

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

ADELL ALLEN, Appellant)
(Administratrix of the Estate of MELVIN L.)
ALLEN))
and)
DEPARTMENT OF THE NAVY, NAVAL AIR)
STATION, Pensacola, FL, Employer)

Docket No. 05-84
Issued: March 23, 2005

Appearances:
Edward T. Boywid, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On October 4, 2004 appellant filed a timely appeal of a July 6, 2004 merit decision of the Office of Workers' Compensation Programs that found that the evidence did not establish that the employee's back condition was causally related to his employment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether the employee was entitled to compensation benefits prior to his death on November 12, 1996.

FACTUAL HISTORY

On March 13, 1995 the employee, then 75 years old, filed a claim for compensation for an occupational disease, stating that, while working as an aircraft cleaner, he was lifting the wing of an aircraft, felt pain in his back and was taken to the Naval hospital. The employee listed the

nature of the disease or illness as “back injury” and the date he first became aware of the disease or illness and its relation to his employment in October 1964. The employee stated that he was unsure of the exact date of his injury, but that it occurred while trying to lift the wing of an aircraft, causing him to injure his back. He was immediately taken to the hospital for about three weeks, with two weeks of bedrest. The employee was put on light duty until his retirement and that, from the time of the injury, he experienced constant pain and discomfort every day, plus inability to lift and difficulty bending or sitting for periods of time.

By decision dated November 7, 1995, the Office found that the employee’s claim was not timely filed. The employee died on November 12, 1996 and appellant, his widow, continued to pursue the claim. On April 25, 1997 the Office set aside the November 7, 1995 decision and found that the claim was timely filed. By decision dated August 7, 1997, the Office found that the employee had not established that he sustained an injury as alleged, as there was no medical evidence to show a condition was diagnosed in connection with the claimed injury.

By letter dated August 9, 1997, appellant requested reconsideration and submitted medical reports from the Naval Hospital in Pensacola and records of the employee’s involuntary disability retirement from the employing establishment. In a November 17, 1958 report of the employee’s hospitalization, Dr. Herman Schreiber, an orthopedic surgeon, stated that the employee was admitted on November 12, 1958 with the chief complaint of back ache, that five days prior to admission, while lifting an airplane wing at work, he suddenly developed a persistent stabbing pain in his lower back which was aggravated by all motions, bending and lifting and relieved somewhat by bedrest. Dr. Schreiber noted that there had been no radiation and that physical examination revealed a considerable amount of paravertebral muscle spasm, limitation of motion in all planes, a positive straight leg raising test and no reflex, sensory or motor changes. He stated: “The patient was treated with bedrest with rapid subsidence of his complaints. At the time of his discharge he had a full range of painless motion and no complaints. He is accordingly discharged, fit for same.”

An April 10, 1963 physician’s request for an orthopedic evaluation for possible disability retirement indicated that the employee-related complaints of low back pain radiating down his thighs since his discharge from the hospital on November 17, 1958. The responding April 11, 1963 orthopedic clinic report noted that at present the employee had no back ache, but that he had a slight aching sensation over the lower back whenever he had to lift over 15 to 20 pounds or when he had to stand for a prolonged period of time. Examination revealed eradication of the normal lumbar curve, paraspinous muscular spasm associated with lateral bending, slight pain on flexion and extension, pain in the L5-S1 area on percussion and deep palpation, low back and thigh pain on straight leg raising, normal reflexes and normal x-rays of the lumbosacral spine. The doctor stated that the employee appeared to have an organic back ache and might have a ruptured disc. A January 3, 1966 orthopedic clinic note concluded that the employee had a chronic lumbosacral sprain and possibly a degenerative disc and that he was not capable of performing sustained heavy work.¹ In a report of a January 4, 1966 examination for disability retirement, Dr. Craig B. Bass stated that the employee had a full range of back flexion and extension with minimal discomfort to extremes, moderate tenderness over L5-S1, negative

¹ The Board is unable to identify the authors of these handwritten notes.

straight leg raising, normal reflexes and no neurological defect. Dr. Bass diagnosed chronic back strain, stated there was no evidence to substantiate a diagnosis of herniated nucleus pulposus and indicated that the employee was permanently disabled for his position of aircraft cleaner.

