

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BILLY R. McWHORTER and DEPARTMENT OF THE NAVY,
NAVAL WEAPONS CENTER, China Lake, CA

*Docket No. 03-394; Submitted on the Record;
Issued April 16, 2003*

DECISION and ORDER

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

The issue is whether appellant has established that he sustained a recurrence of disability on July 26, 2001 due to his accepted employment injuries.

On March 7, 1991 appellant, then a 35-year-old firefighter, filed a claim for a ruptured disc at C6-7 and for surgery for this condition. Appellant stated that he realized his ruptured disc was related to his employment because it was in the same location as his previous cervical spine problems. He also stated that he felt something pull in his neck when he picked up his daughter on February 3, 1991, that he participated in a smokehouse drill from February 7 to 11, 1991 without pain, and that, on February 12, 2001, while off duty, he noticed tingling and pain radiating into his left arm and fingers, for which he sought medical attention the following day.¹

The Office of Workers' Compensation Programs had previously accepted that appellant sustained earlier injuries in the performance of duty: cervical strains on September 21 and October 18, 1980, muscle spasms in the upper back on March 28, 1988 and cervical and thoracic strains on March 21, 1989.

On February 22, 1991 Dr. Abdallah S. Farrukh, a Board-certified neurosurgeon, performed surgery on appellant's cervical spine: a C6-7 hemilaminotomy, foraminotomy and discectomy. In a report dated March 21, 1991, Dr. Farrukh stated that appellant "has suffered a significant cervical disc injury through repeated injuries at work," recommended "he change his line of work because he is at risk of rupturing another disc due to the possibility of exposure to recurrent injury as a fireman," and imposed "a prophylactic limitation of 35 pounds for repeated lifting and 50 pounds for occasional lifting."

¹ The history in the report of appellant's admission to the hospital for surgery on February 22, 1991 was that he "immediately developed a pop-out and excruciating pain" upon trying to lift his six-year-old child three weeks earlier, with continuous pain since then.

By letter dated July 17, 1991, the Office advised appellant that it had accepted that his cervical strain, herniated disc at C6-7 and the surgery he underwent on February 22, 1991 were sustained in the performance of duty.

By decision dated January 27, 1992, the Office found that appellant had a loss of wage-earning capacity based on his loss of premium pay in his position of clerk to which he was reassigned effective May 20, 1991. The Office began payment of compensation for loss of wage-earning capacity on April 8, 1991, the date appellant returned to work following his February 22, 1991 surgery.

In a report dated January 22, 1992, Dr. Farrukh stated that appellant “showed significant improvement. He does not have any particular symptoms consistent with radiculopathy. He remains with occasional neck pain with some radiation to the shoulder as a result of the process he has gone through.” Dr. Farrukh declared appellant “permanent and stationary with a maximum lift of 50 pounds.” In a report dated June 7, 1992, Dr. Nitin A. Shah, a Board-certified orthopedic surgeon to whom the Office referred appellant for a second opinion evaluation, noted that a myelogram and computerized tomography scan on July 10, 1991 showed “no new additional dis[c]” and was essentially negative, as was an electromyogram performed the same date. Dr. Shah diagnosed a recurrent cervical strain, which the doctor attributed to a car accident on June 10, 1991. He stated that appellant could perform his duties as a clerk, and that he needed no further neurological workup or additional surgical treatment.

Appellant’s application for disability retirement was approved effective August 30, 1996. He elected to receive these benefits in preference to those under the Federal Employees’ Compensation Act.

On August 7, 2001 appellant filed a claim for a recurrence of disability, listing the date of the original injury as February 12, 1991, the date of the recurrence as July 25, 2001, and the date he stopped work as July 26, 2001. As to the circumstances of the recurrence of disability, appellant stated: “Aggravated same area of neck helping friend with wallpaper/duties of floor maintenance Wal-Mart running equipment, mopping. Same signs/symptoms in neck, arms, fingers as injury as 1991. Weakness/stiffness/lack of motion.” Appellant indicated that he was claiming compensation for medical treatment, but that he was claiming compensation for lost wages through Wal-Mart and state disability insurance.

