

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALLEN W. HERMES and DEPARTMENT OF AGRICULTURE,
POULTRY GRADING BRANCH, Austin, TX

*Docket No. 03-1859; Submitted on the Record,
Issued December 19, 2003*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant has established that he sustained a recurrence of disability on November 1, 1995 causally related to his accepted work injury of February 21, 1984.

This case has previously been before the Board. The facts of the case as presented in the previous Board decisions are hereby incorporated by reference.¹ The only decision before the Board in this appeal is a July 3, 2003 decision denying appellant's claim for a recurrence of disability commencing in August 1995.

On February 23, 1984 appellant, then a 32-year-old eggshell grader, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1), alleging that on February 21, 1984 when attempting to catch a falling box of eggs he sustained an injury to his lower back. On April 20, 1984 the Office of Workers' Compensation Programs accepted appellant's claim for a lumbosacral strain and herniated nucleus pulposus L4-5 and he was provided with periods of compensation and continued medical care.

On December 10, 1995 appellant filed a notice of recurrence of disability due to the February 2, 1984 injury. He alleged that the recurrence occurred in August 1995, with work stoppage on November 1, 1995. With regard to the claimed recurrence, appellant noted that the position of veterans service officer, upon which had determined his wage-earning capacity, had changed in that his secretary's position was eliminated, which required him to perform such duties. He noted that he had to sit for longer periods of time and work many more hours. Due to change in working conditions, appellant resigned from his position.

In support of his claim, appellant submitted a December 27, 1995 medical report from Dr. Maurice G. Wilkinson, a family practitioner, who indicated that he was experiencing

¹ *Allen W. Hermes*, Docket No. 92-1591 (issued November 14, 2002) Docket No. 98-161 (issued December 13, 1999); Docket No. 94-2143 (issued August 22, 1996); Docket No. 93-72 (issued January 6, 1994); Docket No. 93-185 (issued December 17, 1993); 43 ECAB 435 (1992); 41 ECAB 838 (1990).

discomfort. He stated that appellant's back condition was aggravated by the amount of filing, bending and stooping that he was required to perform.

On February 10, 1999 Dr. Wilkinson indicated that appellant was still unable to perform duties which required him to lift, sit long term sitting or traveling in a car for any length of distance. In a February 19, 2002 report, he stated:

“[Appellant] continues to have pain almost constantly in his lumbar spine. This is into the S1 joint bilaterally, slightly greater on the right than the left. He has obvious difficulty sitting and has difficulty getting up and down. [Appellant] frequently requires a cane for mobility. With the addition of his severe degenerative condition in his right knee of course, his gait is somewhat impaired, which further aggravates his back condition. He has obvious paravertebral muscle spasm in the lumbar paravertebral and is very, very tender over the right S1 joint. [Appellant] rates his pain on a scale of 1-[to]-10 as a 6, even with narcotics on board and is a 9 without.”

In the prior November 14, 2002 decision, the Board found that appellant submitted sufficient evidence that his job duties changed when his secretary's position was eliminated and he performed additional clerical work. The Board noted, however, that the medical evidence was insufficient to show that this change of duties resulted in appellant's claimed disability for work. The Board remanded the case for further development of the medical evidence.

By letter dated January 8, 2003, the Office referred appellant to Dr. Govindasamy Durairaj, a Board-certified orthopedic surgeon, for a second opinion examination. In a medical report dated February 5, 2003, he listed his impressions as: “Degenerative changes in the lumbar spine with marked narrowing at L3-4 and L4-5 with protrusion of the disc at L3-4 and L4-5. Lateral collateral ligament instability with moderate narrowing of the lateral compartment.” Dr. Durairaj opined that the accepted lumbar sprain and lumbar degenerative disease conditions and the work-related aggravation of the right knee condition had not resolved. He noted that the diagnosis should be upgraded to include lumbar disc protrusion at L3-4 and L4-5, rather than lumbar strain. Dr. Durairaj found that appellant was unable to return to his original job due to both his back and knee conditions, but that he could work modified duties for four hours a day. In response to an Office inquiry as to whether appellant sustained a recurrence of total disability in November 1995, due to his work activities, Dr. Durairaj responded:

“It is hard for me to answer this question because I really did not have any information about the total disability of November 1995. I do have information from Dr. Wilkinson, when he wrote that [appellant] is totally disabled somewhere of May 2002. In my opinion, within a reasonable medical probability he could work in restricted and light duty about four hours a day.”

