

**United States Department of Labor
Employees' Compensation Appeals Board**

LARRY F. NICHOLS, Appellant

and

**U.S. POSTAL SERVICE, GENERAL MAIL
FACILITY, Detroit, MI, Employer**

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**Docket No. 04-644
Issued: August 5, 2004**

Appearances:
Larry F. Nichols, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On January 12, 2004 appellant filed an application for review of a merit decision of the Office of Workers' Compensation Programs dated November 24, 2003, in which the Office denied modification of its prior decision that appellant had not established a recurrence of total disability beginning September 2, 2001, causally related to his December 29, 1983 employment injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant sustained a recurrence of total disability beginning September 2, 2001 causally related to his December 29, 1983 employment injury.

FACTUAL HISTORY

On January 28, 2003 the Board issued a decision and order in appellant's case finding that he had not established he sustained a recurrence of total disability beginning September 2, 2001 causally related to his December 29, 1983 employment injury. The basis of this finding

was: “None of the medical reports appellant submitted in support of his claim for a recurrence of disability beginning September 2, 2001 attributed his disability to his December 29, 1983 employment injury.”¹ The facts of the case are contained in the Board’s January 28, 2003 decision and order and are hereby incorporated by reference.

By letter dated March 6, 2003, appellant requested reconsideration. By decision dated April 10, 2003, the Office found appellant’s request insufficient to warrant a review of the merits of his case.

By letter dated June 17, 2003, appellant requested reconsideration and submitted new medical evidence from Dr. Louis D. Zegarelli, his attending osteopath. In an April 29, 2003 report of appellant’s first visit, Dr. Zegarelli described appellant’s history, complaints and findings on examination; the doctor concluded that appellant was “functionally unable to work due to the severity of his pain and generalized limitations.” In a June 11, 2003 report, Dr. Zegarelli diagnosed chronic mechanical lumbosacral pain syndrome, annular fiber tears with high probability for internal disc disruption at L4-5 and L5-S1, lumbar radicular syndrome based on a positive electromyography (EMG) study and L4-5 and L5-S1 disc protrusions. Comparing appellant’s findings on a June 10, 2003 magnetic resonance imaging (MRI) scan to those on a June 11, 2001 MRI scan, Dr. Zegarelli stated that “there is significant progression of disc pathology both at L4-5 in which now we have documented disc protrusion with annular tears and also at L5-S1 where now we have significant protrusion with also evidence of direct S1 nerve root compression within the lateral recesses bilaterally.” Dr. Zegarelli concluded:

“Considering the history provided to me by the patient and the documented progressive noted pathology via the MRI [scan] study comparisons, it is my opinion that the patient does in fact have objective pathology that supports his subjective complaints² and in my opinion is not physically capable of engaging in gainful employment due to his persistent back pain and radicular symptoms.

“Upon further questioning, the patient also stated that there has been no new injury to the low back region and in fact it has been a gradual worsening of his back pain which all is related to the December 29, 1982 injury³ which has resulted in his deteriorated condition and loss of functional capabilities; therefore, there is a direct relationship between the pathology noted here on the MRI [scan] study of June 10, 2003, the patient’s inability to function over the last three years and his injury that occurred in December of 1982.

¹ Docket No. 02-2309 (issued January 28, 2003).

² Earlier in this report, Dr. Zegarelli stated that the EMG revealed evidence of “peripheral neuropathy/L5-S1 lumbar radiculopathy which is consistent with patient complaints and also the objective findings on the MRI [scan] studies.”

³ The June 11 and April 29, 2003 reports mistakenly list the date of appellant’s employment injury as December 29, 1982, but it is obvious that Dr. Zegarelli is referring to appellant’s December 29, 1983 employment injury, which the doctor accurately described in his April 29, 2003 report.

“In my opinion there is no new injury here but rather his increasing pain is the natural progression of his disc pathology which was caused by the work injury of December 29, 1982.”

By decision dated June 24, 2003, the Office found that appellant’s June 17, 2003 request for reconsideration was not timely filed and did not demonstrate clear evidence of error. Appellant appealed the June 17 and April 10, 2003 decisions, to the Board, which, by decision and order dated October 15, 2003, affirmed the April 10, 2003 Office decision but found appellant’s June 17, 2003 request for reconsideration was timely filed and remanded the case to the Office for proper consideration of this request.⁴

By decision dated November 24, 2003, the Office, after a merit review, found that the additional evidence was not sufficient to warrant modification of its prior decision that appellant had not established he sustained a recurrence of total disability beginning September 2, 2001, causally related to his December 29, 1983 employment injury.