Appellant submitted two medical reports. In a report dated April 3, 2001, Dr. Michael R. Decker, a Board-certified internist, stated that appellant was “currently without complaints of numbness and weakness. Also has normal neurological examination.” Dr. Decker stated that he approved appellant’s request to apply for a position as a stocker, in which he would be required to move 40 to 80 pounds. In notes dated August 22, 2001, Dr. Don R. DeFeo, a Board-certified neurosurgeon, diagnosed herniated cervical disc and stated that appellant needs a C6-7 anterior cervical discectomy.

By letter dated October 3, 2001, the Office advised appellant that the aggravation of his neck condition by helping a friend wallpaper and by working at Wal-Mart was not considered a recurrence, since a recurrence was defined as “spontaneous return or increase of disability due to a previous injury or occupational disease without intervening cause.” The Office requested

additional information on his condition and treatment following his original injury, and medical evidence including a history, diagnosis and rationalized opinion on causal relationship.

In a letter dated November 9, 2001, appellant contended that his doctors' statements should confirm that his recurrence was related to a spontaneous return or increase of disability due to a previous injury, and that helping a friend wallpaper and his Wal-Mart duties were not contributing factors. He submitted a November 8, 2001 letter from his supervisor at Wal-Mart stating: "It was reported to me around July 26, 2001 that he had hurt himself helping a friend."

By decision dated November 15, 2001, the Office found that the medical evidence was insufficient to establish a recurrence of his original work injury. The Office also found that the evidence showed that appellant's duties at Wal-Mart caused his neck condition to recur.

By letter dated November 20, 2001, appellant requested a hearing, and stated that he only helped a friend wallpaper once, that he held the wallpaper while his friend did the actual work, and that the total time involved was 45 minutes to 1 hour. Appellant also stated that he performed floor maintenance for Wal-Mart for two and one-half years with no injuries on the job. Appellant submitted a November 20, 2001 letter from his supervisor at Wal-Mart stating that appellant did not report any injury or pain and was capable of doing his duties on floor maintenance from July 17 to 26, 2001. In a letter dated December 12, 2001, appellant's friend stated that appellant assisted him in hanging several pieces of wallpaper, that at most appellant at any one time handed him a piece of wallpaper no greater than 12 feet by 6 inches, that they worked approximately one to one and one-half hours, and that appellant "did not complain of any injury or did I notice any impairment due to handling the wallpaper."

Appellant submitted additional medical evidence. In a report dated July 26, 2001, Dr. Thomas L. Smith, an orthopedic surgeon, noted appellant's complaint of "cervical spine and right arm pain of unknown etiology. He states that he has had this for a considerable period of time." Dr. Smith diagnosed probable cervical radiculopathy, recommended a magnetic resonance imaging (MRI) scan of appellant's cervical spine and "a Corticosteroid Dosepak," and stated that "he is to be off for two weeks." X-rays on July 26, 2001 showed "relatively mild degenerative disc disease at C3-4 and C6-7." An MRI scan of appellant's cervical spine on July 30, 2001 showed "no significant central spinal stenosis or nerve root compression in spite of mild degrees of extruded disc material at C6-7." In a report dated August 6, 2001, Dr. Smith interpreted this MRI scan as "negative for any major disc problems or neuroforaminal problems. There is some scar tissue and old area at C6-7 consistent with old surgical site."

In a report dated August 22, 2001, Dr. DeFeo stated that appellant's "chief complaint began July 17[, 2001] with neck, interscapular, right shoulder and right arm pain," that appellant's MRI scan showed a C6-7 disc herniation, plus "T2 weighted changes [that] are definitely related to his previous surgery." Dr. DeFeo stated: "[Appellant] clearly has a right C7 radiculopathy secondary to dis[c] disease. The pain is significant and has reduced [appellant's] ability to work." In a report dated December 19, 2001, Dr. DeFeo stated that appellant "underwent an anterior cervical discectomy with fusion at C6-7 on Monday, December 17, 2001. The C6-7 is the same disc that was injured and operated on in 1991 as a result of a work injury. It is my opinion that I am treating [appellant] for a recurrent disc at C6-7 and it is related to the 1991 work injury."

