

In a report dated December 29, 1997, Dr. John P. Howser, a Board-certified neurosurgeon and appellant's attending physician, related that he treated appellant on December 2, 1997 for pain in his back and left hip and leg which began when he walked up stairs at work. He noted that a magnetic resonance imaging (MRI) study of appellant's lumbar spine "revealed a minimal broad based posterior disc bulge at L5-S1" without evidence of herniation. Dr. Howser diagnosed an exacerbation of a preexisting condition. In an accompanying form report, Dr. Howser diagnosed lumbar facet syndrome and found that appellant was totally disabled beginning December 2, 1997.

In a form report dated January 14, 1998, Dr. Howser described the history of injury as appellant experiencing pain after repositioning a personal computer and then walking up a flight of stairs on November 26, 1997. He diagnosed lumbar facet syndrome and noted that appellant had previously experienced lumbar facet syndrome in May 1991. Dr. Howser checked "yes" that the condition was caused or aggravated by his employment and noted that appellant's "employment activity required repositioning of [the] computer -- which required lifting [and] twisting which could cause and/or aggravate his lumbar facet syndrome."

Dr. Howser reevaluated appellant on January 29, 1998. He noted that appellant had originally forgotten to mention moving the personal computer in his office when he initially described the circumstances surrounding his injury. On physical examination, Dr. Howser listed findings of "moderate paravertebral muscle spasm and restricted range of motion of the lumbar spine with pain on extension and on flexion." He further noted that appellant had a normal thoracic MRI scan. Dr. Howser diagnosed an exacerbation of preexisting lumbar facet syndrome and opined that appellant was disabled from employment.

In an undated report received by the Office on April 23, 1998, Dr. Howser discussed appellant's history of injury and medical treatment provided. He found that appellant was "unable to work because of this significant lumbar facet syndrome which in my opinion was a result of an injury at work as described of November 26, 1997."¹

Appellant filed a claim requesting compensation beginning February 9, 1998 and continuing indefinitely. By letter dated May 20, 1998, the Office informed appellant that it had accepted his claim for lumbosacral sprain. The Office requested that appellant submit medical evidence establishing his disability from work beginning February 9, 1998.²

On June 6, 1998 Dr. Howser diagnosed lumbar facet syndrome and recommended that appellant retire on disability as he was unable to work since December 2, 1997. The record indicates that appellant retired on disability effective April 15, 1998.

A computerized tomography (CT) scan following a myelogram was obtained on October 20, 1998 and showed a disc bulge at L5-S1 mildly effacing the thecal sac. A CT scan of

¹ An MRI scan dated March 31, 1998 revealed no bulging disc, herniation, degeneration or stenosis at L1-2, L2-3, L3-4 and L4-5. At L5-S1 the MRI scan revealed a minimal to mild disc bulge without evidence of herniation and no significant stenosis.

² The Office further noted that appellant had previously sustained lumbar facet syndrome in May 1991.

the cervical spine dated October 21, 1998 showed “[f]acet hypertrophy and small osteophytes at multiple levels with no evidence of an HNP [herniated nucleus pulposus] or spinal stenosis.”

By decision dated December 2, 1998, the Office denied appellant’s claim for an exacerbation of lumbar facet syndrome casually related to his November 26, 1997 employment injury. The Office noted that appellant had not mentioned moving a personal computer on his original claim form and informed him that he should file another claim for any injury arising from this incident.

On December 28, 1998 appellant requested a hearing. He submitted a report dated January 4, 1998, received by the Office on January 11, 1999, from Dr. Howser, who discussed appellant’s history of a November 26, 1997 injury while repositioning a computer and later going up steps. Dr. Howser stated, “His diagnosis is [l]umbar [f]acet [s]yndrome and he is currently under my care for this condition. This condition is related to the above incidents.”

A hearing was held on July 26, 1999. In a decision dated September 22, 1999, an Office hearing representative set aside the December 2, 1998 decision and remanded the case for the Office to refer appellant for a second opinion examination. The hearing representative found that appellant had established that he moved a computer on November 26, 1997 as alleged and accepted the claim for an exacerbation of lumbar facet syndrome. He further rescinded the acceptance of lumbosacral sprain after noting that none of the medical reports included that diagnosis. The hearing representative found that the record required further development on the issue of whether appellant was totally disabled on or after February 9, 1998 due to his exacerbation of lumbar facet syndrome.

By letter dated February 14, 2000, the Office referred appellant to Dr. Carl W. Huff, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated February 29, 2000, Dr. Huff described appellant’s complaints and reviewed the medical evidence of record. On physical examination, Dr. Huff noted that appellant responded “in a grossly exaggerated manner, making exaggerated facial and verbal gestures and body movements to even light pressure or stimulus.” He opined that appellant’s examination “correlates strongly with symptom magnification.” Dr. Huff diagnosed back pain without objective findings and status post lumbar laminectomy. He opined that appellant could resume his regular employment. Dr. Huff further noted that, at the time of appellant’s injury, he was receiving treatment by Dr. Howser for neck and lower back pain. Dr. Huff found that the diagnosis of lumbar facet syndrome was based on subjective criteria rather than objective evidence such as MRI findings. In a work restriction evaluation dated March 1, 2000, Dr. Huff found that appellant could work for eight hours per day without limitations.

In a decision dated March 10, 2000, the Office denied appellant’s claim for disability on or after February 9, 1998 causally related to his November 26, 1997 employment injury.

In a report dated April 11, 2000, Dr. Howser noted that appellant’s “multiple problems will greatly impair his ability to obtain and sustain gainful employment” and enclosed a March 17, 2000 functional assessment.

