

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LEONARD J. FISHER and DEPARTMENT OF THE AIR FORCE,
McCHORD AIR FORCE BASE, WA

*Docket No. 03-1823; Submitted on the Record;
Issued October 7, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether appellant established that his disability for the period January 14 to February 22, 2002 was causally related to his employment-related back condition; and (2) whether the Office of Workers' Compensation Programs abused its discretion on April 8, 2003 in refusing to reopen appellant's claim for further reconsideration of the merits under 5 U.S.C. § 8128(a).

On January 29, 1999 appellant, then a 48-year-old machinist welder, filed a claim for traumatic injury alleging that on that date he sustained a back injury while reassembling a milling machine in the performance of duty. He stopped work on January 27, 1999 and returned to part-time limited duty on June 1, 1999. On June 28, 1999 appellant was released to return to work full duty, but continued to be accommodated by the employing establishment. On March 22, 1999 the Office accepted appellant's claim for a herniated nucleus pulposus, necessitating L5-S1 surgical microdissection on March 29, 1999.

On July 14, 2000 appellant completed a claim for a recurrence of disability, which was received by the Office on November 14, 2000. He listed the date of the recurrence as June 28, 2000, but did not indicate whether he had stopped work. By letter dated December 1, 2000, the Office requested that appellant submit additional factual and medical information, but he did not respond. In a memorandum dated January 28, 2002, the employing establishment explained that in July 2000, appellant discussed complications he had been having since his back surgery the previous year. He completed a claim for recurrence of disability, but the employing establishment failed to submit the claim on his behalf until November 2000. The employing establishment noted that, while appellant had received the Office's December 1, 2000 development letter, he suffered a heart attack on January 18, 2001 before he could respond to the letter. Appellant returned to work after approximately four weeks, but on October 25, 2001, he was relieved of all work duties due to severe back pain, high blood pressure and phlebitis. On December 10, 2001 he returned to work, however, he was unable to continue and was again released from work indefinitely on December 20, 2001.

On January 25, 2002 appellant submitted a second claim for a recurrence of disability. He indicated that the date of the recurrence was June 28, 2000 and indicated that he stopped work on October 25, 2001, returned to work on December 10, 2001 and stopped work again on December 13, 2001. Accompanying appellant's claim form was a letter dated January 25, 2002 from Robert J. Pierce, appellant's foreman. Mr. Pierce stated that due to the difficult nature of the work, since appellant's surgery he kept appellant off the flight line, which normally accounted for 25 percent of the work, except for training or supervising other workers. He stated that this was his decision based on the real possibility of reinjury and the fact that younger workers could do the work faster. Mr. Pierce explained that appellant was an outstanding worker, but that since his surgery he was only able to perform at 50 percent of his prior ability. He noted that since appellant's back surgery, he had also suffered a heart attack and experienced uncontrolled high blood pressure. Mr. Pierce concluded that in his opinion, if appellant kept working he would become an on-the-job fatality.

By letter dated February 26, 2002, the Office asked appellant to submit additional medical and factual evidence in support of his claim for a recurrence of disability. In response, in addition to medical evidence, appellant submitted a narrative statement dated January 13, 2002, in which he described his back pain and explained how it affected his daily life. Appellant stated that he had been on a light "work as tolerated" schedule prior to October 25, 2001 and that since that date he has been off work except for December 10 and 11, 2001, when he attempted to return to work. He stated that he had tried to return to work because he wanted to be productive and was also extremely stressed out over the fact that he had no leave. Appellant concluded that, when he did return to work, his pain increased, the stress increased and his blood pressure rose, necessitating that he again stop work. In addition to the medical evidence and narrative statement, appellant submitted three claims for compensation, Forms CA-7, claiming wage-loss compensation for the period January 14 to February 22, 2002.

By letter dated June 18, 2002, the Office explained the type of medical evidence appellant needed to submit in order to support his claim for disability for the period January 14 to February 22, 2002. The Office allowed 30 days for response.

By letter dated June 19, 2002, the Office informed appellant that his claim for a recurrence of disability had been accepted. The Office did not specify the date of the recurrence, or explain what periods of disability were covered, but rather instructed appellant to submit a completed CA-7 form for any lost time from work, if he had not already done so.

