U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of OSCAR B. JAMISON and U.S. POSTAL SERVICE,
POST OFFICE, St. Louis, MO

Docket No. 03-543; Submitted on the Record;
Issued April 18, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant's lumbar surgery in August 1997 was medically necessary for treatment of his work-related lumbar condition; and (2) whether appellant established that he sustained a recurrence of disability, commencing February 22, 2001, due to the June 23, 1989 employment injury.

The Office of Workers' Compensation Programs accepted appellant's claim for a herniated disc at L5-S1 and a right L5-S1 lumbar laminectomy on July 21, 1989. The Office paid appellant compensation for time lost from work in July and August 1989 and issued appellant a schedule award for a three percent permanent impairment of the right lower extremity. In October 1995 appellant accepted a limited-duty assignment that required no prolonged standing or sitting, no lifting over 20 pounds and no work over 40 hours a week. On August 15, 1997 appellant underwent a second surgery consisting of posterior lumbar interbody fusion at L5-S1 and posterior decompression at L4-5 and L5-S1. Appellant stopped working on February 22, 2001.

On March 10, 2001 appellant filed a claim for a recurrence of disability, commencing February 22, 2001, due to the June 23, 1989 employment injury. Appellant stated that although he was released to light duty, he had not returned to work but would return to work after his examination by his treating physician, Dr. David R. Lange, a Board-certified orthopedic surgeon. Appellant stated that he had the symptoms and ailments he had before his two back surgeries as in severe inflammation and stiffness in his lower back and in the right and left leg and numbness with no relief from pain.

In a progress note dated February 24, 2001, Dr. Lange stated that appellant had chronic lower back and his examination was "really" unchanged from October 20, 2000. He prescribed medicine for appellant. Progress notes from March 5 through May 30, 2001, document appellant's chronic low back pain.

By decision dated August 7, 2001, the Office denied appellant's claim, stating that the medical evidence did not establish a relationship to the accepted condition of a herniated disc.

By letter dated August 23, 2001, appellant requested an oral hearing before an Office hearing representative, which was held on February 27, 2002. At the hearing, appellant testified that before he stopped work on February 22, 2001 he was performing light-duty work. Appellant testified that he stopped work in February 2001, because he had severe, lower back pain and some pain in both his feet making it hard for him to walk and keep his balance. He stated that both his surgeries in 1989 and 1997, were authorized by the Office although the hearing representative noted that she could find no approval of the 1997 surgery in the record and Dr. Lange stated in a report that the 1997 surgery had been billed under private health insurance. Appellant was currently on disability retirement and stated that he felt his herniated disc was one of the main reasons he was having his physical problems, that he believed that most of them were caused and aggravated by his federal employment.

In the August 15, 1997 surgery report, Dr. Lange stated that appellant had multilevel stenosis, more severe at L4-5 and a degenerative disc at L5-S1. He stated that appellant appeared to have a small amount of retained or recurrent disc material at L5-S1 with epidural scarring. Dr. Lange stated that because of this combination, the appropriate approach would be a posterior decompression along with an interbody fusion.

In his March 13, 2001 report, Dr. Lange stated that appellant felt his current problem was a recurrence of the 1989 work injury and all his care had been authorized by the Office. Dr. Lange stated that this was "news to him" since in 1997, when they performed the decompression and fusion at L5-S1, they knew of the surgery for disc herniation in 1989, but there appeared to be no ongoing connection to his claim since appellant's private health insurance had been billed for his care. Dr. Lange stated that "ultimately" appellant was returned to his chronic limited duty at the employing establishment and it was "obviously unclear" how his current situation might fit into his original injury in 1989. Dr. Lange stated that appellant's current problem was that he "probably" had symptoms partially related to spinal stenosis although it was unclear what was producing his diffuse paresthesia in the upper extremities and potential bowel and bladder dysfunction.

In a report dated September 26, 2001, Dr. Lange diagnosed status post lumbar discectomy 1989 and decompression with interbody fusion 1997. He also diagnosed severe degenerative changes in the lumbar spine, severe spinal stenosis and lumbar radiculopathy. He stated that appellant was trying to avoid a repeat operative procedure on the lumbar spine and should be considered permanently, totally disabled.

