

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOEL L. CLEMENT and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Seattle, WA

*Docket No. 02-592; Submitted on the Record;
Issued October 10, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant has established that he sustained a recurrence of disability on March 1, 2001 causally related to his July 1, 1993 employment injury.

On July 2, 1993 appellant, then a 34-year-old food service worker, filed a claim for a traumatic injury occurring on July 1, 1993 in the performance of duty. The Office of Workers' Compensation Programs accepted appellant's claim for low back strain, a herniated nucleus pulposus at L4-5 and left leg radiculopathy.¹

By decision dated June 6, 1997, the Office reduced appellant's compensation to zero based on its finding that he had the capacity to perform the position of truck driver.

On June 18, 2001 appellant filed a notice of recurrence of disability beginning March 2001 causally related to his July 1, 1993 employment injury. He described his problem as occurring when he unloaded boxes from trucks.²

By decision dated January 7, 2002, the Office denied appellant's claim on the grounds that the evidence did not establish that he sustained a recurrence of disability beginning March 2001 causally related to his accepted employment injury.

¹ The Office, in a December 7, 1995 decision, granted appellant a schedule award for an eight percent permanent impairment of the left lower extremity. By decision dated July 2, 1997, the Office denied appellant's request for reconsideration of its schedule award decision on the grounds that the request for reconsideration was untimely and did not show clear evidence of error.

² On September 26, 1997 appellant filed a notice of recurrence of disability on September 22, 1997 causally related to his July 1, 1993 employment injury. In a memorandum to file, the Office noted that it had denied appellant's September 1997 recurrence claim; however, the decision does not appear to be in the record. Appellant also filed a notice of recurrence of disability on May 1, 2000 after he felt his lower back "shift" after picking up a bag weighing five to ten pounds.

The Board finds that appellant has not met his burden of proof to establish that he had a recurrence of disability beginning March 2001 causally related to his July 1, 1993 employment injury.

Where appellant claims a recurrence of disability due to an accepted employment-related injury, he has the burden of establishing by the weight of the substantial, reliable and probative evidence that the subsequent disability for which he claims compensation is causally related to the accepted injury.³ This burden includes the necessity of furnishing evidenced from a qualified physician who, on the basis of a complete and accurate factual and medical history, concludes that the condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.⁴

In response to the Office's request for additional information, appellant, in a statement dated August 28, 2001, indicated that he worked driving and loading and unloading trucks. He related that he believed that he had sustained a recurrence of his original injury because his L4-5 disc problems were growing worse from sitting and lifting boxes off of trucks.

In a report dated April 6, 2001, Dr. Sohail K. Mirza, a Board-certified orthopedic surgeon, noted appellant's history of a July 1993 employment injury. He reviewed the results of a magnetic resonance imaging (MRI) study obtained on March 6, 2001 and found that appellant had disc degeneration and bulges at L4-5 and L5-S1. Dr. Mirza stated:

“[Appellant] had a CT [computerized tomography] scan of his lumbar spine in July 1993. This study shows a moderate[-]sized L4-5 disc herniation. This has resolved on his current MRI scan. He no longer has the mass affect apparent on the CT.”

Dr. Mirza concluded that appellant's current symptoms were probably caused by disc degeneration. As Dr. Mirza did not attribute appellant's condition to his July 1993 employment injury or discuss whether he was disabled from his employment, his opinion is insufficient to meet appellant's burden of proof.⁵

³ *Robert H. St. Onge*, 43 ECAB 1169 (1992).

⁴ *Id.*

⁵ *Linda I. Sprague*, 48 ECAB 386 (1997) (medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship).

In a report dated May 2, 2001, Dr. Richard L. Rapport, a Board-certified neurosurgeon, related:

“...[Appellant] had an on[-]the[-]job injury for which I apparently saw him in 1993. I have reviewed personally the CT scan done at that time which does demonstrate a free foramen disc herniation left L4-5. [Appellant] has intermittently had back problems since but was really quite well until he moved a couch a few weeks ago and developed left back and then left radiating leg pain.”