The Office asked Dr. Durairaj for clarification with regard to whether appellant's work-related condition changed in 1995 to the extent that it caused total disability. In a letter dated February 27, 2003, he responded:

"I feel that the injury which has been dated so long is probably the cause of [appellant] not being able to return back to work, even though we do not have a documented report from Dr. Wilkinson. Whether he would have been able to do any light job or not, it is a very hard question to answer for anybody, because we really do not know how much pain he has, whether he would have worked two hours or four hours a day at that time or he could have done restricted work or not, it is going to be very hard to say. With the time of injury from 1979 to 1995, which is about 16 years and the back injury which is from 1984 to 1995, which is about 11 years, it looks like within reasonable medical probability, [appellant] probably would not have been able to return back to any type of work. I can only base my opinion on reasonable medical probability and not on reasonable medical certainty."

As the Office found Dr. Durairaj's opinion to be inconclusive and referred appellant for another second opinion evaluation with Dr. Jonathan Clark Race, a Board-certified orthopedic surgeon. In a report dated May 27, 2003, he listed his impressions as chronic low back pain with radicular symptoms in the left leg secondary to degenerative disc disease at L3-4 and L4-5 and post-traumatic arthritis of the right knee. He did not believe that the effects of the accepted lumbar strain and degenerative disc disease condition had resolved. With regard to appellant's knee, Dr. Race indicated that appellant's slip and fall had probably aggravated his knee, but would not be the primary reason that he continues to have knee problems of the current magnitude. He noted:

"The ongoing symptoms appear to be primarily related to the fact that [appellant] had multiple surgeries prior to his work-related injury and it appears that he had a lateral meniscectomy and ligament reconstruction causing progressive lateral arthritis in the knee. Those previous injuries and surgeries are most likely the cause of his continuing knee symptoms as opposed to a one-time injury at work. The evidence would support that [appellant's] ongoing conditions are primarily related to his degenerative arthritis in the knee, which as discussed above, in my opinion, is primarily related to preexisting injuries. The fact that he had no history of any prior lower back symptoms would suggest that the work-related injury may have caused a cascade of events leading to chronic degenerative disc problems with the lower back. In that sense, those conditions would still be active. Progressive lumbar degenerative disc disease is often a very prolonged and drawn out process resulting in chronic pain and mechanical dysfunction of the back leading to gradual deterioration of the structure of the lumbar spine disc segments. In that sense, it is possible that an injury long ago could result in damage to the spine, which would have ongoing symptoms. In my opinion [appellant] could return to work part time. I would agree with the restrictions placed by Dr. Durairaj.... I would not consider the injury to be the primary problem causing [appellant's] ongoing symptoms, as there was no report of any significant traumatic injury during that period. I do not think that any possible

aggravation of the condition in 1995 would be responsible for his permanent problems.”

By decision dated July 3, 2003, the Office found that the evidence of record failed to support a recurrence of total disability on November 1, 1995 as being causally related to the work-related injury of February 21, 1984. The Office denied appellant’s claim as the evidence submitted failed to establish a causal relationship between his alleged recurrence of disability and the work-related injury of February 21, 1984.

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

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 of establishing by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he cannot perform such light duty. As part of his burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.²

Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence a causal relationship between his recurrence of disability and his February 21, 1984 employment injury.³ 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 employment factors and supports that conclusion with sound medical reasoning.⁴

The Office referred appellant to Dr. Durairaj for a second opinion medical evaluation and opinion on whether he sustained a recurrence of disability due to his accepted injury. The Office determined that Dr. Durairaj’s opinion was inconclusive. The Office then referred appellant to Dr. Race who opined that appellant’s work-related injury was not the primary problem causing his ongoing symptoms and that he did not think that any possible aggravation of appellant’s condition in 1995 would be responsible for his permanent condition. The Board finds that Dr. Race’s opinion is contrary to the opinion of appellant’s treating physician, Dr. Wilkinson, who noted that aggravation of appellant’s back injury was caused by the amount of filing, bending and stooping.

Section 8123(a) of the Federal Employees’ Compensation Act provides that, when there is a disagreement between a physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.⁵ The case will be remanded to the Office for resolution of the conflict. On

² *Terry R. Hedman*, 38 ECAB 222 (1986).

³ *Maurissa Mack*, 50 ECAB 498, 503 (1999).

⁴ *Id.*

⁵ *Roger W. Griffith*, 51 ECAB 491, 504 (2000); *Joseph D. Lee*, 42 ECAB 172 (1990).

remand the Office should refer appellant, along with the case record and a statement of accepted facts, to an appropriate specialist for a rationalized opinion on whether appellant's accepted condition caused or contributed to his disability on or after November 1, 1995. After such development as the Office deems necessary, it should issue an appropriate decision.

The decision of the Office of Workers' Compensation Programs dated July 3, 2003 is hereby set aside and this case is remanded for further consideration consistent with this decision.⁶

Dated, Washington, DC
December 19, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁶ Appellant submitted additional evidence to the Office after July 3, 2003, but the Board's review of a case is limited to the evidence in the case record, which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).