

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

L.D., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
U.S. COAST GUARD, Warwick, RI, Employer**

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**Docket No. 09-519
Issued: October 22, 2009**

Appearances:
John L. Whitehouse, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 15, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated December 1, 2008. Pursuant to 20 C.F.R. §§ 501.2 and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he was entitled to wage-loss compensation beginning August 9, 1992.

FACTUAL HISTORY

This case was previously before the Board. On May 13, 2008 the Board issued an order remanding the case to the Office for proper assemblage of the record and a *de novo* decision as the case record was missing materials from August 4, 1995 through December 14, 2004.¹ By decision dated December 1, 2008, the Office again denied appellant's claim for compensation

¹ Docket No. 08-278 (issued May 13, 2008).

beginning August 9, 1992. It found that there were no missing documents during the period August 4, 1995 through December 14, 2004.

On January 14, 1992 appellant, then a 49-year-old construction representative, sustained injuries to his neck and back when he slipped on a wet dock at work. He stopped work on January 16, 1992 and never returned. Appellant began leave without pay on August 9, 1992 and retired on September 2, 1993. Effective August 9, 1992, he elected a disability retirement annuity from the Office of Personnel Management (OPM).² The Office accepted the claim for cervical and lumbosacral sprains and paid compensation benefits until the election of OPM benefits.³

On January 5, 2007 appellant elected to receive wage-loss compensation from the Office, retroactive to August 9, 1992, in lieu of the OPM benefits. He asserted that his disability was due to his accepted condition. Evidence received in support of appellant's claim for compensation commencing August 9, 1992 included physical therapy reports, magnetic resonance imaging (MRI) scans dated November 18, 1992, May 5, 2005 and October 2, 2006.

The record contains medical records from Dr. Federico L. Catucci, a neurosurgeon. On February 28, 1992 he noted that appellant was injured on June 6, 1991 and January 14, 1992 while at work. Dr. Catucci stated that appellant had difficulties since the June 6, 1991 injury, which affected the cervical spine and disabled him intermittently. Appellant had not worked since the January 14, 1992 injury. Dr. Catucci advised that 1991 cervical x-rays were reported as showing extensive degenerative changes from C4-7. He noted examination findings and listed an impression of cervical radiculitis secondary to trauma. Dr. Catucci advised that appellant had preexisting degenerative changes with symptomatology that was greatly aggravated by the January 14, 1992 injury. He opined that appellant's symptoms were related to the described injury and that appellant was disabled from any laboring activity. On December 23, 1992 Dr. Catucci noted MRI scan results for the cervical and lumbar spines. He advised that appellant had trapezius muscle spasm on the right and paralumbar muscle spasm on the left with tenderness present in both areas. Appellant was referred for physical therapy and remained totally disabled. On February 22, 1993 Dr. Catucci noted that appellant's status and findings were unchanged from previous examinations. In a March 12, 1993 attending physician's report, he noted the history of the January 14, 1992 work injury and diagnosed multilevel disc pathology at the lumbar and cervical spine. Dr. Catucci checked the box "yes" regarding whether he believed that the condition was caused or aggravated by an employment activity. He advised that appellant was totally disabled from May 14, 1992. In April 5 and June 7, 1993 reports, Dr. Catucci reiterated his opinion that appellant was totally disabled

On October 5, 1992 Dr. Richard G. Bertini, a Board-certified orthopedic surgeon, diagnosed cervical lumbosacral strain and herniated disc. He noted that appellant was injured on

² A beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity. The beneficiary must elect the benefit he or she wishes to receive and the election, once made, is revocable. *See* 5 U.S.C. § 8116(a) (2006); 20 C.F.R. § 10.421(a) (2008).

³ OPM indicated that appellant was overpaid \$7,597.83 for the period August 9, 1992 through March 29, 1993, when he received both OPM disability annuity and compensation from the Office. OPM reached a settlement with appellant and thereafter paid benefits beginning March 30, 1993.

January 14, 1992 and noted with a check mark "yes," that his condition was caused or aggravated by the employment activity. Dr. Bertini advised that appellant was totally disabled from January 14 through May 16, 1992 and partially disabled from May 16, 1992 as he was able to perform light duty. On January 28, 1993 he noted Dr. Catucci's treatment and advised that appellant's lower back and left upper extremity symptoms persisted. Appellant was totally disabled from performing his regular job but could work light-medium classification work. In a March 18, 1993 attending physicians report (Form CA-20), Dr. Bertini noted the history of injury and diagnosed cervical and lumbar radiculopathy and herniated discs at C3-4. He checked the box "yes" indicating that the condition was caused or aggravated by work activity. Dr. Bertini advised that appellant was totally disabled from January 14 through May 16, 1992 and partially disabled since May 16, 1992.

