

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EDWARD M. WAXMAN and U.S. POSTAL SERVICE,
POST OFFICE, Vernon, NY

*Docket No. 02-966; Submitted on the Record;
Issued October 1, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant sustained a recurrence of disability.

On October 17, 1996 appellant, then a 47-year-old mailhandler, filed a notice of traumatic injury and claim for compensation (Form CA-1) alleging that he injured his back while emptying a hamper. Appellant was diagnosed as having degenerative disc disease and his claim was accepted for an acute lumbosacral strain.

On October 25, 1996 appellant returned to light duty. On November 4, 1996 he returned to full duty.

On July 19, 1999 appellant filed a recurrence of disability and claim for continuation of pay/compensation (Form CA-2a), alleging that the recurrence occurred on May 26, 1999 when he leaned over to put a fuse in the central air conditioning unit in his home.

Appellant submitted a June 6, 1999 report, from Andy Milone, a physician's assistant that said:

“It would appear [appellant] has suffered flare up of a work-related back injury, which initially occurred on October 15, 1996. I have examined him on May 26, 1999, June 2, 1999 and today. He has been out of work since May 26, [1999], but is now able to return in a limited capacity. He can alternate between sitting and standing work, lift no more than 10 pounds and should not bend, squat or twist. He will be going to physical therapy and returning to see me in a week.”

Appellant did not return to work until June 26, 1999, when he worked approximately five hours and stopped due to pain.

On September 2, 1999 appellant filed a recurrence of disability and claim for continuation of pay/compensation (Form CA-2a) alleging that on July 2, 1999 he returned to work “but the pain was intense, after I moved cages and started unloading the multi-slide.”

In a September 17, 1999 letter, the Office of Workers’ Compensation Programs informed appellant that based on his Form CA-2a it appeared he may have sustained a new injury and provided appellant with a check list to determine the appropriate way to file the claim.

In an October 15, 1999 letter, appellant wrote that his back has never been 100 percent since the October 15, 1996 injury and that it had been his daily routine to put ice packs on his back after work. Appellant stated that on July 2, 1999 he felt some discomfort while pushing cages, but nothing unbearable. Approximately, four hours later, while clearing off the multi slide he picked up a No. 1 parcel sack and experienced excruciating pain in the same area of my back as the October 15, 1996 injury and the recurrence. Appellant also submitted pictures of himself at the air conditioner.

In a September 29, 1999 letter, physicians assistant Mr. Milone wrote:

“[Appellant] was seen in the office regarding his back injury on October 17 and 24 and November 1, 1996 and May 26, June 2, 8, 15, 22 and 29 and August 6, 1999. On May 26, 1999 [appellant] stated that he developed pain across his low back the day before while working around his house. It was similar to, if not identical, to the injury that he suffered on October 17, 1996, at which time he was feeling pain on the right lower back after bending to get something out of a hamper.... His complaint on May 26, 1999 was that of a pain across the low back, later becoming isolated to the right side radiating into the right buttock and anterolateral thigh to the level of the knee....”

Appellant also submitted results from an August 13, 1999, magnetic resonance imaging scan that showed findings consistent with lateral bulging of the disc at the level of L3-4 on the right side with stretching of the exiting neural root. Minimal central prolapse of the disc was noted at the level of L4-5, L5-S1.

In a January 4, 2000 decision, the Office denied both of appellant’s recurrence claims.

In a letter postmarked February 4, 2000, appellant requested a hearing.

In a March 31, 2000 decision, the Branch of Hearings and Review denied appellant’s request as untimely.

In an April 11, 2000 letter, appellant requested reconsideration.

In a May 10, 2000 decision, the Office denied reconsideration in a nonmerit review.

In a May 31, 2000 letter, appellant requested reconsideration again. In support of his request appellant submitted an April 13, 2000 report, from Dr. Richard Maun, an orthopedist and Dr. Maun's progress notes covering July 6 through December 20, 1999. In his report Dr. Maun wrote:

“[Appellant] is under my care for degenerative disc disease of the lumbar spine since July 6, 1999. I find him to be totally disabled from his present employment. I find that he has multiple degenerative disc disease. His prognosis is guarded and the causal relationship to his employment is 100 percent in my opinion.”

In a February 28, 2000 progress report, Dr. Maun wrote that “his current disability is 100 percent work related and it is not amendable to surgery.”

