claimant may obtain review of the merits of the claim by submitting evidence and argument:

- (1) showing that the Office erroneously applied or interpreted a specific point of law; or
- (2) advancing a relevant legal argument not previously considered by the Office; or
- (3) constituting relevant and pertinent new evidence not previously considered by the Office.

Section 10.608(b) (1999) provides that where the request is timely but fails to meet at least one of the standards described in section 10.606(b)(2) (1999), or where the request is untimely and fails to present any clear evidence of error, the Office will deny the application for reconsideration without reopening the case for a review on the merits.²

In the present case, relevant and pertinent new medical evidence did not accompany appellant's request for reconsideration. This is important since the underlying issue in the claim is whether appellant had a recurrence of total disability on October 7, 1996 is essentially medical in nature.

In his request for reconsideration, appellant submitted a medical report from Dr. Harwood dated October 12, 1998. He essentially repeated the same information previously submitted by Drs. Cutson and Shelton. Dr. Harwood opined that appellant did not have these symptoms prior to 1984, as previous x-rays did not reveal problems with degeneration at multiple levels, but mainly at the last level. The Board has held that an opinion that a condition is causally related to an employment injury because the employee was asymptomatic before the injury, is insufficient, without supporting rationale, to establish causal relation.³ Furthermore, Dr. Harwood diagnosed mechanical back pain with underlying significant lumbar scoliosis and did not find any definitive evidence of lumbar radiculopathy but he did not address whether appellant's claimed recurrence of disability beginning October 7, 1996 was causally related to his employment injury. Thus, this report was not relevant, as it did not address causal relationship of the claimed recurrence of disability. The information provided in this report was not new, relevant or pertinent. Appellant did not provide any reports with relevant or pertinent new evidence, nor did he advance a relevant legal argument that had not been previously considered by the Office. Additionally, appellant did not argue that the Office erroneously applied or interpreted a specific point of law. Consequently, appellant is not entitled to a merit review of the merits of the claim based upon any of the above noted requirements under 10.606(b)(2) (1999). Accordingly, the Board finds that the Office properly denied appellant's April 8, 1999 request for reconsideration.

² 20 C.F.R. § 10.608(b) (1999).

³ *Kimper Lee*, 45 ECAB 565 (1994).

The September 11, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
June 13, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member