

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

K.J., Appellant

and

**U.S. POSTAL SERVICE, MAIN POST OFFICE,
Louisville, KY, Employer**

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**Docket No. 10-457
Issued: September 15, 2010**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 10, 2009 appellant filed a timely appeal from July 14 and August 31, 2009 merit decisions of the Office of Workers' Compensation Programs finding that he did not sustain a recurrence of disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant sustained a recurrence of disability beginning April 11, 2009 causally related to his March 26, 1996 employment injury.

FACTUAL HISTORY

On March 26, 1996 appellant, then a 45-year-old custodian, filed a claim alleging that he sustained an injury to his lower back on that date in the performance of duty. The Office accepted his claim for lumbar strain and a herniated disc. In June 1996 appellant underwent a decompression hemilaminectomy and in August 1996 he underwent a repeat laminectomy.

Appellant sustained intermittent periods of disability due to his employment injury. On October 1, 2001 he returned to work with restrictions.¹ Appellant worked various modified assignments.

In February 2003 the Office authorized a L4-5 lumbar decompression and fusion with posterior lumbar interbody cages and pedicle screw fixation without posterolateral intertransverse fusion.² In December 2007 the Office authorized an implanted stimulator. In recommending retroactive authorization for the stimulator, the Office medical adviser noted that appellant had undergone numerous back surgeries and that the procedure “was undoubtedly in the treatment of the [accepted conditions] and is, therefore, authorized.” In May 2008 the Office authorized epidural injections. The Office medical adviser noted that appellant experienced chronic low back pain from postlaminectomy syndrome and chronic arachnoiditis.

In a progress report dated May 28, 2009, Dr. Richard T. Holt, a Board-certified orthopedic surgeon, opined that appellant was unable to work until July 3, 2009 due to his “original 1996 work[ers’] comp[ensation] back injury.”³

On May 29, 2009 appellant filed a claim for intermittent compensation from April 1 to 29, 2009 due to his accepted work injury.

In a report dated June 22, 2009, Dr. Kimber S. D’Antoni, a Board-certified internist, related that he was treating appellant for “a long-term work-related back injury.” He stated:

“In April 2009 [appellant] presented to the clinic with a severe exacerbation of his chronic back pain. He was limping and grimacing and appeared to feel very badly. At that time we made some medication changes that required titration and a period of adjustment. During this medication adjustment he was recommended to stay off work due to medication side effects of sleepiness, loss of concentration and continuation of severe pain. Despite treatment he continued to worsen in his severe back and leg pain.”

Dr. D’Antoni noted that appellant was evaluated by a neurosurgeon for possible removal of a spinal cord stimulator. He concluded, “there is no doubt that [appellant’s] current back and leg pain are directly associated to his original back injury and is an exacerbation and

¹ By decision dated May 23, 2006, the Office found that appellant had not established recurrences of disability for multiple periods throughout 2004 and 2005. By decision dated September 29, 2008, it found that he had not established an employment-related recurrence of disability beginning June 25, 2008. In August 2008 it determined that he received an overpayment of compensation because he received compensation for disability after he returned to work on October 4, 2003. On October 7, 2008 the Office denied appellant’s claim for compensation from April 24 to May 9, 2008. By decision dated March 31, 2009, a hearing representative finalized the August 2008 overpayment determination.

² By decision dated August 8, 2005, the Office denied appellant’s claim for a schedule award after finding that the medical evidence did not establish that he had reached maximum medical improvement.

³ In an April 20, 2009 progress report, a nurse found that appellant was unable to work from April 1 to 28, 2009. On May 6, 2009 a nurse attributed his back pain to prior surgeries related to his 1996 work injury.

continuation of the same. In fact some of the pain may be a direct sequelae of the neurostimulator.”

By decision dated July 14, 2009, the Office found that appellant had not established a recurrence of disability beginning April 11, 2009. It determined that the evidence was insufficient to show that he was unable to perform his limited-duty position due to his accepted employment injury.

On July 14, 2009 Dr. Holt related that he evaluated appellant in April 2009 for low back and right leg pain.⁴ He stated:

“[Appellant] had had 10 surgeries by Dr. Villanueva, including an interbody fusion without posterior stabilization. Some of the surgeries were complicated by staph infection. He also had a spinal cord stimulator placed in the last few years. The onset of his pain was from a workers’ compensation event. He complains now of increasing pain in his lumbar spine radiating into his right leg.”

Dr. Holt noted that an imaging study showed “nonunion at the L4-5 level with arachnoiditis.” He noted that he considered removing appellant’s spinal cord stimulator, but advised:

“After further evaluation, our determination was that after nine surgeries the probability of improving his situation was too low to justify the risk in my hands and I recommended that he seek a surgical opinion elsewhere. In my opinion [he] has disabling pain [and] no neurological deficit. I believe his condition has been exacerbated by his multiple surgeries and fusion attempts. He currently has a diagnosis of arachnoiditis with intractable pain and nonunion.”