On October 26, 1994 an Office medical adviser noted that a November 18, 1992 MRI scan of the cervical spine revealed a small central disc herniation at C3-4 without significant impingement. An MRI scan of the lumbar spine showed multilevel disc bulges with osteophytes, with no central or neural foraminal stenosis, with encroachment on the left L4-5 neural foramen by an osteophyte. The Office medical adviser reviewed the history of the January 14, 1992 injury and treatment. When Dr. Catucci treated appellant in April and June 1993, there was no mention of any neurologic impairment. The Office medical adviser stated that a causal relationship between appellant's current condition and the January 14, 1992 injury was difficult to confirm. The symptoms of the accepted muscle strains should have resolved within six to eight weeks of the injury as no more serious injury had been confirmed. Moreover, the MRI scan failed to confirm any significant disc or other lesion and the degenerative changes found on the skeletal spine and discs were not likely due to the January 14, 1992 work injury. The Office medical adviser advised that appellant had preexisting degenerative arthritis of the cervical, thoracic and lumbar spine and there was no firm evidence the January 14, 1992 injury significantly affected those conditions. He noted that it was difficult to be certain of appellant's current status without more current medical evidence.

In a June 15, 2005 report, Dr. Albert A. Ackil, a neurologist, stated that appellant had low back pain with numbness, paresthesias and weakness in both legs. Review of the MRI scans showed left paracentral protrusion at L5-S1 with impingement at the L5 root. Dr. Ackil found that appellant had positive straight leg raising and positive femoral stretch, but no difficulty to suggest long track signs. He noted that appellant did not want surgery, but stated that it might be needed if physical therapy and rehabilitation were unsuccessful. Dr. Ackil advised that appellant was totally disabled. On October 26, 2006 he advised that the recent MRI scan showed degenerative disc disease, moderate spondylosis and protrusions at L5-S1. Dr. Ackil reiterated that appellant was totally disabled. He also diagnosed possible right hip trochanteric bursitis.

By letter dated April 12, 2007, the Office requested additional medical evidence from appellant. It asked that the attending physician address his capacity to engage in gainful employment, either full or part time, from August 9, 1992 to the present and whether his disability for work was causally related to the accepted neck and lumbar sprains of January 14, 1992. The physician was also asked to explain why the condition diagnosed was believed to be caused or aggravated by the injury and whether there was a material change in appellant's condition. The Office requested appellant to submit the requested information within

30 days. On May 4, 2007 appellant's attorney requested a two-week extension to provide the requested medical report. No additional information was received.

By decision dated June 1, 2007, the Office denied wage-loss compensation commencing August 9, 1992. It found that the medical evidence failed to establish that the claimed medical conditions were related to the accepted injury or work-related conditions.

On June 27, 2007 letter appellant requested reconsideration. In a May 31, 2007 report, Dr. Ackil noted that appellant was first seen on April 28, 2005 for constant back pain. Appellant provided a history of injury on January 14, 1992 as slipping and falling on a wet deck and landing heavily with his arms outstretched to minimize the effects of the fall. Dr. Ackil noted that appellant's diagnosis was cervical radiculitis secondary to trauma with degenerative changes which were aggravated by the trauma. He noted the November 1992 MRI scans were positive for multilevel disc abnormalities with central disc herniation at C3-4 and positive for bulging lumbar discs. The MRI scans of May 2005 again showed disc protrusion at L5-S1 with impingement of the existing left S1 and intraforaminal left L5 nerve roots. A small protrusion was also noted at L4-5. Dr. Ackil noted that appellant declined surgery and underwent physical therapy and rehabilitation. He opined that appellant's conditions were causally related to the injuries sustained in January 1992 and that he was totally disabled from any gainful employment. Dr. Ackil stated that appellant had significant trauma to the low back and cervical region from the January 14, 1992 work injury and, other than the January 14, 1992 work injury, there had been no traumatic event that would account for appellant's diagnosis or the conditions shown on diagnostic studies. Prior to his January 14, 1992 injury, appellant stated that he was healthy, working full time and not under medical care for a back condition. Diagnostic testing shortly after the injury was positive for disc herniations in both the upper and lower back and lumbar disc disease and appellant's complaints remained consistent through the present.

