



accepted the claim for a lumbosacral strain and authorized a magnetic resonance imaging (MRI) scan test, which was performed on September 14, 1999. The September 14, 1999 MRI scan reported minimal noncompression right parasagittal disc bulging and normal levels at L3-4 and L4-5.

On August 9, 2000 appellant filed a claim for a recurrence of disability beginning August 9, 2000.<sup>2</sup>

In treatment notes dated August 9, 2000, Dr. Howard J. Schertzing, an attending Board-certified internist, diagnosed chronic pain syndrome, lower extremity lumbar radiculopathy, back pain, muscle spasm, and a generalized anxiety disorder. The physician stated that appellant “continues to attempt to work but is limited because of severe pain” which “is worse with standing and sitting for long periods of time.” Dr. Schertzing noted that appellant would be off until August 23, 2000.

By decision dated October 2, 2000, the Office denied appellant’s claim for a recurrence of disability.

Appellant requested a hearing before an Office hearing representative in an October 24, 2000 letter and submitted reports dated July 5 and August 17, 2000 by Dr. Schertzing and a July 17, 2000 MRI scan of the lumbar spine.<sup>3</sup> A hearing was held on August 27, 2001 at which appellant was represented by counsel. Appellant submitted reports dated May 4, 2000 and July 4, 2001, by Dr. Mark Bibler, a treating Board-certified internist, a November 14, 2000 statement, two statements from coworkers, a copy of the August 30, 1999 traumatic injury claim and the employing establishment’s accident report form.

On May 4, 2000 Dr. Bibler reported initially seeing appellant on June 9, 1999 for pain, which he diagnosed as right-sided sciatica with no neurological compromise. Dr. Bibler noted that appellant had a laminectomy on July 30, 1999, returned to work on August 23, 1999 and sustained an injury on August 30, 1999 when he fell out of a chair. He stated that this “caused an immediate increase in his back pain that again radiated down the right buttock in a sciatic distribution.” With regard to the physical examination, Dr. Bibler noted a normal neurological examination and a repeat MRI scan “which showed arachnoiditis of the S1 root.” He stated that appellant was referred to an anesthesiologist for epidural steroid injections that somewhat helped. On March 13, 2000, his partner, Dr. Niranjana P. Candadai, a Board-certified internist,

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<sup>2</sup> The employing establishment stated that appellant continued to be in the limited-duty position and that no special accommodations were required due to the nature of his job. It reported that he began to use annual leave on August 9, 2000.

<sup>3</sup> Appellant’s counsel filed an appeal with the Board on December 22, 2000, which was docketed as No. 01-594. On February 1, 2001 the Director filed a motion to dismiss, which the Board granted on March 26, 2001. (Docket No. 01-594, issued March 26, 2001)

reported an unremarkable examination and diagnosed a lumbosacral strain. In summarizing, Dr. Bibler stated:

“[Appellant] had an insidious dis[c] herniation in the summer of 1999 that improved with surgical therapy. His recurrent symptoms are clearly a result of his fall from his chair at work. Since that time he has been treated with therapies, epidural steroids and a variety of medications, but continues to have significant radicular pain down the right leg. This discomfort prevents him from sitting for long periods of time, from bending and from lifting.”

On July 4, 2001 Dr. Bibler noted appellant’s medical and employment injury history and that appellant has been totally disabled since September 2000. He diagnosed chronic low back pain with right lumbar radiculopathy, status post microlumbar laminectomy and discectomy, postoperative arachnoiditis and depression.

In a September 11, 2000 report, Dr. Schertzinger stated that he admitted appellant to the hospital on September 1, 2000 for right leg pain, severe low back pain and that an electromyogram and nerve conduction study of the lower extremity was negative and a lumbar spine computerized tomography scan with myelogram was unremarkable. In a September 5, 2001 report, Dr. Bibler opined that appellant “had made an excellent functional recovery from” the July 30, 1999 surgery and that there were no significant problems “until the episode which occurred at work on August 30, 1999.” He opined: “this is likely a new problem and not simply a recrudescence of his prior problem.”

