

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

ADOLPH S. NOVOTNY, Appellant)

and)

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Grand Junction, CO, Employer**)

**Docket No. 05-563
Issued: June 10, 2005**

Appearances:
Adolph S. Novotny, 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
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On January 6, 2005 appellant filed a timely appeal of an October 27, 2004 nonmerit decision of the Office of Workers' Compensation Programs and of a March 2, 2004 Office merit decision, finding that the evidence did not establish that his claimed recurrence for medical treatment resulted from his accepted work injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review both the merit and the nonmerit decisions in this case.

ISSUES

The issues are: (1) whether appellant has established a recurrence of the need for medical treatment beginning October 21, 2003 causally related to his October 3, 1997 employment injury; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits of his claim.

FACTUAL HISTORY

On October 6, 1997 appellant, then a 41-year-old file clerk, filed a claim for compensation for a traumatic injury, stating that he sustained a fractured vertebra on October 3, 1997 when his foot slipped off the bottom step of a step stool and he fell against chart shelves.

In an October 9, 1997 report, Dr. David P. Fisher, a Board-certified orthopedic surgeon, set forth a history of the October 3, 1997 injury, noted that appellant had no previous significant back problem but had sustained a lumbar strain “some 20 years ago” and stated that “review of x-rays done at the employing establishment after the October 3, 1997 injury showed “a bilateral spondylosis at L5 with no true spondylolisthesis.” He recommended a bone scan to determine if he had a fracture or a chronic problem, stating that the “more likely alternative is that this is a long-standing spondylolysis that was not symptomatic and that the patient’s symptoms will probably resolve without our active participation.” In an addendum, he stated that the bone scan showed “a lot of activity at the L5 pedicles,” which demonstrated that “this is a spondylolysis of a more chronic nature and I would suspect that we will treat him conservatively over a period of time and he’s not likely to have significant residual from this.” Work limitations imposed by him were no lifting, bending, pushing or pulling, with sitting one-half the time and standing one-half the time. In an October 21, 1997 report on an Office form, Dr. Fisher diagnosed spondylosis without myelopathy and stated, with regard to causal relationship, “Bone scan demonstrates that this is possibly a spondylolysis of a more chronic nature that was not symptomatic and aggravated by the October 3, 1997 injury.”

On March 5, 1998 the Office accepted that appellant sustained an aggravation of preexisting spondylosis without myelopathy. The Office advised Dr. Fisher of this acceptance and requested his opinion on whether the aggravation was temporary or permanent. In a March 9, 1998 response, he stated that the true diagnosis was spondylolysis, not spondylosis,¹ that the aggravation fit more completely the Office’s definition of temporary rather than permanent aggravation, that there was no evidence of myelopathy or radiculopathy. In response to an Office inquiry when the aggravation would cease, Dr. Fisher replied one year.

On May 1, 2000 appellant filed a claim for compensation for a recurrence of disability, stating that he had performed limited duty for the employing establishment since his October 3, 1997 injury and that he felt it was necessary to seek more medical treatment. In a May 9, 2000 report, Dr. Fisher stated that a negative September 24, 1980 lumbar spine x-ray gave credence to him not having spondylolysis at that time and that “[x]-rays today demonstrate that he does not have an increase in the slip.” In a May 23, 2000 statement, appellant stated that his back had never been the same since his October 3, 1997 injury and that he had pain in his lower back. In a June 13, 2000 report, Dr. Fisher stated that the May 9, 2000 x-rays “demonstrated that he has a Grade [1] slip. A definite change from his earlier findings.” Dr. Fisher concluded: “[Appellant’s] diagnosis is spondylolysis, Grade [1], L5-S1 and I feel that there is plenty of information to suggest that he had a normal previous lumbar spine film, a spondylolysis after his injury and now a slip which would tend to make a casual relationship between the disability and

¹ Spondylosis: degenerative spinal changes due to osteoarthritis; spondylolysis: dissolution of a vertebra; a condition marked by platyspondyilia, aplasia of the vertebral arch and separation of the pars interarticularis. Dorland’s *Illustrated Medical Dictionary* (30th ed. 2003).

the original injury.” An Office medical adviser reviewed the medical evidence and stated, as there was no evidence that appellant had a normal previous lumbar spine film, the diagnosis should remain the same: preexisting spondylolysis at L5-S1 with temporary aggravation without myelopathy. The medical adviser stated: “If the Grade [1] slip is new and appellant remained on the job (even with limitations) it would suggest a causal relationship to his injury.”