Dr. Rapport reviewed an MRI of appellant’s spine and found that “the free fragment is now completely resolved. He does have an annular bulge of some significance at the [L]4-5 segment.” Dr. Rapport diagnosed “[l]umbar strain with a bulging annulus at the [L]4-5 segment.” However, he did not specifically discuss the cause of the diagnosed condition and thus his opinion is insufficient to meet appellant’s burden of proof. Further, Dr. Rapport related a history of a possible new injury from moving a couch. A recurrence of disability is defined as the inability to work caused by a spontaneous change in a medical condition, which results from a previous injury or illness without intervening injury or new exposure in the work environment that caused illness.⁶

In a report dated May 11, 2001, Dr. Susannah Taylor, a Board-certified internist, noted appellant’s complaints of low back pain and diagnosed lumbar strain. However, Dr. Taylor did not provide a finding on causation or indicate that appellant was unable to perform his employment duties and thus her report is of little probative value.⁷

In a report dated May 16, 2001, Dr. Maureen Johnson, a Board-certified internist, discussed appellant’s July 1993 employment injury. She noted that appellant reported that “driving with sitting on a continuous basis and then the heavy lifting caused a recurrence of his left leg symptoms and he has had progressive problems with climbing up hills and climbing up stairs.” She diagnosed “L4-5 disc derangement now with degenerative changes and radicular component in the left leg and acute impaired mobility.” Dr. Johnson noted that it was not typical for an individual with back problems to be rehabilitated to work as a truck driver. He, however, did not specifically address the cause of appellant’s degenerative changes and radiculopathy at L4-5 and, therefore, her opinion is insufficient to establish a recurrence of disability.

In a report dated August 28, 2001, Dr. Johnson discussed appellant’s history of a July 1993 employment injury and subsequent retraining as a truck driver. She stated:

“[Appellant] had an L4-5 dis[c] herniation with a left L5 radiculopathy which had somewhat improved but has persisted and continued to flare throughout the course of his work. He experiences increased pain into the left leg, occasionally on the right side as well. This has incapacitated him as per his report, from his self-employment as a truck driver due to the fact that he frequently has to load as well as unload the cargo he is transporting.”

⁶ See 20 C.F.R. § 10.5(x).

⁷ See *Linda I. Sprague*, *supra* note 5.

Dr. Johnson noted:

“...[A]lthough his full past records are not available for review, it appears that he was trained in a field which can be associated with a high incidence of back problems which is that of a truck driver and loader or material handler. The issues that must be addressed are that he did not appear to recover from the original disability. [Appellant] did return to regular employment but not to the job o[f] injury. His lingering symptoms include chronic low back pain. The factors producing the recurrence per his report were loading and unloading the truck and sitting for prolonged periods. The initial condition was definitely prone to recurrence and the precipitating factors capable of causing the condition by itself, I believe the repeated bending and lifting of loads contributed greatly to his ongoing problem.”

In a form report of the same date, Dr. Johnson diagnosed degenerative disc disease and L4-5 and chronic pain syndrome. She checked “yes” that the condition was caused or aggravated by employment and noted that appellant “has not tolerated voc[ation] to driving.” In her August 28, 2001 reports, Dr. Johnson attributed the worsening of appellant’s condition to the performance of his duties as a truck driver. However, an exacerbation of aggravation of the July 1, 1993 employment injury would constitute a new injury rather than a recurrence of disability. As noted above, a recurrence of disability is defined as a spontaneous material change in the employment-related condition without an intervening injury.⁸ Dr. Johnson’s opinion, therefore, is insufficient to establish a recurrence of disability.

In a medical report dated November 21, 2001, Dr. Johnson diagnosed “[c]hronic low back pain with degenerative disc and prior disc protrusion with radiculopathy.” However, she did not address the cause of the diagnosed condition and thus her report is of little probative value.

As appellant failed to submit rationalized medical evidence establishing that his claimed recurrence of disability is causally related to his accepted employment injury, the Office properly denied his claim for a recurrence of disability.

The Board notes, however, that the Office has not considered whether appellant had established modification of the loss of wage-earning capacity decision. If a claimant stops work after the issuance of a formal loss of wage-earning capacity decision, the Office’s Procedure Manual states:

“If a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In this instance the claim’s examiner will need to evaluate the

⁸ *Id.*

request according to the customary criteria for modifying a formal loss of wage-earning capacity decision....”⁹

On return of the case record, the Office should consider whether appellant has established modification of the loss of the June 6, 1997 wage-earning capacity decision.

The decision of the Office of Workers’ Compensation Programs dated January 7, 2002 is affirmed.

Dated, Washington, DC
October 10, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).