By decision dated November 15, 2001, the Office hearing representative affirmed the October 2, 2000 decision, denying appellant’s recurrence of disability claim.

Appellant requested reconsideration in an undated letter received on October 28, 2002 and submitted reports from Dr. David W. Chow, a Board-certified physiatrist, and a September 27, 2002 report by Dr. Bibler.

In a June 5, 2002 report, Dr. Chow noted that appellant had a lumbar laminectomy in 1999 and that due to a fall on August 30, 1999 his symptoms returned. A physical examination revealed an obese male with restricted lumbar ranges of motion due to pain, positive discogenic provocative maneuvers and negative bilateral nerve root tension signs. Dr. Chow diagnosed right S1 radiculitis, lumbar internal disc disruption syndrome, deconditioning, grand mal seizures, depression, hepatitis C and history of cerebral arteriovenous malformation. Dr. Chow, in reports dated July 1 and 10, 2002, noted that appellant underwent a lumbar discogram on June 26, 2002, which showed: “a fissured disc at L5-S1 which produced a concurrent pain response in the bilateral low back.” Findings on physical examination and diagnosis were the same as in the June 5, 2002 report.

In a September 27, 2002 report, Dr. Bibler stated:

“It appears to me now that [appellant] may have sustained an annular disc tear at L5-S1 when he fell on August 30, 1999. This disc tear has likely been the cause of the symptoms he has experienced over the ensuing three years. Of note, this tear did not show up on standard MRI scan but only recently became apparent

when he underwent a dis[c]ogram by Dr. Chow. I do not believe that this tear was present at the time of [appellant]’s original back surgery in July of 1999 and is likely a direct consequence of the fall he sustained at work on August 30, 1999.”

In a merit decision dated July 28, 2003, the Office denied appellant’s request for modification.

In a letter dated October 14, 2003, appellant requested reconsideration and submitted an August 26, 2003 report by Dr. Bibler in support of his request.

In an August 26, 2003 report, Dr. Bibler stated:

“I believe that [appellant] definitely sustained an annular dis[c] tear at L5, S1 when he fell on [August] 30[,] 1999 at work. This dis[c] tear has definitely been the cause of his symptoms that he has experienced over the ensuing three years. This tear was not present on standard MRI scan but only recent became apparent when he underwent a formal dis[c]ogram. This tear was not present at the time of [appellant]’s original back surgery in [July] 1999 and was a direct consequence of the fall he sustained at work on [August] 30[,] 1999.”

With regards to the fluctuation of appellant’s symptoms between March and August 2000, Dr. Bibler stated: “As you may know, fluctuation in the degree of low back pain is very common and cannot be accounted for in most circumstances by specific circumstances. In other words, I am unable to give you a direct answer as to what caused his pain to fluctuate other than that that is the nature of the problem.”

In a merit decision dated December 4, 2003, the Office denied appellant’s request for modification.

### **LEGAL PRECEDENT**

A recurrence of disability is defined as the inability to work caused by a spontaneous change in a medical condition which results from a previous injury or illness without an intervening injury or new exposure in the work environment that caused illness.<sup>4</sup> When an appellant claims a recurrence of disability due to an accepted employment-related injury, he has the burden of establishing by the weight of reliable, probative and substantial evidence that the recurrence of disability is causally related to the original injury. 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. Moreover, sound medical reasoning must support the physician’s conclusion.<sup>5</sup>

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<sup>4</sup> *Donald T. Pippin*, 54 ECAB \_\_\_\_ (Docket No. 03-205, issued June 19, 2003).

<sup>5</sup> *Ricky S. Storms*, 52 ECAB 349 (2001).

An award of compensation may not be made on the basis of surmise, conjecture or speculation or on appellant's unsupported belief of causation.<sup>6</sup> However, proceedings under the Federal Employees' Compensation Act are not adversarial in nature, nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.<sup>7</sup> This holds true in recurrence claims as well as in initial traumatic and occupational claims.