In a decision dated July 19, 2002, the Office denied appellant's claim for compensation for the period January 14 to February 22, 2002. By letter dated February 1, 2003, appellant requested reconsideration and submitted additional medical evidence in support of his request. In a decision dated April 8, 2003, the Office found the newly submitted evidence to be insufficient to warrant further merit review.

The Board finds that appellant has not established that his disability for the period January 14 to February 22, 2002 was causally related to his accepted herniated nucleus pulposus.

It is an accepted principle of workers' compensation law that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that

flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause which is attributable to the employee's own intentional conduct.¹ In discussing how far the range of compensable consequences is carried, once the primary injury is causally connected with the employment, Professor Larson states:

“When the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury, the rules that come into play are essentially based upon the concepts of ‘direct and natural results’ and of claimant’s own conduct as an independent intervening cause. The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.”²

Thus, it is accepted that once the work-connected character of any condition is established, the “subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause.”³

Appellant’s primary assertion is that his accepted back condition exacerbated his other nonwork-related conditions, necessitating his January 14, 2002 work stoppage. The medical evidence consists of numerous reports from appellant’s treating physician, Dr. Mark F. Brooks, a Board-certified family practitioner. In treatment notes dated November 27 and 30, 2001, Dr. Brooks noted appellant’s symptoms of right leg phlebitis, recommended he undergo a Doppler venous study⁴ and recommended that he stay off work for about a week. Dr. Brooks did not discuss appellant’s accepted back condition or how it contributed to any disability for work. In a treatment note dated December 20, 2001, shortly before the claimed period of disability, he noted that appellant presented for a follow-up of his hypertension and right leg phlebitis conditions. Dr. Brooks noted that appellant attempted to work two days but developed pain in his right leg, as he had previously and stopped work. He noted that appellant complained that he continued to have residual pain in his right leg, that his blood pressure had been elevated, although less so since he had been away from work and that he was under a great deal of stress dealing with trying to work with the symptoms and physical limitations that he has. Dr. Brooks diagnosed hypertension, coronary artery disease and phlebitis and stated:

“I do not think the [appellant] will be able to work with his recurrent phlebitis, his [hypertension] and [coronary artery disease]. I have a piece of correspondence from his supervisor who feels that [he], based on the supervisor’s observations, would probably die on the job if he continues to work. I do not think that this is a far fetched assessment. [Appellant] is not to return to work at this time. I asked

¹ Larson, *The Law of Workers’ Compensation*, 13.00.

² *Id.* at § 13.11.

³ *Id.* at § 13.11(a); *Charlet Garrett Smith*, 47 ECAB 562 (1996); *see also Stuart K. Stanton*, 40 ECAB 859 (1989); *Robert R. Harrison*, 14 ECAB 29 (1962).

⁴ Additional testing performed on December 31, 2001 confirmed the diagnosis of superficial phlebitis, right leg.

that he check into disability and I will obtain from him the forms that I need to that end.”

In a letter also dated December 20, 2001, Dr. Brooks stated:

“[Appellant] is a patient of mine and has been for approximately seven years. He has a history of a myocardial infarction and a lumbosacral syndrome which necessitated surgery and is currently symptomatic. In addition, he has a history of hypertension and recurrence phlebitis.

“[Appellant] has attempted to remain functional in his employment as an aircraft mechanic. Unfortunately, he experiences daily pain with radiation into the leg. In [appellant’s] attempt to remain stoic and work, he has had an exacerbation of his hypertension. Given his past history of myocardial infarction and the severity of the blood pressure readings I think that it is detrimental for him to continue in his current capacity. Based on my history, physical exam[ination] and ongoing evaluations of [appellant], I believe he is totally and permanently disabled.”

In a treatment note dated January 10, 2002, Dr. Brooks noted that appellant’s back pain had been aggravated recently by having to be on bed rest with recurrent superficial phlebitis. He noted that on physical examination, appellant had decreased range of motion secondary to low back pain and marked spasticity and extreme tenderness in the paralumbar muscles over the proximate L4-5. Dr. Brooks stated that appellant should continue his efforts at medical retirement and concluded that he did not think appellant could continue to work. In treatment notes dated January 29 and June 4, 2002, Dr. Brooks documented appellant’s continued complaints due to his coronary artery disease, phlebitis, hypertension, back and leg pain. While he also noted that appellant was not working, he did not discuss the cause of appellant’s disability.