By decision dated May 21, 2002, the Office hearing representative found that although the medical evidence in the record did not contain a well-rationalized medical opinion explaining how appellant's current disability was work related, the medical evidence was sufficient to require further development of the Office. The Office hearing representative remanded the case instructing the Office to ask the employing establishment to submit a description of the duties and physical requirements of the limited-duty job claimant held when he stopped work in February 2001. The Office hearing representative stated that the Office should send appellant with a statement of accepted facts to Dr. Lange or to an appropriate medical specialist for a

second opinion to answer the following questions: (1) whether residuals from appellant's June 23, 1989 employment injury contributed to the need for the decompression and fusion surgery appellant underwent on August 15, 1997; (2) whether the medical records from 2001 showed objective evidence of a worsening of the residuals from the June 30, 1989 employment injury; and (3) whether appellant was disabled from performing his limited-duty assignment on and after February 22, 2001 due to a worsening of an employment-related pathology in his back.

By letter dated May 12, 2002, appellant requested authorization for surgery for his spinal stenosis in his lower back.

By letter dated July 10, 2002, the Office informed appellant that a letter from his physician addressing the need for surgery was necessary before further action could be taken.

In a report dated August 19, 2002, a second opinion physician, Dr. Faisal J. Albanna, a Board-certified neurological surgeon, considered appellant's history of injury, performed a physical examination and reviewed magnetic resonance imaging (MRI) scans and computerized axial tomography scans. Dr. Albanna diagnosed residual spinal stenosis at L3-4 and L4-5, above the lumbar fusion, manifesting itself with cauda equina syndrome. He stated that "[t]hese symptoms mainly are consistent with bladder and bowel incontinence, symptoms of concern and if left alone serious neurological compromise with permanence could result." He stated:

> "As to the indication of surgery of August 15, 1997, I agree with that surgery. The patient had the post laminectomy syndrome with degeneration of the disc at that level and a lumbar fusion with instrumentation would be the procedure of choice. Because of the degenerative nature of that disc that could result in spinal instability any surgery short of fusion with instrumentation operation may not provide the structural support, henceforth chronic low back pain, mechanical discogenic back pain, so the decompression removal of scar and fusion with instrumentation would not only decompress the neural elements and free them from any pressure point, in addition to that it would provide structural stability to the lower spine."

Dr. Albanna stated that appellant had symptoms free or mild symptomatology for several years after his initial injury. He stated that since appellant's work included a lot of repetition and lifting, it was "fair to conclude that this repetition and body mechanics employed have aggravated the disc space at L5-S1, which is the disc where surgery was performed in 1989 and in addition to that, the build up of scar in addition to the progressive degeneration of the disc." Dr. Albanna opined that the 1989 surgery and subsequent surgery "were appropriate and were related." He stated:

> "The record is very vague as to the level of symptomatology [appellant] had before his second surgery. If the level of his symptoms was to the point that he had to work in a light[-]duty capacity and his symptoms were becoming in spite of that progressive, I can state there is a relationship between his second surgery and the first surgery, but independent of that, if [appellant] has a good two to three-year period without symptoms between the two surgeries it is very hard, although the second surgery was appropriate, to relate that second surgery to the

> work[-]related injury of 1989, but it would be a separate concurrence. In other words, if the patient had livable back pain, tolerable, manageable symptoms and was functioning well between 1989 and 1997, it would be very hard to justify although appropriate and indicated given the nature of his symptoms by 1997, however, there is no relationship, though appropriate, the surgery of 1997 would not be related to 1989. The record does not furnish substantial evidence of worsening of the residual to relate it to the work injury sustained in 1989."

By letter dated September 16, 2002, the Office asked Dr. Albanna to supplement his opinion based on an updated statement of accepted facts and an updated list of questions.

In a supplemental report dated October 22, 2002, Dr. Albanna stated that within a reasonable degree of medical certainty, the August 15, 1997 lumbar decompression and fusion surgery was necessary secondary to a combination of factors including residual herniated nucleus pulposus, life style as a mailhandler as well as the potential of some people to degenerate more than others. He stated that the worsening of the lumbar surgery was not related to the 1989 work injury. He stated that there was a mild contribution of aggravation of symptoms by the light-duty responsibilities. He diagnosed spinal stenosis and stated that the aggravation was mild lumbar degeneration, which had not resolved. Dr. Albanna stated that the bowl and bladder dysfunctions were suggestive of caudaequina syndrome and were not related to the 1989 work injury. He stated that it appeared from appellant's records that there was a progressive worsening of appellant's symptoms prior to February 22, 2001.