On April 6, 2000 appellant requested a hearing on his claim. Following a preliminary review of the request, a hearing representative found that the case was not in posture for a hearing and vacated the Office's March 10, 2000 decision. The hearing representative found that Dr. Huff had not addressed whether appellant had an injury to his back from the November 26, 1997 employment incident and whether it caused any disability from employment. He instructed the Office to refer the record back to Dr. Huff for a supplemental report. The hearing representative further instructed the Office to obtain records regarding appellant's July 1989 back surgery and May 9, 1991 employment injury, accepted by the Office for lumbosacral strain under File Number A6-518916. The hearing representative also determined that the Office should prepare a new statement of accepted facts.

In a letter dated January 25, 2001, the Office requested that appellant submit all medical records regarding his July 1989 low back surgery.

On May 10, 2001 the Office requested that Dr. Huff clarify his prior medical report and enclosed a new statement of accepted facts. In a supplemental report dated August 6, 2001, Dr. Huff found that the November 26, 1997 employment injury caused "no structural injury to the lumbar spine" as documented by MRI scans. He opined that appellant was not disabled from employment beginning February 9, 1998 due to the November 26, 1997 employment incident.

By decision dated August 20, 2001, the Office denied appellant's claim for compensation on or after February 9, 1998 due to a November 26, 1997 employment injury.

Appellant requested that his senator assist him with his claim in a letter dated August 8, 2002. In a letter dated December 1, 2002, appellant requested that the Office resend a copy of his appeal rights from the August 20, 2001 decision. Appellant submitted a witness statement and medical evidence previously of record.

By letter dated April 12, 2003, appellant requested an appeal and noted that he had previously appealed on August 8, 2002. In another letter dated April 12, 2003, appellant requested a hearing before an Office hearing representative.

In a decision dated June 9, 2003, the Office denied merit review of its prior decision on the grounds that appellant did not submit new evidence or a new legal argument. The Office indicated that it would consider appellant's August 8, 2002 letter as a request for reconsideration.

On July 7, 2003 appellant appealed to the Board.³ The Board issued an order remanding case dated September 4, 2003 setting aside the Office's June 9, 2003 decision and remanding the case for reconstruction and properly assemblage of the case record followed by a *de novo* decision on the merits of the claim.⁴

³ By decision dated August 21, 2003, the Office denied appellant's request for a hearing on the grounds that he had previously requested and received reconsideration in the Office's June 9, 2003 decision. Under the principles discussed in *Douglas E. Billings*, 41 ECAB 880 (1990), the Office's August 21, 2003 decision, issued while the Board has jurisdiction over the matter in dispute, was null and void.

⁴ Docket No. 03-1821 (issued September 4, 2003).

In a decision dated October 21, 2003, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant modification.

LEGAL PRECEDENT

Under the Federal Employees' Compensation Act, the term "disability" means incapacity because of an employment injury to earn the wages that the employee was receiving at the time of injury. Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. An employee who has a physical impairment causally related to a federal employment injury, but who nonetheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as the term is used in the Act.⁵ Whether a particular injury causes an employee disability for employment is a medical issue, which must be resolved by competent medical evidence.⁶ An employee bears the burden of establishing that he or she is disabled for work and that any disability for which compensation is claimed is causally related to an employment injury.⁷

ANALYSIS

The Office accepted that appellant sustained an exacerbation of lumbar facet syndrome due to an injury on November 26, 1997. Appellant filed a claim for compensation beginning February 9, 1998. The issue, thus, is whether appellant is entitled to wage-loss compensation beginning February 9, 1998.

Appellant submitted evidence from Dr. Howser, a Board-certified neurosurgeon and his attending physician. In reports dated December 29, 1997, Dr. Howser noted that he treated appellant on December 2, 1997 for pain after he walked up stairs at work and diagnosed lumbar facet syndrome. He opined that appellant was disabled beginning December 2, 1997. In a report dated January 29, 1998, Dr. Howser listed findings of "moderate paravertebral muscle spasm and restricted range of motion of the lumbar spine." He diagnosed an exacerbation of preexisting lumbar facet syndrome and found that appellant was disabled from employment. The Office received an undated report from Dr. Howser on April 23, 1998. Dr. Howser found that appellant was disabled due to lumbar facet syndrome which he attributed to appellant's November 26, 1997 employment injury.

On the other hand, in a report dated February 29, 2000, Dr. Huff, a Board-certified orthopedic surgeon and Office referral physician, diagnosed back pain unsupported by objective findings and noted that appellant was status post lumbar laminectomy. He further opined that appellant's examination suggested symptom magnification. Dr. Huff noted that the diagnosis of lumbar facet syndrome was subjective as it was not based on objective findings on imaging studies. He found that appellant could perform his regular employment. In a supplemental

⁵ *Maxine J. Sanders*, 46 ECAB 835 (1995).

⁶ *Patrick H. Hall*, 48 ECAB 514 (1997).

⁷ *See generally Charles E. Evans*, 48 ECAB 692 (1997).

report dated August 6, 2001, Dr. Huff found that appellant did not have a structural spinal injury due to his November 26, 1997 employment injury.

Section 8123(a) of the Act provides that where there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Office shall appoint a third physician who shall make an examination.⁸ As the record contains a conflict in medical evidence between Dr. Howser and Dr. Huff regarding whether appellant was disabled beginning February 9, 1998 due to his November 26, 1997 employment injury, the Office should refer appellant for an impartial medical examination. After such further development as is deemed necessary, the Office shall issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision on the issue of whether appellant was disabled as of February 9, 1998 due to his accepted employment injury.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 21, 2003 is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: April 28, 2004
Washington, DC

Alec J. Koromilas
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁸ 5 U.S.C. § 8123(a); *Esther Velasquez*, 45 ECAB 249, 252-53 (1993).