

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

JEFFREY W. DURBIN, Appellant)
and) Docket No. 05-272
DEPARTMENT OF JUSTICE, IMMIGRATION) Issued: May 11, 2005
& NATURALIZATION SERVICE, Phoenix, AZ,)
Employer)

)

Appearances:
Jeffrey W. Durbin, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On November 8, 2004 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated October 13, 2004, denying his recurrence of disability claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the October 13, 2004 decision and also a May 14, 2004 decision denying his recurrence of disability claim.

ISSUE

The issue is whether appellant sustained a recurrence of disability on or after November 12, 2002 causally related to his November 7, 2002 employment injury.

FACTUAL HISTORY

On November 7, 2002 appellant, then a 43-year-old procurement technician, filed a traumatic injury claim alleging that on that date he injured his back and shoulder while attempting to remove a fax machine from the trunk of a motor vehicle. The Office initially

accepted appellant's claim as a minimal or no time loss claim without formal adjudication of the merits.¹ On September 5, 2003 the Office accepted his claim for a cervical strain and dislocation of his lumbar spine based upon merit review of the claim.

In a report dated November 7, 2002, Dr. Haymond, a chiropractor, diagnosed a lumbar sprain/strain and indicated that appellant was disabled from November 7 to 11, 2002.

In a report dated November 8, 2002, Dr. Arnold H. Meyerowitz, a Board-certified family practitioner, diagnosed a back strain and prescribed medication and physical therapy. In a June 20, 2003 report, Dr. Meyerowitz diagnosed low back pain.

In a January 14, 2003 report, a physician diagnosed cervical, thoracic and lumbar sprains/strains as a result of the November 7, 2002 employment injury and indicated that appellant was totally disabled from November 7 to 11, 2002.

A May 22, 2003 x-ray report and June 5, 2003 computerized tomography scan of the lumbosacral spine indicated degenerative disc disease at the L6-S1 level, degenerative joint disease and bilateral L6 spondylosis with Grade 1 spondylolisthesis.

Appellant submitted reports dated July 28 to December 8, 2003 from Dr. John DeAngelis, a specialist in pain management. However, these reports describe low back pain and left hip pain sustained in December 2001.

In a letter dated August 2, 2003, appellant stated that his November 7, 2002 employment injury had "recently surfaced itself." He alleged that the initial report from his chiropractor had not been accurate and he had a disc problem in his lower spine.

By letter dated September 5, 2003, the Office asked appellant to submit a detailed narrative report from his attending physician explaining how his condition and disability were causally related to his November 7, 2002 employment injury.

On October 1, 2003 appellant filed a claim for compensation for lost wages beginning in November 2002.

In a report dated February 2, 2004, Dr. Douglas A. Slaughter, an orthopedic surgeon, stated that appellant began having back pain in November 2002 while lifting at work. He indicated that he had some back pain relief through epidural steroid injections for three or four months and then the pain returned. Dr. Slaughter provided findings on examination, diagnosed isthmic spondylolisthesis with degenerative disc disease and lumbar arthritis and suggested surgery consisting of a lumbar fusion at L5-S1.

In a February 5, 2004 report, Dr. Meyerowitz indicated that the disability caused by appellant's back injury required a spinal fusion.

¹ Appellant resigned from his federal employment effective December 1, 2002.

In a letter dated February 5, 2004, the Office advised appellant that he needed to provide medical evidence establishing that his disability beginning November 12, 2002 was causally related to his November 7, 2002 employment injury.

By decision dated May 14, 2004, the Office denied appellant's claim on the grounds that the medical evidence did not establish that his recurrence of disability on November 12, 2002 was causally related to his November 7, 2002 employment injury.

In a May 27, 2004 report, Dr. Meyerowitz stated that appellant was experiencing chronic back pain.

In an undated letter received by the Office on June 21, 2004, appellant requested a review of the written record and submitted a January 4, 2004 report from Dr. Alan Kazan who indicated that appellant sought treatment for his dependence on prescription pain and sleep medications.

By decision dated October 13, 2004, an Office hearing representative affirmed the Office's May 14, 2004 decision on the grounds that the medical evidence did not establish that appellant sustained a recurrence of disability on November 12, 2002 causally related to his November 7, 2002 employment injury.

LEGAL PRECEDENT

An individual who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which compensation is claimed is causally related to the accepted injury.² This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical rationale.³

Recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness. (Emphasis in the original.)⁴

ANALYSIS

Appellant sustained a back injury on November 7, 2002 and was released to return to work as of November 12, 2002. He subsequently filed a claim for compensation for lost wages beginning in November 2002. In a letter dated August 2, 2003, appellant stated that his November 7, 2002 employment injury had "recently surfaced itself." He alleged that the initial

² *Charles H. Tomaszewski*, 39 ECAB 461 (1988).

³ *Lourdes Davila*, 45 ECAB 139 (1993).

⁴ 20 C.F.R. § 10.5(x).

report from his chiropractor had not been accurate and he had a disc problem in his lower spine. Radiology reports indicated that appellant had degenerative disc and joint disease.

In Dr. Slaughter's February 2, 2004 report, he stated that appellant began having back pain in November 2002 while lifting at work. He diagnosed isthmic spondylolisthesis with degenerative disc disease and lumbar arthritis and suggested surgery consisting of a lumbar fusion at L5-S1. However, these conditions have not been accepted by the Office as being related to appellant's November 7, 2002 employment injury. Dr. Slaughter did not explain how the conditions he diagnosed were caused by the November 7, 2002 employment injury. Therefore, his report is not sufficient to establish that appellant sustained a work-related recurrence of disability beginning November 12, 2002.

In February 5 and May 27, 2004 reports, Dr. Meyerowitz indicated that appellant was experiencing chronic back pain and his disability which in his opinion was caused by his November 7, 2002 back injury required a spinal fusion. However, he provided no medical rationale explaining how appellant's back condition and need for surgery in 2004 were causally related to his November 7, 2002 employment injury. Therefore, the reports of Dr. Meyerowitz are not sufficient to discharge appellant's burden of proof.

In a January 4, 2004 report, Dr. Kazan indicated that appellant sought treatment for his dependence on prescription pain and sleep medications. However, he did not explain how appellant's drug dependence was related to his November 7, 2002 employment injury. Therefore, this report is not sufficient to establish that appellant sustained a recurrence of disability causally related to his November 7, 2002 employment injury.

Appellant also submitted reports from Dr. DeAngelis. However, these reports describe an injury sustained in December 2001. As his employment injury was sustained on November 7, 2002, these reports are of limited probative value and are not sufficient to discharge appellant's burden of proof to establish that he sustained a recurrence of disability on or after November 12, 2002 causally related to his November 7, 2002 employment injury.

CONCLUSION

The Board finds that appellant has failed to establish that he sustained a recurrence of disability on or after November 12, 2002 causally related to his November 7, 2002 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 13 and May 14, 2004 are affirmed.

Issued: May 11, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

A. Peter Kanjorski
Alternate Member