

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARTIN MELLIAND and DEPARTMENT OF JUSTICE,
BUREAU OF PRISONS, Otisville, NY

*Docket No. 03-1228; Submitted on the Record;
Issued August 25, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant met his burden of proof to establish that he became totally disabled for the period of December 26, 2000 to February 19, 2001 due to his August 4, 1997 employment injury.

On August 4, 1997 appellant, then a 42-year-old correctional officer, slipped while checking a drainage pipe and landed on his back and upper right arm. He filed a notice of injury (Form CA-1) and submitted an August 5, 1997 report from Dr. Thomas Minora, who diagnosed a lumbar strain and recommended that appellant return to light duty on August 7, 1997. In a September 16, 1997 report, Dr. Minora, after interpreting a magnetic resonance imaging (MRI) scan, diagnosed lumbosacral disc disease and placed appellant on total temporary disability. The Office of Workers' Compensation Programs accepted appellant's claim for aggravation of preexisting degenerative disc disease.

On January 13, 2000 the Office authorized back surgery that was performed on April 11, 2000. Appellant remained off work until July 24, 2000 when he returned to light duty for six hours a day; he then returned to full-time light duty on August 25, 2000. In a September 18, 2000 report, Dr. Allan Gillick, an attending Board-certified orthopedic surgeon, wrote that a recent MRI scan revealed mild degeneration at L5-S1 and that a discogram was positive at L4-5 and mildly positive at L5-S1. In an October 11, 2000 report, Dr. Paul Horchos, an attending osteopath, wrote that appellant's pain was severe and getting worse and he needed to be evaluated for surgical fusion. On examination he found appellant's ambulation smooth and nonantalgic, with a significantly impaired range of a motion. Dr. Horchos indicated that appellant described a sense of pressure along the L3-4 and L5 region.

Appellant stopped work on December 26, 2000 and returned on February 19, 2001 and requested wage-loss compensation for this period through periodic CA-8 forms. In a January 30, 2001 report, Dr. Horchos wrote that appellant presented with intensified back pain that occasionally would have a radicular component. Dr. Horchos indicated that appellant took himself off work for a couple of weeks, due to pain that prevented him from doing even light

duty, which might have resulted when he was patting a prisoner down with his palms. He concluded that appellant needed to pursue lumbar fusion surgery, but first he had to lose 100 pounds and get down to around 250 pounds. He indicated that there was no reason that appellant should not work, provided it was sedentary duty.

In a March 2, 2001 letter, the Office informed appellant that he should submit a claim for a recurrence of disability and submit a detailed medical report. In a March 20, 2001 report, Dr. Minora wrote that appellant was seen on December 29, 2000 and complained of back pain consistent with his MRI scan results. He recommended that appellant remain off work until further testing. In an April 24, 2001 report, Dr. Horchos wrote that appellant had returned to work but still suffered from lumbar discogenic disease exacerbated by his weight and current level of activity.

In a December 15, 2001 decision, the Office denied compensation for the period of December 26, 2000 through February 19, 2001, finding the medical evidence insufficient to establish that he was totally disabled.

In a January 4, 2002 letter, appellant requested a hearing. In a January 4, 2002 letter, Dr. Horchos clarified that, when he wrote in the January 30, 2001 report that appellant could return to light-duty work, he did not mean that appellant was not totally disabled for the weeks preceding his report, but that appellant could return to work after January 30, 2001.¹ Appellant also submitted various medical reports that address his condition after the period at issue.

In a December 12, 2002 letter, appellant requested that his review be performed on the record and not in a hearing. In an April 7, 2003 decision, the Office denied the claim finding the medical evidence insufficient.

The Board finds that appellant has not met his burden of proof to establish that he was totally disabled from December 29, 2000 through February 19, 2001 due to the accepted injury.

The Office accepted that appellant sustained an employment-related aggravation of his preexisting degenerative disease culminating in surgery on April 11, 2000. He was released to return to work at light duty on July 24, 2000 for six hours a day, and to full time on August 25, 2000. Appellant claimed compensation for total disability for the period December 26, 2000 to February 19, 2001 by submission of a Form CA-8. As such, he has the burden of proof to establish total disability for the claimed period by the submission of probative medical evidence.²

In the present case, the medical evidence is insufficient to establish that appellant was totally disabled for the period in question due to his accepted employment injury of August 4, 1997. In a March 20, 2001 report, Dr. Minora, an attending Board-certified orthopedic surgeon, wrote that appellant was seen on December 29, 2000 and complained of back pain

¹ In a December 11, 2001 form report, Dr. Horchos checked a box indicating that appellant's "lumbar discogenic entroply" was related to his August 4, 1997 injury; he noted that appellant was totally disabled since December 26, 2000.

² See *Sheri Lynn Gavise*, Docket No. 94-663 (issued January 17, 1995); see also *Charles E. Robinson*, 47 ECAB 536 (1996); *Donald Leroy Ballard*, 43 ECAB 876 (1992).

consistent with his MRI scan results. He recommended that appellant remain off work until further testing but did not explain how appellant's back condition was causally related to the accepted injury or surgery. Dr. Minora did not provide a rationalized medical opinion to explain how appellant's disability for work commencing December 29, 2000 related to the accepted condition.

In a January 30, 2001 report, Dr. Horchos, an attending osteopath, noted that appellant took himself off work for a couple of weeks due to pain that prevented him from doing light duty, which might have resulted from appellant patting a prisoner down with his palms. This report does not establish that appellant became totally disabled during the period in question due to residuals of the accepted back condition or surgery. Rather, the physician noted that appellant took himself off work and did not provide any opinion on disability.³ Moreover, Dr. Horchos suggested that appellant's disability may have been the result of a new injury. In a clarifying report, written almost a year later, Dr. Horchos stated that, when he wrote the January 30, 2001 report that appellant could return to light-duty work, he did not mean that appellant was not totally disabled for the weeks preceding his report, but that appellant could return to work after January 30, 2001. The Board finds the reports of Dr. Horchos to be of diminished probative value as the physician did not causally relate appellant's condition during the period in question to his accepted injury nor did he explain how appellant's disability was caused or aggravated by the accepted condition. The record also contains a December 11, 2001 form report, in which Dr. Horchos checked a box indicating that appellant's "lumbar discogenic entropy" was related to his August 4, 1997 injury; indicating that appellant was totally disabled since December 26, 2000. However, as Dr. Horchos did no more than check "yes" to a form question, his opinion on causal relationship is of diminished probative value.⁴ The other evidence that appellant submitted consists of medical reports that address his condition subsequent to February 19, 2001 and are not relevant to the question at issue.

Absent rationalized medical evidence establishing appellant was totally disabled for the period of December 29, 2000 through February 19, 2001 and causally relating his medical condition to the accepted injury of August 4, 1997, he has not met his burden of proof to establish entitlement of benefits under the Federal Employees' Compensation Act.

³ See *Earl David Seal*, 49 ECAB 152 (1997).

⁴ See *Calvin E. King*, 51 ECAB 394 (2000).

The decisions of the Office of Workers' Compensation Programs dated April 7, 2003 and December 15, 2001 are affirmed.

Dated, Washington, DC
August 25, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member