By decision dated September 25, 2007, the Office denied modification of its June 1, 2007 decision. Following the Board's remand order, it issued a December 1, 2008 decision which again denied modification of its previous decisions.

LEGAL PRECEDENT

As used in the Federal Employees' Compensation Act, the term disability means incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury.⁴ When the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his employment, he is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity.⁵

Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues, which must be proved by a preponderance of the

⁴ *Richard T. DeVito*, 39 ECAB 668 (1988); *Frazier V. Nichol*, 37 ECAB 528 (1986); *Elden H. Tietze*, 2 ECAB 38 (1948); 20 C.F.R. § 10.5(f).

⁵ *Bobby W. Hornbuckle*, 38 ECAB 626 (1987).

reliable, probative and substantial medical evidence.⁶ Findings on examination are generally needed to support a physician's opinion that an employee is disabled for work. When a physician's statements regarding an employee's ability to work consist only of repetition of the employee's complaints that he hurt too much to work, without objective findings of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.⁷ The Board will not require the Office to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.⁸

ANALYSIS

The Office accepted appellant's claim for cervical and lumbosacral sprains. The issue is whether appellant was totally disabled beginning August 9, 1992, due to his accepted injury

Dr. Catucci, a neurosurgeon, first examined appellant on February 28, 1992. He opined that appellant was totally disabled due to cervical radiculitis and aggravation of preexisting degenerative conditions secondary to the January 14, 1992 trauma. However, the conditions diagnosed were not those accepted as being employment related and Dr. Catucci failed to provide a fully rationalized medical opinion describing how appellant's cervical or lumbar conditions were related to the January 14, 1992 work injury.⁹ In subsequent reports through June 1993, he reiterated that appellant was totally disabled. Dr. Catucci diagnosed paraspinal spasm and multilevel disc pathology at the lumbar and cervical spine along with trapezius muscle spasm; however, he did not offer any opinion regarding the cause of appellant's condition or address the January 14, 1992 work injury.¹⁰ In a March 12, 1993 attending physician's report, he checked a box "yes" on the form to indicate that appellant's condition was employment related. However, the Board has held that a check mark or affirmative notation in response to a form question on causal relationship is not sufficient to establish a claim.¹¹ Thus, Dr. Catucci's reports are insufficient to establish appellant's claim.

Appellant submitted several reports and progress notes from Dr. Bertini. In his October 5, 1992 report, Dr. Bertini diagnosed cervical lumbosacral strain and herniated disc and opined that appellant was partially disabled since May 16, 1992. While he noted that appellant

⁶ See *Fereidoon Kharabi*, 52 ECAB 291, 293 (2001); *Edward H. Horton*, 41 ECAB 301, 303 (1989).

⁷ *G.T.*, 59 ECAB ____ (Docket No. 07-1345, issued April 11, 2008); see *Huie Lee Goal*, 1 ECAB 180, 182 (1948).

⁸ *G.T., id.*; *Fereidoon Kharabi*, *supra* note 6.

⁹ See *T.M.*, 60 ECAB ____ (Docket No. 08-975, issued February 6, 2009) (for conditions not accepted by the Office, a claimant bears the burden of proof to establish that the condition is causally related to the employment injury through the submission of rationalized medical evidence); see also *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (a medical opinion not fortified by medical rationale is of little probative value).

¹⁰ Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship. *S.E.*, 60 ECAB ____ (Docket No. 08-2214, issued May 6, 2009).

¹¹ See *Cecelia M. Corley*, 56 ECAB 662 (2005); *Gary J. Watling*, 52 ECAB 278 (2001).

was injured on January 14, 1992, he did not provide a description of the work injury, explain the nature of the relationship between the diagnosed conditions and the specific events of January 14, 1992 or provide any reasons why appellant's accepted strains continued to render him partially disabled. Dr. Bertini indicated by checking a box "yes" that he believed appellant's condition was caused or aggravated by employment activities. However, as noted, such an opinion on causal relationship is of diminished probative value in the absence of medical rationale explaining the reasons for the conclusion. Similarly, Dr. Bertini's March 18, 1993 attending physician's report also supported causal relationship by checking a box "yes" on the form report but he did not provide any medical rationale to explain why any continuing disability or conditions not accepted by the Office, were causally related to the January 14, 1997 cervical and lumbar sprains. In his January 28, 1993 report, he noted appellant's symptoms persisted and advised that appellant was totally disabled from his regular job but could perform light to medium work. However, Dr. Bertini did not explain the reasons why any disability was caused or contributed to by his January 14, 1992 work injury. Thus, Dr. Bertini's reports are insufficient to establish appellant's claim.