LEGAL PRECEDENT

Where appellant claims a recurrence of disability due to an accepted employment-related injury, he has the burden of establishing by the weight of the substantial, reliable and probative evidence that the subsequent disability for which he claims compensation is causally related to the accepted injury.⁵ This burden includes the necessity of furnishing evidence from a qualified physician, who on the basis of a complete and accurate factual and medical history, concludes that the condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.⁶ However, while the claimant has the burden to establish entitlement to compensation, the Office shares the responsibility of developing the evidence and has an obligation to see that justice is done.⁷

The Board has adopted and applied the “direct and natural consequence rule” espoused by Professor Larson in his treatise on workers’ compensation law.⁸ This rule, as applicable to the present case, states:

“The first group, about which there is no legal controversy, comprises the cases in which an initial medical condition itself progresses into complications more serious than the original injury; the added complications are of course compensable. Thus, if an injury results in phlebitis and this in turn leads to a

⁴ Docket No. 03-1964 (issued October 15, 2003).

⁵ *John E. Blount*, 30 ECAB 1374 (1974).

⁶ *Frances B. Evans*, 32 ECAB 60 (1980).

⁷ *Dennis J. Lasanen*, 43 ECAB 549, 550 (1992); *John R. Knox*, 42 ECAB 193, 196 (1990). In *Knox*, the Board also stated that liability under the Federal Employees’ Compensation Act “continues so long as the disability *is in any part* caused by the employment-related incident.” (Emphasis in original).

⁸ *Dennis J. Lasanen*, 41 ECAB 933, 937 (1990).

cerebral thrombosis, the effects of the thrombosis are compensable.... Moreover, once the work-connected character of any injury, such as a back injury, has been 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.”⁹

ANALYSIS

On a prior appeal, the Board affirmed the Office’s decision that appellant had not established a recurrence of disability beginning September 1, 2001, on the basis that none of the medical reports submitted by appellant attributed his disability beginning that date to his December 29, 1983 employment injury. The case record now contains such evidence, namely the June 11, 2003 report from Dr. Zegarelli, that appellant submitted with his June 17, 2003 request for reconsideration.

In this report, Dr. Zegarelli stated that the objective pathology demonstrated on a June 10, 2003 MRI scan supported appellant’s subjective complaints and his inability to engage in gainful employment. Dr. Zegarelli also concluded that there was “a direct relationship between the pathology noted here on the MRI [scan] study of June 10, 2003 ... and his injury that occurred in December of 1982,” [sic] and that “his increasing pain is the natural progression of his disc pathology which was caused by the work injury of December 29, 1982.” [sic]

Dr. Zegarelli did not provide rationale for his opinion that the findings on the June 10, 2003 MRI scan constituted a natural progression of the disc pathology caused by appellant’s December 29, 1983 employment injury and his opinion therefore is not sufficient to meet appellant’s burden of proving a recurrence of disability. However, the Office accepted that appellant’s December 29, 1983 employment injury resulted in disc pathology, namely a herniated lumbar disc¹⁰ and there is no evidence that the worsening of appellant’s back condition was produced by an independent nonindustrial cause. Under these circumstances, Dr. Zegarelli’s opinion is sufficient to require the Office to further develop the medical evidence¹¹ to determine whether appellant’s recurrence of disability beginning September 1, 2001, is a direct and natural consequence of his December 29, 1983 employment injury.

CONCLUSION

The case is not in posture for a decision and is remanded for further development of the medical evidence on the question of whether appellant sustained a recurrence of total disability beginning September 2, 2001 causally related to his December 29, 1983 employment injury.

⁹ A. Larson, *The Law of Workers’ Compensation* § 10.02 (2000).

¹⁰ The Office did not specify the level of the lumbar herniated disc it accepted, but the medical evidence prior to its acceptance of this condition clearly shows it was at L4-5 or L5-S1, which are the levels addressed in Dr. Zegarelli’s June 11, 2003 report.

¹¹ *John J. Carlone*, 41 ECAB 354 (1989).

ORDER

IT IS HEREBY ORDERED THAT the November 24, 2003 decision of the Office of Workers' Compensation Programs be set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Issued: August 5, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member