

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CARLOS E. BAEZA and U.S. POSTAL SERVICE,
POST OFFICE, Menlo Park, CA

*Docket No. 99-2205; Submitted on the Record;
Issued December 21, 2000*

DECISION and ORDER

Before WILLIE T.C. THOMAS, PRISCILLA ANNE SCHWAB,
VALERIE D. EVANS-HARRELL

The issue is whether appellant has met his burden of proof to establish that his degenerative disc disease is causally related to factors of his employment.

On November 7, 1997 appellant, then a 46-year-old mail carrier, filed an occupational disease claim (Form CA-2) alleging that his lumbar disc syndrome was caused or aggravated by factors of his employment. He stopped work on May 24, 1997.

By letter dated December 29, 1997, the Office of Workers' Compensation Programs notified appellant of the factual and medical evidence necessary to establish his claim.

In response, appellant submitted a narrative statement dated January 26, 1998 in which he described his job duties, history of injury, symptoms and treatment. He asserted that when he lifted a toilet cover on October 4, 1996 at work he sustained severe back pain and stopped work until January 1997 when he returned to regular duty. Appellant stated that he subsequently worked light duty but stopped work completely on May 24, 1997. He also stated that he had experienced continuous back pain since September 1996.

By decision dated March 17, 1998, the Office denied appellant's occupational disease claim on the grounds that he failed to submit medical evidence to support his claim.

Subsequently, appellant submitted progress notes dated July 9 to December 30, 1997 in which Dr. Towie Fong, Board-certified in internal and geriatric medicine, diagnosed lumbosacral sprain with spasms and noted appellant's complaints and treatment. Appellant also submitted a report dated July 29, 1997 in which Dr. Justin McKendry, Board-certified in internal medicine and anesthesiology, diagnosed chronic low back pain. In progress notes dated September 2, 1997, Dr. Patrick Nance, a Board-certified anesthesiologist, described appellant's lumbar epidural steroid injection.

In a report dated April 22, 1998, Dr. Kenneth I. Light, a Board-certified orthopedic surgeon, noted that appellant initially injured his back in the shower in 1993 and again in September 1996 after lifting a toilet seat. An evaluation and magnetic resonance imaging (MRI) scan showed narrowing and collapse of the L4-5 disc. A subsequent myelogram, computerized tomography (CT) scan and MRI scan showed normal L3-4 and L5-S1 discs and a degenerative and painful L4-5 disc.

By letter dated June 15, 1998, appellant requested reconsideration and submitted a brief report dated August 5, 1998 in which Dr. Light stated that a recent myelogram, CT scan and discography revealed L4-5 degeneration with central protrusion. He opined that, based on those diagnostic tests, an anterior discectomy and fusion would be considered and appellant wanted to undergo that surgery.

By merit decision dated September 9, 1998, the Office vacated its prior decision and accepted appellant's claim for lumbar strain. The Office noted that the medical evidence of record indicated a degenerative condition at L4-5 but did not relate that condition to work factors of his employment and, therefore, surgery was not authorized.

By letter dated October 5, 1998, appellant again requested reconsideration and submitted a report dated September 30, 1998 in which Dr. Light stated:

“[Appellant’s] tests demonstrate a wearing out and protrusion of the L4-5 disc. This has occurred for two reasons. He had a weakness in the spine at the L4-5 level related to repetitive bending and lifting which occurred as a result of lifting mailbags and carrying letters for 15 years. This is directly related to [appellant’s] job as a letter carrier and is the reason he requires surgery. It has been shown that repetitive bending, lifting and carrying mailbags produces increasing strain and stress on the intervertebral discs, especially at the L4-5 disc, which is [his] current problem.”

On November 9, 1998 appellant, together with a statement of accepted facts and list of questions, was referred to Dr. Robert Ferretti, a Board-certified orthopedic surgeon, for a second opinion evaluation. In his report dated November 9, 1998, Dr. Ferretti provided an extensive history of injury and review of appellant's complaints and treatment. Based on his physical examination and review of appellant's medical records, he diagnosed the following conditions: (1) work-related lumbar strain; (2) history of chronically recurring nonwork-related low back pain incident to a January 1993 injury; (3) chronic discogenic low back pain syndrome without neurological involvement; (4) broad-based disc bulge at L4-5 with possible annulus fissure and very slight central protrusion within the bulging disc; and (5) degenerative disc with annular tears and small midline protrusion at L4-5.