The Office accepted that appellant sustained a recurrence of the need for medical treatment in May 2000 and authorized a magnetic resonance imaging (MRI) scan. On a July 18, 2000 Office request for clarification of the discrepancy between his April 1998 report indicating that Dr. Fisher expected appellant’s condition to resolve in one year and his June 13, 2000 report indicating a continuing work-related medical condition, Dr. Fisher wrote “Permanent, see x-ray note.” An August 8, 2000 MRI scan showed some loss of disc height and early desiccation and degeneration at L5-S1. In a December 4, 2000 report on an Office form, Dr. Fisher listed the diagnosis due to injury as spondylolisthesis.²

On December 11, 2000 the Office referred appellant, a statement of accepted facts and prior medical reports to Dr. Rhett K. Rainey, an osteopath specializing in orthopedic surgery, for a second opinion on his condition and its relationship to his employment. Dr. Rainey stated that x-rays he did on December 28, 2000 showed “bilateral spondylolysis L5-S1 with evidence of a Grade [1] spondylolisthesis between L5 and S1.” In a December 28, 2000 report, Dr. Rainey described appellant’s October 3, 1997 employment injury, his symptoms and findings on physical examination. He concluded that appellant’s Grade [1] spondylolisthesis was causally related to his October 3, 1997 injury, that he had a continuing work-related medical condition and that this condition was “an aggravation of appellant’s underlying spondylolysis and there is evidence that there is progression from a 0 to Grade [1] spondylolisthesis since the time of his injury. I do feel that this is permanent.” In an August 21, 2001 report, Dr. Fisher stated that it was in his interest to intermittently take a day off work so he could tolerate working.

On December 9, 2003 appellant filed a claim for compensation for a recurrence of the need for medical treatment beginning October 2, 2003. He stated that he had experienced pain and stiffness since his October 3, 1997 injury.

In a February 5, 2004 report, Dr. Fisher stated that appellant continued to complain of pain that was related to the amount of activity that he performed, that his examination was totally unchanged and that he “still has the problems with the spondylolisthesis.” In a February 10, 2004 report, Dr. Fisher noted that he was seen on October 2, 2003 and that appellant continued to have back pain. Dr. Fisher stated: “The spondylolisthesis at L5-S1 is documented in a number of x-rays in our files and I think that his clinical course will be guarded with intermittent exacerbations. I think that this is an ongoing problem from [appellant’s] spondylolisthesis and I can expect that it will intermittently be exacerbated in the future.”

By decision dated March 2, 2004, the Office found that the factual and medical evidence did not establish that the claimed recurrence resulted from the accepted work injury.

² Spondylolisthesis: forward displacement (olisthy) of one vertebra over another, usually of the fifth lumbar over the body of the sacrum or of the fourth lumbar over the fifth, usually due to a developmental defect in the pars interarticularis. Dorland’s *Illustrated Medical Dictionary* (30th ed. 2003).

On October 1, 2004 appellant requested reconsideration, pointing out that Dr. Rainey stated that his Grade 1 spondylolisthesis was causally related to his October 3, 1997 injury and that his injury was permanent. By decision dated October 27, 2004, the Office found his request for reconsideration not sufficient to warrant a review of the merits of his case.