After a merit review the Office found in an August 22, 2000 decision, that regarding his May 26, 1999 recurrence, the medical evidence was insufficient to establish that appellant sustained a recurrence of disability. Regarding his July 2, 1999 recurrence, the Office found an intervening incident and the medical evidence supporting the incident was insufficient to establish compensability.

In an August 9, 2001 letter, appellant requested reconsideration. His representative argued that the Office had no medical evidence to contradict appellant's medical evidence supporting a recurrence and alternatively that if the July 2, 1999, recurrence claim was actually a new injury then the medical evidence already submitted was sufficient to establish appellant's entitlement to compensation.

In a November 16, 2001 decision, the Office denied modification.

The Board finds that appellant has not met his burden of proof to establish that he sustained a recurrence of disability.

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.¹ 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 rationale.² Where no such rationale is present, medical evidence is of diminished probative value.³

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's claimed condition became apparent during a period of

¹ *Charles H. Tomaszewski*, 39 ECAB 461, 467 (1988); *Dominic M. DeScala*, 37 ECAB 369, 372 (1986).

² *Mary S. Brock*, 40 ECAB 461, 471-72 (1989); *Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

³ *Michael Stockert*, 39 ECAB 1186-88 (1988).

employment nor his belief that appellant's condition was aggravated by his employment is sufficient to establish causal relationship.⁴

Appellant failed to submit rationalized medical evidence establishing that his claimed recurrence of disability is causally related to the accepted employment injury and, therefore, the Office properly denied his claim for compensation.

The only medical evidence appellant submitted in support of either his two recurrence claims was the April 13, 2000 report, from Dr. Maun and his progress notes.⁵ In his report Dr. Maun diagnosed appellant with degenerative disc disease of the lumbar spine. He stated that appellant's condition was 100 percent work related but he never explained how or why it was work related. Dr. Maun's reports did not indicate an awareness of the nature of appellant's accepted employment injury; nor did he explain why appellant's condition was a spontaneous return of his accepted injury. Without these explanations his reports lack sufficient rationalization and are speculative. A rationalized explanation of the causal relationship between appellant's current condition and accepted injury are critical because appellant had a history of degenerative disc disease prior to his original injury.

Dr. Maun's report is insufficient to establish a new work-related injury.

An employee seeking benefits under the Federal Employees' Compensation Act⁶ has the burden of establishing the essential elements of his or her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.⁷ These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁸

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether the "fact of injury" has been established. There are two components involved in establishing the fact of injury. First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place and in the manner alleged.⁹ Second, the employee must

⁴ See *Walter D. Morehead*, 31 ECAB 188, 194-95 (1986).

⁵ The Board notes appellant submitted reports, from Mr. Milone, a physician's assistant. But his reports are not considered to be medical evidence. Section 8102(2) of the Act provides, in relevant part, "physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law." 5 U.S.C. § 8101(2).

⁶ 5 U.S.C. §§ 8101-8193.

⁷ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁸ *Delores C. Ellyett*, 41 ECAB 992, 998-99 (1990); *Ruthie M. Evans*, 41 ECAB 416, 423-27 (1990).

⁹ *Julie B. Hawkins*, 38 ECAB 393, 396 (1987); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.2a (June 1995).

submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.¹⁰ The term “injury” as defined by the Act, refers to some physical or mental condition caused by either trauma or by continued or repeated exposure to, or contact with, certain factors, elements or conditions.¹¹

Traumatic injury means a wound or other condition of the body caused by external force, including stress or strain, which is identifiable as to time and place of occurrence. The injury must be caused by a specific event or incident, or series of events or incidents within a single workday or work shift.¹²

Dr. Maun’s reports, while stating that appellant’s back injury is 100 percent work related, do not demonstrate knowledge of appellant’s work history; nor do they contain the results of tests or a clear rationalized opinion on how the incident of July 2, 1999 is causally related to his degenerative disc disease.

The November 16, 2001 and August 22 and January 4, 2000 decisions of the Office of Workers’ Compensation Programs are hereby affirmed.

Dated, Washington, DC
October 1, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

¹⁰ *John J. Carlone*, 41 ECAB 354, 356-57 (1989); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.2a (June 1995).

¹¹ *Elaine Pendleton*, *supra* note 7; 20 C.F.R. § 10.5(a)(14).

¹² *William Taylor*, 50 ECAB 234 (1999).