On February 11, 1966 the employing establishment notified the employee that it proposed to separate him due to his inability to perform the duties of his position related to his back condition. This letter noted that at a November 8, 1965 meeting the employee was informed that he could reopen his workers' compensation claim relating to his 1958 back injury. He expressed a desire to reopen his claim for occupational injury but wished to be guaranteed 75 percent of his present income and was advised that reopening must be requested from the Office. The employee informed the employing establishment that he would not apply for compensation because of the absence of a guarantee. A July 13, 1966 memorandum on the employing establishment's filing of a claim for the employee's involuntary disability retirement from Dr. Melvin T. Johnson, a medical director, stated that "the medical evidence indicates he suffered an injury to his back a number of years ago which appears to be the basis for his disability" and that disability retirement was suggested at the time of his November 1958 hospitalization because of his inability to perform the full duties of his job.

By decision dated October 8, 1997, the Office found that the evidence was sufficient to establish that the employee sustained a traumatic injury to his back on November 7, 1958 but that the medical evidence contained no clear statement relating his back complaints after November 17, 1958 to the November 7, 1958 injury and did not establish that his disability at the time of his retirement was causally related to this injury.²

By letter dated October 7, 1998, appellant's attorney requested reconsideration and submitted additional evidence obtained from the employing establishment. On a November 7, 1958 notice of injury on an Office form, the employee stated that he injured his back that date when attempting to turn over an aircraft wing section. The supervisor's December 1, 1958 report of this injury noted that the employee used sick leave from November 10 to 21, 1958 and returned to work on November 24, 1958 and that no physician was now attending the employee. In a November 7, 1958 report, Dr. B. Vaughn reported that the employee's injury as paravertebral muscle spasm with limitation of forward bending and his treatment of diathermy and analgesics. In a November 13, 1958 report, Dr. Vaughn noted that the employee's neurological examination on November 7, 1958 was negative, that he reported for work but soon was unable to move, that he returned to the dispensary and refused to do anything but lie flat on his back. The employee did not return for treatment and that on November 12, 1958 he was taken to the hospital. Dr. Vaughn diagnosed lumbar strain, indicated that the prognosis was good and stated that there was "large emotional overlay of dependency."

Dispensary notes reflected back pain and spasm on July 17, 1961, chronic back pain from sacroiliac strain and a recommendation for a lighter job on December 14, 1961 and on June 12, 1962 a recurrence of pain in the back the previous day after lifting objects of 45 pounds and light-duty status. A February 11, 1964 note from an employing establishment physician³

² The decision noted that the records from the compensation claim filed for the November 1958 injury were no longer available.

³ The Board is unable to identify the author of this handwritten note.

indicated that the employee was not disabled for work. In an October 20, 1965 report setting forth work tolerance limitations, Dr. Bass stated that the employee had a back disease, which probably would not improve substantially and that his back could not stand a regular routine of strenuous work.

On January 14 and February 5, 1999 the Office advised appellant that she could request reconsideration only if she submitted proof that she was the executor of the employee's estate. On October 3, 2002 her counsel submitted letters of administration from the Probate Division of the Circuit Court for Escambia County, Florida appointing appellant as the personal representative of the estate of the employee, with full power to administer the estate. Appellant requested a merit review and also submitted a November 21, 1958 report from Dr. Vaughn, stating that the employee was not disabled when he was seen on November 7, 1958 but had left paravertebral muscle spasm with limitation of forward bending and no extremity involvement.