Dr. Ferretti opined that, based on medical probability, appellant's work-related lumbar strain had resolved and his present low back pain was incidental to his nonwork-related L4-5 degenerative lumbar disc condition. He explained that there was no relationship between

appellant's resolved work-related lumbar strain and his preexisting degenerative disc disease. Dr. Ferretti stated:

"There is no correlation between the occurrence of the lumbar strain and the symptomatic lumbar degenerative disc disease with general work activities which might cause only a temporary aggravation of the degenerative condition. The work activities have resulted in no permanent worsening or acceleration of the lumbar degenerative disc disease.... The low back symptoms would be the same today irregardless of work activities and the work injury recorded as September 3, 1996. The symptoms presently described are identical to those occurring during work activities despite the fact that the claimant has been out of work completely since May 24, 1997."

Regarding the issue of appellant's ability to work, he stated:

"There are no physical limitations resulting from [the] work-related disability but there are restrictions attributable to the preexisting lumbar degenerative disc disease consisting of no greater than 20-pound repetitive lifting, pushing and pulling and no prolonged sustained bending or stooping.

"[Appellant] is unable to perform his regular duties eight hours [per] day but is capable of working in a modified capacity consisting of his usual work six hours [per] day."

Regarding the issue of treatment, Dr. Ferretti stated:

"Based on the present findings, with no neurological involvement and restricted back range of motion due to stiffness, there are indications that there has been insufficient exposure to a therapeutic back exercise program despite the extensive physical therapy and chiropractic treatment. This is the primary treatment measure for [appellant's] condition. Surgery for disc excision and insertion of a cage is an option for the chronic low back pain but there can be no guarantee as to the degree of improvement related to this procedure. The surgery, if it becomes indicated, would be on a nonindustrial basis and neither the injury of September 3, 1996 nor general work activities would be considered causative factors resulting in this treatment."

Dr. Ferretti completed an undated work capacity evaluation form in which he indicated that appellant's chronic low back pain required that he work a six-hour day and that he did not anticipate an increase in the number of hours per day that appellant could work. He also noted appellant's activity restrictions.

By merit decision dated January 13, 1999, the Office affirmed its prior decision on the grounds that the weight of the medical evidence failed to establish a causal relationship between appellant's L4-5 degenerative disc disease and factors of his employment.

The Board finds that this case is not in posture for decision.¹

Section 8123 of the Federal Employees' Compensation Act provides that if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.²

In this case, appellant's treating physician, Dr. Light, a Board-certified orthopedic surgeon, opined that appellant's L4-5 degenerative disc disease was causally related to factors of his federal employment. Dr. Ferretti, the second opinion specialist and who is also a Board-certified orthopedic surgeon, however, opined that appellant's L4-5 degenerative disc disease was not work related because his symptoms subsequent to May 24, 1997, the date he stopped work, were the same as those he experienced during his employment. The Board finds that these opinions are of equal weight as they are well rationalized and based on complete factual and medical background. Therefore, a conflict exists on the issue of whether appellant's L4-5 degenerative disc disease is causally related to his federal employment. The case, therefore, shall be remanded for referral to an appropriate impartial medical specialist, accompanied by a statement of accepted facts and the complete case record, for a rationalized medical opinion addressing that issue. After such further development as deemed necessary, the Office shall issue a *de novo* decision.

¹ On March 9, 1999 the Board dismissed this appeal, filed on January 27, 1999 and originally assigned Docket No. 99-997, on the grounds that appellant had requested review of the Office's January 11, 1998 decision, which was not within the Board's jurisdiction as it was not within the one-year period in which appeals must be filed. *See* Docket No. 99-997 (issued March 4, 1999). Appellant, through his representative, subsequently advised the Board that he had actually intended to appeal the Office's January 13, 1999 decision and, therefore, requested that the Board redocket his appeal.

² 5 U.S.C. § 8123; *see Shirley L. Steib*, 46 ECAB 309 (1994).

The decision of the Office of Workers' Compensation Programs dated January 13, 1999 is set aside, and the case is remanded to the Office for proceedings consistent with this opinion.

Dated, Washington, DC
December 21, 2000

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member

Valerie D. Evans-Harrell
Alternate Member