In a report dated December 13, 2001, Dr. Smith stated that, on his initial examination of appellant on July 26, 2001, he complained of ongoing problems in his neck “over a number of years, continuing to get worse over the last few months. He states that the pain was first noted, by him, to be increasing on July 17[, 2001] where he had neck and intrascapular pain, right shoulder pain and pain in the right arm.” Dr. Smith concluded:

“Diagnosis, clearly this gentleman has a C7 radiculopathy secondary to dis[c] disease and could benefit from an anterior cervical dis[c]ectomy at the C6-7 area. He has had disease here for a long time and I feel strongly that this is a continuation of the same process at the C6-7 area. The clearest way I could put it is that this cervical dis[c] disease is an ongoing process in this area. I see no indication that there was a new significant injury but one of an exacerbation of a preexisting condition.”

At a hearing held on June 25, 2002, appellant testified that he helped his friend wallpaper on July 17, 2001 but did not notice pain in his right arm until July 26, 2001, that his duties at Wal-Mart consisted of mopping and of running power equipment such as a buffer and scrubber, that this job required lifting up to 50, then 80 pounds and that he had returned to this job on March 4, 2002.

By decision dated September 20, 2002, an Office hearing representative found that appellant “did not establish that he had a recurrence of disability causally related to the accepted condition of cervical strain and herniated disc at C6-7.” The Office hearing representative found that the medical evidence did not indicate what specific employment factors may have led to appellant’s herniated disc in 2001, did not offer an opinion explaining how his current complaints were related to the accepted condition, and did not show that his condition “continued to deteriorate as a result of the accepted condition to cause further disc herniation.”

The Board finds that appellant has not established that he sustained a recurrence of disability on July 26, 2001 due to his accepted employment injuries.

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.² This burden includes the necessity of furnishing evidence 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.³

Although the Office accepted that appellant’s herniated disc that was surgically corrected in 1991 was related to his employment, it did not accept that his cervical disc disease was related to his employment. In a December 13, 2001 report, Dr. Smith concluded that appellant’s C7 radiculopathy found in 2001 was secondary to his disc disease, which he characterized as “an

² *John E. Blount*, 30 ECAB 1374 (1974).

³ *Frances B. Evans*, 32 ECAB 60 (1980).

ongoing process.” In his August 22, 2001 report, Dr. DeFeo also attributed appellant’s C7 radiculopathy to his disc disease.

In a December 19, 2001 report, Dr. DeFeo stated that appellant’s recurrent disc was related to his 1991 work injury, but his only explanation was that this was the same disc that was previously injured and operated on. In a December 13, 2001 report, Dr. Smith stated that appellant’s condition was “an exacerbation of a preexisting condition,” but his only explanation was that it was “a continuation of the same process at the C6-7 area” and that there was no indication of a new significant injury. Neither doctor offered convincing rationale for causal relation, especially in light of both doctors’ statements that the C7 radiculopathy in 2001 was due to cervical disc disease.

The reports of Drs. DeFeo and Smith also do not contain a complete or accurate history. Neither doctor shows any awareness of the July 17, 2001 wallpapering or of appellant’s work involving moving up to 80 pounds at Wal-Mart. These are the factors to which appellant attributed his recurrence of disability on his claim form. After the Office advised him that disability attributable to these factors did not constitute a recurrence, appellant stated that they were not contributing factors. Whether nonwork factors contributed to a claimant’s disability is a medical question, not one for the claimant to decide. Absent an awareness of these factors, the reports of Drs. DeFeo and Smith are of reduced probative value.

An awareness of appellant’s recent activities was especially important, given Dr. Decker’s report of a normal neurological examination of appellant on April 3, 2001, less than four months before his claimed recurrence of disability.⁴ Dr. Decker also reported that appellant had no complaints of numbness or weakness, and concluded that he was able to move up to 80 pounds in his work at Wal-Mart. There is no medical evidence that explains how appellant’s condition progressed to no disability to total disability in less than four months, or how this progression was due to appellant’s employment injuries, the last of which occurred over 12 years earlier. The medical evidence is not sufficient to meet appellant’s burden of proof.

⁴ This was the first medical report in appellant’s case record in almost nine years.

The September 20, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
April 16, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member