By decision dated August 1, 2003, the Office found that appellant's request for reconsideration was not timely filed and did not demonstrate clear evidence of error. Appellant appealed this decision to the Board. By decision dated March 18, 2004, the Board found that appellant's request for reconsideration was timely filed. The Board remanded the case to the Office for a determination of whether the evidence submitted with appellant's request for reconsideration warranted a review of the merits of the case.⁴

By decision dated July 6, 2004, the Office found that there was no evidence that connected the diagnosed back injury with the employee's work duties and that causal relationship was not established.

LEGAL PRECEDENT

For any period of disability claimed, a claimant has the burden of proving by the preponderance of the reliable, probative and substantial evidence that he or she is disabled for work as a result of an employment injury or condition. This burden includes the necessity of submitting medical opinion evidence, based on a proper factual and medical background, establishing such disability and its relationship to employment.⁵ A claimant also has the burden of proof to show that medical expenses were incurred for treatment of the effects of an employment-related condition and this burden includes the necessity to submit supporting rationalized medical evidence.⁶

ANALYSIS

The evidence establishes that the employee sustained a traumatic injury to his back on November 7, 1958. The employee was hospitalized from November 12 to 17, 1958, but

⁴ Docket No. 04-208 (issued March 18, 2004). The facts of the case, as set forth in the March 18, 2004 decision, are incorporated herein.

⁵ *Fereidoon Kharabi*, 52 ECAB 291 (2001); *David H. Goss*, 32 ECAB 24 (1980).

⁶ *Dorothy J. Bell*, 47 ECAB 624 (1996).

apparently did not incur any medical expenses, as his treatment was at the employing establishment's hospital. He also was not paid any compensation, as he used sick leave to cover his absence from work until his return on November 24, 1958.

The employee, and later appellant acting on behalf of his estate, has the burden of proving that the disability and medical expenses he later incurred were related to his November 7, 1958 employment injury. The Board finds that this burden has not been met.

The report from the employee's hospitalization dated November 12 to 17, 1958 from Dr. Schreiber, an orthopedic surgeon, states that his treatment resulted in "rapid subsistence of his complaints," and that he was discharged with "a full range of motion and no complaints." The next record of any medical attention for the employee's back is almost three years later, in a July 17, 1961 dispensary note. The only evidence of bridging symptoms between the November 17, 1958 hospital discharge and the later treatment is an April 10, 1963 note indicating that the employee had related complaints of low back pain radiating down his thighs since the hospital discharge.⁷ Even if this bridging evidence is considered reliable, it does not obviate the need for a rationalized medical opinion that the subsequent periods of disability and medical treatment are causally related to the employment injury.⁸

There is no such medical evidence in the case record. The statement from a physician that is most supportive of causal relation between the employee's November 7, 1958 employment injury and his later disability is Dr. Johnson's July 13, 1966 statement that the back injury he sustained a number of years ago "appears to be the basis of his disability."⁹ The Board finds that this statement to be speculative and, falls far short of meeting appellant's burden of proof to submit reliable, substantial evidence that any disability and medical expenses the employee incurred beginning in 1961 or at the time of his involuntary disability retirement in 1966, were causally related to his November 7, 1958 employment injury.

CONCLUSION

Appellant has not met her burden of proof that the employee was entitled to any compensation benefits prior to his death on November 12, 1996.

⁷ In his March 13, 1995 claim, the employee stated that he was put on light duty after his hospital stay until his retirement. By this time, however, the employee's recollection of events over 36 years earlier is questionable, given that he also stated that he was hospitalized for three weeks, when the evidence shows this hospitalization lasted six days. There is no other evidence that the employee was put on light duty before 1962.

⁸ See *Ricky S. Storms*, 52 ECAB 349 (2001).

⁹ Dr. Johnson's other July 13, 1966 statement that disability retirement was suggested at the time of the employee's November 1958 hospitalization is not corroborated by any evidence in the record. Dr. Schreiber's report of the hospital discharge indicates that the employee had recovered from the injury.

ORDER

IT IS HEREBY ORDERED THAT the July 6, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 23, 2005
Washington, DC

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member