LEGAL PRECEDENT

Section 10.5(y) of the Office's regulations³ defines "recurrence of medical condition" as "a documented need for further medical treatment after release from treatment for the accepted condition or injury when there is no accompanying work stoppage. Continuous treatment for the original condition or injury is not considered a 'need for further medical treatment after release from treatment,' nor is an examination without treatment." Appellant has the burden of establishing that the need for further medical treatment is causally related to the employment injury.⁴

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 benefits, the Office shares responsibility in the development of the evidence. It has the obligation to see that justice is done.⁵

ANALYSIS

The Office authorized treatment for appellant's work-related condition, including a recurrence of the need for medical treatment in May 2000. Dr. Fisher treated him until August 21, 2001. The record indicates that the next time Dr. Fisher or any other doctor treated appellant was on October 2, 2003. As there was more than a two-year gap in his treatment, such treatment was not continuous and he had the burden of proving that the treatment beginning October 2, 2003 was causally related to his October 3, 1997 employment injury.

The Board finds that the case is not in posture for a decision on the question of whether appellant's need for medical treatment beginning October 2, 2003 was causally related to his October 3, 1997 employment injury. Dr. Fisher stated in a February 10, 2004 report, that appellant was seen on October 2, 2003 and had an ongoing problem from his spondylolisthesis, which is a condition not accepted by the Office.

The Board finds that further development of the evidence is needed to determine if appellant's spondylolisthesis, which is documented by May 9 and December 8, 2000 x-rays, but was not seen on x-rays within a week after the injury, is causally related to his October 3, 1997 employment injury. Dr. Fisher, Dr. Rainey and an Office medical adviser all indicated that this condition is related to his injury, but the reports of these physicians are not sufficient to establish such a relationship. Dr. Fisher listed spondylolisthesis as the diagnosis due to injury in a December 4, 2000 report and stated in a June 13, 2000 report, that the prior normal x-ray in 1980

³ 20 C.F.R. § 10.5(y).

⁴ *Joan R. Donovan*, 55 ECAB ___ (Docket No. 04-113, issued July 22, 2004).

⁵ *Isidore J. Gennino*, 35 ECAB 442 (1983).

and the spondylolisthesis seen on a May 9, 2000 x-ray “would tend to make a cause relationship between the disability and the original injury.” This opinion is too speculative to establish causal relation, as is an Office medical adviser’s opinion that, if the spondylolisthesis was new and appellant remained on the job “it would suggest a causal relationship to his injury.” Dr. Rainey also concluded that his Grade 1 spondylolisthesis was causally related to his October 3, 1997 injury, but provided no rationale for this opinion. Medical reports not containing rationale on causal relation are entitled to little probative value and are generally not sufficient to meet an employee’s burden of proof.⁶

The lack of rationale, however, does not mean these reports may be disregarded by the Office. It merely means that their probative value is diminished.⁷ The opinions supporting causal relationship and the absence of any medical evidence negating causal relationship between the employment injury and appellant’s spondylolisthesis obligates the Office to obtain a rationalized medical opinion on this relationship.⁸

The Office accepted that appellant sustained an aggravation of preexisting spondylosis. However, Dr. Fisher, the Board-certified orthopedic surgeon, whose reports were the basis of the Office’s acceptance of appellant’s claim, pointed out in a March 9, 1998 report, that the true diagnosis was spondylolysis, not spondylosis. The Office’s referral physician, Dr. Rainey, an osteopath specializing in orthopedic surgery, also concluded in a December 28, 2000 report, that appellant’s work-related condition was an aggravation of his underlying spondylolysis, as did an Office medical adviser. On return of the case record, the Office should further develop this aspect of the claim.

CONCLUSION

The case is not in posture for a decision on whether appellant’s recurrence of the need for medical treatment on October 2, 2003 is causally related to his October 3, 1997 injury and is remanded to the Office for further development of the medical evidence.

⁶ *Ceferino L. Gonzales*, 32 ECAB 1591 (1981).

⁷ *Joseph R. Guay*, 35 ECAB 455 (1983).

⁸ *Daniel J. Gury*, 32 ECAB 261 (1980).

ORDER

IT IS HEREBY ORDERED THAT the March 2, 2004 decision is set aside and the case remanded to the Office of Workers' Compensation Programs for action consistent with this decision of the Board, to be followed by an appropriate decision.

Issued: June 10, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member