

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAUL W. HARDING and DEPARTMENT OF VETERANS AFFAIRS,
BRONX VETERANS HOSPITAL, Bronx, NY

*Docket No. 00-2527; Submitted on the Record;
Issued March 27, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant met his burden of proof in establishing that he sustained a recurrence of disability, due to his June 21, 1995 employment injury, commencing January 10, 1996.

This case is on appeal to the Board for the second time.¹ In the first appeal, the Board affirmed the Office of Workers' Compensation Programs' October 1 and May 28, 1996 decisions and found that appellant did not present rationalized medical evidence establishing that he sustained a recurrence of disability, due to his April 5, 1981 employment injury, commencing June 21, 1995, for claim No. A02-0475599. The Board also affirmed the Office's finding that appellant received an overpayment of compensation in the amount of \$4,728.75 and that he was not entitled to waiver of the overpayment. The Board found that the Office properly denied appellant's request for a hearing made after issuance of a final payment decision.

The Office subsequently accepted that appellant sustained a work-related injury consisting of cervical and lumbosacral sprains on June 21, 1995.

By decision dated May 8, 1996, the Office denied appellant's claim for a recurrence of disability, due to the June 21, 1995 employment injury, commencing January 10, 1996, for claim No. A2-0701725.

Due to certain procedural complications, by decision dated October 24, 1997, the Office vacated its May 8, 1996 decision and reissued that decision as of October 24, 1997 to protect appellant's appeal rights.

By letters dated December 23, 1997 and October 25, 1999, appellant requested reconsideration of the Office's decisions and submitted the report of the second opinion

¹ Docket No. 97-377 (issued November 24, 1998). The facts and history surrounding the prior appeal is set forth in the initial decision and is hereby incorporated by reference.

physician, Dr. Harry Merliss, a Board-certified orthopedic surgeon, dated April 11, 1996 on which the Office relied in denying appellant's claim on May 8, 1996. Appellant contended that Dr. Merliss' report was incomplete and a conflict existed between his report and the reports of appellant's treating physicians regarding whether appellant's back condition was work related. In his April 11, 1996 report, Dr. Merliss considered appellant's history of injury, performed a physical examination and diagnosed acute sprain of the cervical and dorsal and lumbar musculature. On page eight of his report, he stated that he did not review the employing establishment's emergency record nor the reports of "Dr. Andronaco" and "Dr Adler." Dr. Merliss concluded that appellant had subjective complaints of back pain which were not corroborated by objective findings. He stated that appellant's present complaints could not be explained on the basis of any specific organic condition, with underlying pathology, causally related to the June 21, 1995 employment injury.

In a report dated April 26, 1996, Dr. Bella Malits stated that appellant had an L4-5 disc bulge on the most recent magnetic resonance imaging (MRI) scan and his condition was amenable to a series of epidural steroid injections.

In a report dated May 2, 1996, Dr. Leland Abbey considered appellant's history of injury, performed appellant's physical examination and reviewed diagnostic tests including x-rays, MRI scans, and a computerized axial tomography scan. He diagnosed chronic low back pain due to ligamentous and muscular strain. Dr. Abbey stated that from his work history, "it is clear that [appellant's] pain is exacerbated by pushing, pulling and lifting heavy objects." He prohibited all bending and advised no sitting or standing for prolonged periods. Dr. Abbey stated that appellant would "most likely ... always be bothered by back pain of some degree."

In a report dated July 17, 1996, Dr. Malits stated that appellant had been treated at the pain clinic for chronic lower back pain and lower extremity spasticity since October 17, 1995. She described the medicine appellant was taking and stated that he exercised regularly.

Appellant also submitted progress notes from the employing establishment dated from December 19, 1995 through February 28, 1997 documenting his ongoing back pain.

By decision dated December 21, 1999, the Office denied appellant's request for modification.

By letter dated February 9, 2000, appellant requested reconsideration of the Office's decision and argued that there was a conflict in the medical evidence between Dr. Merliss' opinion and his treating physicians' opinions regarding whether his back condition was work related. Appellant presented some new reasons for his argument.

By decision dated June 9, 2000, the Office denied appellant's request for modification.

The Board finds that appellant failed to meet his burden of proof in establishing that he sustained a recurrence of disability, due to his June 21, 1995 employment injury, commencing January 10, 1996.

An individual 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 disability for which compensation is claimed is causally related to the accepted injury.² When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he 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 show that he cannot perform such light duty.³ As part of this burden, the employee must show a change in the nature and extent of the light-duty job requirements or a change in the nature and extent of the injury-related condition.⁴ This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.⁵ An award of compensation may not be made on the basis of surmise, conjecture or speculation or an appellant's unsupported belief of causal relation.⁶

In this case, although appellant objected to the Office's use of Dr. Merliss' report in denying his recurrence of disability, he did not present any medical evidence containing a rationalized explanation as to how his current symptoms were due to a recurrence of disability on January 10, 1996 resulting from the June 21, 1995 employment injury. In his May 2, 1996 report, Dr. Abbey opined that appellant had chronic low back pain due to ligamentous and muscular strain and stated that appellant most likely would always be bothered by back pain of some degree. He also placed restrictions on appellant. Dr. Abbey did not explain how appellant's current symptoms of low back pain resulted from his January 10, 1996 recurrence of disability or were work related. He did not address causation. His opinion is therefore not probative.⁷

Similarly, in her April 26 and July 17, 1996 reports, Dr. Malits stated that appellant had been treated at a pain clinic for chronic lower back pain and lower spasticity since October 17, 1995, described appellant's medication and his treatment program and noted that there was an L4-5 disc bulge on the most recent MRI scan. She did not provide any opinion on causation and did not explain how appellant's current symptoms of back pain resulted from the January 10, 1996 recurrence of disability. The progress notes dated from November 7, 1995 to February 28, 1997 document appellant's ongoing back pain but they also do not address causation. Dr. Merliss' April 11, 1996 report in which he opined that the June 21, 1995 incident had no impact on appellant's health based on the lack of objective findings disproves appellant's claim for a recurrence of disability. Despite Dr. Merliss' statement that he did not consider all the reports of record, his opinion is well rationalized. Since, however, appellant has the burden to

² *Dominic M. DeScala*, 37 ECAB 369 (1986); *Bobby Melton*, 33 ECAB 1305 (1982).

³ *George DePasquale*, 39 ECAB 295, 304 (1987); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

⁴ *Id.*

⁵ *See Nicolea Brusio*, 33 ECAB 1138 (1982).

⁶ *See William S. Wright*, 45 ECAB 498, 503 (1994).

⁷ *See Linda I. Sprague*, 48 ECAB 386, 389-90 (1997).

submit medical evidence to establish his claim for a recurrence of disability and did not submit medical evidence establishing the requisite causal connection between his current symptoms of low back pain and the January 10, 1996 recurrence of disability, he has failed to establish his claim. The medical evidence appellant submitted was insufficient to counter Dr. Merliss' opinion and create a conflict in the medical evidence.

The June 9, 2000 and December 21, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
March 27, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member