### ANALYSIS

In the instant case, the Office accepted that appellant sustained a lumbosacral strain when he fell out of his chair on August 30, 1999. Appellant filed a claim for a recurrence of disability beginning August 9, 2000, due to his accepted August 30, 1999 employment injury.

In support of his recurrence claim appellant has submitted various reports from Drs. Bibler, Chow, Schertzingler and Dr. John M. Tew, Jr., a Board-certified neurological surgeon. Dr. Schertzingler, in an August 9, 2000 report, diagnosed chronic pain syndrome, lower extremity lumbar radiculopathy, back pain, muscle spasm, and generalized anxiety disorder and opined that appellant was limited in his attempts to work due to severe pain. In his September 11, 2000 report, the physician noted that he hospitalized appellant on September 1, 2000 for an inability to work, severe right leg pain and severe low back pain. Dr. Bibler, in a July 4, 2001 report, diagnosed chronic low back pain with right lumbar radiculopathy and noted that appellant has been totally disabled since September 2000. In his September 5, 2001 supplemental report, the physician noted that appellant "had made an excellent functional recovery" from his July 30, 1999 surgery with no significant problems until the August 30, 1999 employment injury and opined that appellant's current disability is due to the August 30, 1999 employment injury. Dr. Bibler, in a September 27, 2002 report, opined that appellant "may have sustained an annular disc tear at L4-S1 when he fell on August 30, 1999" and concluded "this tear has likely been the cause of his symptoms" for the past three years. Dr. Bibler noted that the tear was not evident on the MRI scans, "but only recently became apparent" on the June 26, 2002 lumbar discography. He opined this tear was not present at the time of the July 1999 surgery "and is likely a direct consequence of the fall he sustained at work on August 30, 1999."

The reports of Dr. Mark J. Goodard, a treating Board-certified physiatrist, and Dr. Tew are insufficient to support appellant's burden as the reports from Dr. Tew do not address appellant's accepted employment injury and Dr. Goodard's reports predate August 9, 2000, the date appellant claimed his recurrence began. Dr. Chow noted that appellant's symptoms returned due to a fall on August 30, 1999 but did not provide a rationalized medical opinion of whether appellant's back condition was causally related to the August 30, 1999 injury. Similarly, Dr. Schertzingler's reports are insufficient to meet appellant's burden of proof because his reports did not contain a rationalized medical opinion establishing a causal relationship between appellant's current condition and the August 30, 1999 employment-related injury.

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<sup>6</sup> *Alfredo Rodriguez*, 47 ECAB 437, 441 (1996).

<sup>7</sup> *Betty J. Smith*, 54 ECAB \_\_\_ (Docket No. 02-149, issued October 29, 2002).

Without such a rationalized medical opinion, the reports by these physicians are insufficient to establish causal relationship.<sup>8</sup>

In the instant case, Dr. Bibler provided reports which attributed appellant's recurrence of disability to his August 30, 1999 employment in reports. However, while these reports do not contain rationale sufficient to discharge appellant's burden of proof that his total disability beginning August 9, 2000 was causally related to his August 30, 1999 injury, they constitute substantial evidence in support of appellant's claim and raise a unrefuted inference of causal relationship sufficient to require further development of the case record by the Office. Moreover, there is no probative opposing medical evidence in the record for this period.

On remand, the Office should develop the medical evidence as appropriate to obtain a rationalized opinion regarding whether appellant sustained a recurrence of disability on or about August 9, 2000 causally related to the August 30, 1999 injury and, if so, the period of disability. Following such further development of the case record as it deems necessary, the Office should issue a *de novo* decision.

### **CONCLUSION**

The case is not in posture for decision regarding whether appellant sustained a recurrence of disability causally related to factors of employment. The case will be remanded to the Office.

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<sup>8</sup> *Jennifer L. Sharp*, 48 ECAB 209 (1996).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated December 4 and July 28, 2003 are set aside and the case is remanded for further development consistent with the above decision of the Board.

Issued: September 24, 2004  
Washington, DC

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
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