Appellant also submitted reports from Dr. Ackil dated June 15, 2005, October 25, 2006 and May 31, 2007. In his June 15, 2005 and October 25, 2006 reports, Dr. Ackil indicated that he reviewed appellant's MRI scans of the cervical and lumbar spines and opined that the degenerative disc disease, moderate spondylosis and disc protrusions at L5-S1 totally disabled appellant. Dr. Ackil did not offer an opinion as to whether the claimed disability was causally related to appellant's accepted conditions or provide an explanation as to how the diagnosed conditions were caused or aggravated by the January 14, 1992 work injury. In fact, Dr. Ackil never mentioned the January 14, 1992 work injury in these reports. Thus, these reports are insufficient to establish appellant's claim.

In a May 31, 2007 report, Dr. Ackil opined that the conditions diagnosed on MRI scan reports were causally related to the January 14, 1992 injuries and that appellant was totally disabled from his 1992 injury since January 14, 1992. He noted that the November 1992 MRI scan report showed disc herniations at C3-4 and the May 2005 MRI scan showed disc protrusions at L5-S1 with impingement of the existing left S1 and intraforaminal left L5 nerve roots and a small protrusion at L4-5. The Board finds Dr. Ackil's opinion lacks sufficient rationale to meet appellant's burden of proof. While Dr. Ackil noted there was no other traumatic event other than the January 14, 1992 work injury to account for appellant's diagnosis and the diagnostic testing shortly after the work injury was positive for disc herniations in both the upper and lower back and lumbar disc disease, he did not provide medical rationale explaining how appellant's accepted cervical and lumbosacral sprains caused or aggravated the disc herniations and protrusions noted on the MRI scan reports.¹² The mere fact that a condition manifests itself during a period of employment does not raise an inference of causal relation.¹³ Dr. Ackil also relied on a 2005 MRI scan to find that appellant was still disabled from his 1992 injury and unable to work. Generally, the greater the delay in testing the greater the likelihood

¹² See *John W. Montoya*, 54 ECAB 306 (2003) (the physician must provide an opinion on whether the employment incident described caused or contributed to the claimant's diagnosed medical condition and support that opinion with medical reasoning to demonstrate that the conclusion reached is sound, logical and rational).

¹³ A.C., 60 ECAB ___ (Docket No. 08-1453, issued November 18, 2008).

that an event not related to employment has caused or worsened the condition for which the employee seeks compensation.¹⁴ Dr. Ackil did not provide sufficient medical rationale explaining why appellant's current condition and disability would be caused or aggravated by the January 14, 1992 injury that was accepted for lumbar and cervical sprains. He apparently based his opinion on a history indicating that the fall suffered on January 14, 1992 marked the beginning of appellant's many complaints and conditions. The medical evidence from 1992 also indicated that appellant had an injury in 1991 affecting the cervical spine and that he also had preexisting degenerative changes in his spine. Medical opinion based on an incomplete or inaccurate factual history is of little probative value.¹⁵ This report is insufficient to establish appellant's claim.

Other medical reports of record are insufficient to establish the claim as they do not address whether the claimed disability was causally related to appellant's accepted conditions. The Office also received several physical therapy reports, but lay individuals, such as physical therapists, are not competent to render a medical opinion under the Act.¹⁶

Appellant alleged that he was disabled beginning August 9, 1992 as a result of his accepted employment injury. The medical evidence of record, however, does not establish that his claimed disability was related to his accepted employment injuries. The Board thus finds that appellant has not submitted sufficient medical evidence to establish that his disability commencing August 9, 1992 is a result of the accepted employment injury.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he was entitled to wage-loss compensation beginning August 9, 1992.

¹⁴ *Mary A. Ceglia*, 55 ECAB 626 (2004).

¹⁵ *M.W.*, 57 ECAB 710 (2006); *Beverly R. Jones*, 55 ECAB 411 (2004).

¹⁶ *David P. Sawchuk*, 57 ECAB 316 (2006); see 5 U.S.C. § 8101(2).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs decision dated December 1, 2008 is affirmed.

Issued: October 22, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board