On July 21, 2009 appellant requested reconsideration. By decision dated August 31, 2009, the Office denied modification of its July 14, 2009 decision. It found that Dr. Holt did not explain why appellant was disabled from his limited-duty work due to his 1996 work injury.

On appeal appellant related that since his March 1996 herniated disc he had 12 surgeries. He noted that Dr. Holt attributed his condition to nonunion from a surgery due to his accepted work injury.

LEGAL PRECEDENT

Where an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence, a recurrence of total disability and to show that he or she cannot perform such light duty. As part of this burden, the

⁴ On June 30, 2009 Dr. Holt opined that appellant was disabled from June 30 to July 14, 2009.

employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.⁵

Office regulations provide that a 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.⁶ This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn, (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force) or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.⁷

Proceedings under the Federal Employees' Compensation Act are not adversarial in nature and the Office is not 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.⁸

ANALYSIS

The Office accepted that appellant sustained lumbar strain and herniated disc due to a March 26, 1996 employment injury. After sustaining intermittent periods of disability, he returned to work with restrictions on October 1, 2001. Appellant underwent multiple authorized surgeries on his back, including a decompression hemilaminectomy in June 2006, a repeat laminectomy in August 2006, an L4-5 lumbar decompression and fusion in February 2003 and a stimulator implant in December 2007. On May 29, 2009 he stopped work and filed a claim for compensation beginning April 1, 2009.

Appellant has not alleged a change in the nature and extent of his light-duty job requirements. He must thus provide medical evidence establishing that he was disabled due to a worsening of his accepted work-related conditions.⁹ In a progress report dated May 28, 2009, Dr. Holt found that appellant was unable to work due to his 1996 employment injury. On June 22, 2009 Dr. D'Antoni indicated that he was treating appellant for an employment-related back injury that occurred a long time ago. In April 2009 he evaluated him for an exacerbation of his chronic back pain and took him off work due to his pain and a necessary adjustment in his medication. Dr. D'Antoni related that appellant's back and leg pain was directly related to his "original back injury and is an exacerbation and continuation of the same" and could be the direct result of the implanted neurostimulator. On July 14, 2009 Dr. Holt discussed appellant's

⁵ *Jackie D. West*, 54 ECAB 158 (2002); *Terry R. Hedman*, 38 ECAB 222 (1986).

⁶ 20 C.F.R. § 10.5(x).

⁷ *Id.*

⁸ *J.B.*, 60 ECAB ____ (Docket No. 08-1735, issued January 27, 2009); *Jimmy A. Hammons*, 51 ECAB 219 (1999).

⁹ *See Jackie D. West*, *supra* note 5.

history of 10 surgeries and an interbody fusion without posterior stabilization. He reviewed imaging studies which he found showed a nonunion at L4-5 with arachnoiditis. Dr. Holt considered removing the spinal cord stimulator, but determined in view of appellant's multiple surgeries that the risk was too great. He diagnosed arachnoiditis with intractable pain and opined that his condition "has been exacerbated by [appellant's] multiple surgeries and fusion attempts."

Proceedings under the Act are not adversarial in nature, nor are 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.¹⁰ The Board has reviewed the reports of Dr. Holt and Dr. D'Antoni and notes that Dr. Holt and Dr. D'Antoni provided a clear opinion that appellant had back pain and disability from work were due to the effects of his employment injury and multiple authorized back surgeries.¹¹ Dr. Holt based his diagnosis on the objective findings, including a magnetic resonance imaging (MRI) scan study that showed a nonunion of the lumbar spine at L4-5 with arachnoiditis. The opinions of Dr. Holt and Dr. D'Antoni are supportive, unequivocal, bolstered by objective findings and based on a firm diagnosis and an accurate history. Their conclusions lack only an explanation of why appellant was unable to perform his modified employment beginning April 2009 due to the exacerbation of his back condition and surgeries. Consequently, while the medical evidence from Dr. Holt and Dr. D'Antoni is insufficiently rationalized to meet his burden of proof to establish that he was disabled beginning April 1, 2009 due to his accepted employment injury, it raises an undisputed inference of causal relationship sufficient to require further development by the Office.¹² Accordingly, the Board will remand the case to the Office. On remand the Office should further develop the medical record to determine whether appellant sustained a recurrence of disability beginning April 11, 2009 due to his March 26, 1996 work injury and resulting surgeries. Following this and such further development as the Office deems necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision.

¹⁰ A.A., 59 ECAB ___ (Docket No. 08-951, issued September 22, 2008); *Phillip L. Barnes*, 55 ECAB 426 (2004).

¹¹ A medical condition resulting from authorized examination or treatment, such as surgery, may form the basis of a compensation claim for impairment or disability, regardless of the compensability of the original injury. *See D.B.*, 58 ECAB 464 (2007).

¹² *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 31 and July 14, 2009 are set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: September 15, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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