Although appellant has an employment-related herniated disc, the record addresses several additional health conditions which rendered him unable to work from January 14 to February 22, 2002. In order for appellant to be entitled to compensation benefits under the Federal Employees’ Compensation Act, he must establish, through the submission of rationalized medical evidence, that his disability for this period was due, at least in part, to his accepted back condition.⁵ While Dr. Brooks has indicated that appellant’s back was still symptomatic and that he was unable to work, he did not say that appellant’s inability to work was due to his back condition. Rather, Dr. Brooks clearly attributed appellant’s inability to work to his recurrent phlebitis, hypertension and coronary artery disease. The medical evidence required to establish causal relationship, generally, is rationalized medical opinion evidence.⁶ Rationalized medical opinion evidence is medical evidence that includes a physician’s reasoned opinion on whether there is a causal relationship between the claimant’s diagnosed condition and the established incident or factor of employment. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical

⁵ *Carmen Gould*, 50 ECAB 504 (1999).

⁶ *Charles E. Evans*, 48 ECAB 692 (1997).

certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the established incident or factor of employment.⁷ Appellant asserts that attempting to perform his duties with his painful herniated disc increased his stress level, which, in turn, increased his blood pressure to dangerous levels, causing his disability for work. However, appellant did not provide a medical opinion which explained the relationship, if any, between his accepted back condition, his other diagnosed conditions and his disability for work for the period January 14 to February 22, 2002.

Subsequent to the Office's July 19, 2002 merit decision, in a February 1, 2003 letter, appellant requested reconsideration and submitted additional factual and medical evidence. He asserted that his disabling coronary artery disease, hypertension and phlebitis were causally related to the back pain from his accepted herniated disc.

By decision dated April 8, 2003, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant review of the prior decision.

The Board finds that the Office properly denied appellant's request for reconsideration.

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.⁸ Section 10.608(b) provides that, when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.⁹

Appellant's February 1, 2003 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Appellant asserted that the reports of Dr. Brooks were sufficient to establish that he continued to be disabled due to his accepted back condition. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).

Appellant submitted treatment notes from Dr. Brooks, dated December 26, February 19 and August 28, 2002 and January 23, 2003, who documented his treatment for hypertension, coronary artery disease and phlebitis and further noted that appellant continued to suffer exacerbations of his employment-related back injury. While Dr. Brooks also noted that appellant was not working, he did not discuss the cause of his disability. The record also contains the results of a magnetic resonance imaging scan performed on January 27, 2003. This report indicates the presence of postoperative changes at L5 and degenerative disc disease focally at

⁷ *Charles E. Evans, supra; Earl D. Smith*, 48 ECAB 615 (1997).

⁸ 20 C.F.R. § 10.606(b)(2).

⁹ 20 C.F.R. § 10.606(b).

L2-3 with a mild concentric disc bulge, but no significant spinal stenosis. However, the report does not contain any opinion regarding appellant's disability for the period claimed. The record contains a narrative report from Dr. Brooks dated July 5, 2002, in which he referenced the Office's June 18, 2002 development letter and stated:

“[Appellant] has been under my care during the same time in question, that being January 14 to February 22, 2002. Reasons listed for his inability to work in this particular letter included coronary artery disease, hypertension and phlebitis. This is a correct listing of his diagnosis, but not all inclusive. [Appellant] also at that period of time definitely was experiencing problems from his low back syndrome. There are records on file in my office to substantiate this.”

Although Dr. Brooks stated that appellant had back pain from his accepted condition, but he did not offer any opinion as to how appellant's back pain rendered him disabled from January 14 to February 22, 2002. As his reports do not discuss the issue of causal relationship, they are irrelevant to the particular issue in this case.¹⁰ Consequently, this evidence is insufficient to warrant reopening the record for merit review.

As appellant has failed to show that the Office erroneously applied or interpreted a point of law, to advance a point of law not previously considered by the Office or to submit relevant and pertinent new evidence not previously considered by the Office, the Office properly refused to reopen appellant's claim for a review on the merits.

The decisions of the Office of Workers' Compensation Programs dated April 8, 2003 and July 19, 2002 are affirmed.

Dated, Washington, DC
October 7, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

¹⁰ *Dominic E. Coppo*, 44 ECAB 484 (1993); *Barbara J. Williams*, 40 ECAB 649 (1989).