By decision dated November 18, 2002, the Office denied the claim, stating that the medical evidence failed to establish that he sustained a recurrence of disability, that he was totally disabled as of February 23, 2001 and that the 1997 surgery was medically necessary due to his work-related condition.

The Board finds that the case is not in posture for decision.

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] 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.[2] 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.[3] This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate

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

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

[3] *Id*.

factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.[4] 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.[5]

Section 8103(a) of the Federal Workers' Compensation Act states in pertinent part: "The United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduce the degree of the period of disability, or aid in lessening the amount of the monthly compensation."[6] In order to obtain authorization for surgery, appellant must establish that the surgery is necessary for treatment of the effects of the employment-related injury.[7] Proof of causal relation must include supporting rationalized medical evidence.

In his March 13, 2001 report, appellant's treating physician, Dr. Lange stated that it was unclear how appellant's current situation fit into his original injury in 1989. He stated that appellant's current problem was probably related to spinal stenosis and it was unclear what was producing his diffuse paresthesia in the upper extremities and potential bowel and bladder dysfunction. In his September 26, 2001 report, Dr. Lange diagnosed status post lumbar discectomy, 1989 and decompression with interbody fusion, 1997, severe degenerative changes in the lumbar spine, severe spinal stenosis and lumbar radiculopathy. He stated that for appellant to avoid a repeat operative procedure on the spine, he should be considered permanently, totally disabled. Dr. Lange, however, was unable to state what the cause of appellant's back condition was and, therefore, his opinion is of diminished probative value.[8]

In his August 19, 2002 report, the second opinion physician, Dr. Albanna, opined that appellant's surgery on August 15, 1997 was necessary. He then stated that whether the surgery was work related would depend on the severity of appellant's symptoms between the two surgeries, that is, if appellant were symptom free after the 1989 surgery, the 1997 surgery would not be work related but if appellant had symptoms after the 1989 surgery, the 1997 surgery would be work related. Dr. Albanna stated that the record did not furnish substantial evidence of worsening of appellant's residuals related to the 1989 work injury. In his supplemental report dated October 22, 2002, he stated that the August 15, 1997 lumbar decompression and surgery were necessary secondary to a combination of factors including residual herniated nucleus pulposus, life style as a mailhandler as well as the potential of some people to degenerate more than others. He stated that the worsening of the lumbar surgery was not related to the 1989 work injury and there was a mild contribution of aggravation of symptoms by the light-duty

[4] *See Nicolea Bruso*, 33 ECAB 1138 (1982).

[5] *See William S. Wright*, 45 ECAB 498, 503 (1994).

[6] 5 U.S.C. § 8103. *See Robert S. Winchester*, 53 ECAB _____ (Docket No. 00-800, issued November 8, 2002).

[7] *See Cathy B. Millin*, 51 ECAB 331, 333 (2000); *Francis H. Smith*, 46 ECAB 392, 394 (1995).

[8] *Michael E. Smith*, 50 ECAB 313, 316 (1999).

responsibilities. Dr. Albanna stated that appellant had spinal stenosis and the aggravation was mild lumbar degeneration which had not resolved.

Dr. Albanna's opinion is confused and unclear and warrants remand of the case to obtain another second opinion from an appropriate physician. Since Dr. Albanna stated that the August 15, 1997 lumbar decompression and fusion surgery were necessary in part due to the residual herniated nucleus pulposus, which is the accepted condition, that would suggest the 1997 surgery was work related. But then he stated that the worsening of the lumbar surgery was not related to the 1989 work injury. He also suggested that appellant sustained a new injury due to aggravation of his symptoms by the light-duty responsibilities. If this were the case appellant would need to file a claim for a new injury, not a recurrence of disability.[9] Because Dr. Albanna already provided a supplemental opinion, on remand the case should be referred to a different second opinion physician. The Office should send appellant with the case record and a statement of accepted facts for a medical evaluation, with instructions for the physician to address whether appellant sustained a recurrence of disability on February 22, 2001 whether his current back condition or other health problems are causally related to the June 23, 1989 employment injury and whether the 1997 back surgery was necessary and related to the 1989 employment injury. After further development as it deems necessary, the Office should issue a *de novo* decision.

The November 18, 2002 decision of the Office of Workers' Compensation Programs is hereby set aside and the case remanded for further action consistent with this decision.

Dated, Washington, DC
April 18, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[9] *See* 20 C.F.R. § 10.104; *Willie J. Clements, Jr.*, 43 ECAB 244, 247 n. 8 (1991).