U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES P. COTTER and U.S. POSTAL SERVICE,
POST OFFICE, Providence, RI

Docket No. 00-1345; Submitted on the Record;
Issued December 3, 2001

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether appellant met his burden to establish that his alleged recurrence of disability as of August 3, 1996 through November 21, 1997 was caused or aggravated by his accepted April 1, 1996 employment injury.

Appellant, a 42-year-old letter carrier, injured his hip and lower back on April 1, 1996 when the jeep he was driving skidded on a slick, wet curbside. He filed a claim for benefits, which the Office of Workers' Compensation Programs accepted on May 30, 1996 for sciatica.

In a report dated June 20, 1996, Dr. Douglas R. Grogan, a Board-certified family practitioner, stated that appellant was incapable of prolonged standing or lifting more than ten pounds.

In a report dated July 29, 1996, Dr. R.J. O'Brien, a Board-certified surgeon, restricted appellant from lifting no more than 5 pounds, with no intermittent sitting for more than 30 minutes, intermittent standing for more than 1 hour, with no climbing, kneeling, or stooping and simple grasping for more than 4 hours.

On July 31, 1996 the employing establishment offered appellant a light-duty job as a modified letter carrier, which did not require him to do any lifting greater than 5 pounds, intermittent sitting more than 30 minutes, intermittent standing more than 1 hour, no climbing, kneeling or stooping and simple grasping 4 hours. Appellant accepted the modified job and returned to work for four hours a day on August 3, 1996.

Appellant subsequently alleged that he was unable to work at the modified position for four hours a day. In a letter to the employing establishment, he stated:

> "Although I did not work the expected [four] hours due to the pain that I was experiencing in my lower back and sciatic nerve, I did attempt to complete the expected length of duty. I did this for a period of 10 working days, until my next doctor's appointment on August 20, 1996. Therefore, there [were] several hours each week [for which] I have not received [compensation]."

Accompanying appellant's letter was a Form CA-17, dated September 1996, from Dr. Grogan, who readjusted the hours appellant was capable of working at the modified job from four hours to two to three hours. Appellant also submitted three CA-8 forms, dated August 16, August 30 and September 13, 1996, requesting compensation based on wage loss for these periods.

In a letter dated September 18, 1996, the employing establishment controverted appellant's claim for wage loss from August 3 through August 20, 1996. The employing establishment rejected appellant's assertion that he was unable to work the full four hours and went home early most days after returning to work on August 3, 1996, noting that he did not see his physician until August 20, 1996, at which time he was limited to two to three hours a day of work.

By letter dated September 23, 1996, the Office expanded its acceptance of the claim to include the conditions of low back and hipbone spurs.

By letter dated September 27, 1996, the Office requested a medical report from Dr. Grogan to support appellant's claim, with medical rationale, that he was unable to work four hours a day during the period claimed.

Appellant submitted CA-8 forms, dated September 27, October 25 and November 9, 1996, in which he claimed compensation based on wage loss for the period September 14 through November 8, 1996. He sought compensation from the employing establishment for four additional hours a day from August 3 through November 21, 1997, noting that he had been paid compensation based on four hours during that time.

In Office payroll worksheets dated November 27 and December 27, 1996, it was noted that appellant experienced a nonwork-related heart attack on November 14, 1996 and indicated that he was not working at that time.

Appellant continued to submit CA-8 forms through December 10, 1996 and the Office continued to pay him compensation based on wage loss for four hours a day.

In a report dated December 10, 1996, Dr. Grogan stated that appellant was totally disabled by his back pain and totally disabled from any type of meaningful employment with the employing establishment. In a report dated December 17, 1996, Dr. Grogan stated that, due to the severity of appellant's condition, he had reduced appellant's work hours as of August 20, 1996 from four, to two to three hours a day.

In a January 27, 1997 letter to his congressional representative, appellant stated that Dr. O'Brien had allowed him to return to work at the modified job for four hours a day as of August 3, 1996 but that he was never able to work a four-hour shift due to the pain in his back. He stated that on August 20, 1996 he saw Dr. Grogan, who reduced his work hours from four to two to three hours a day until December 10, 1996, when he stopped working. This letter was forwarded to the Office on February 7, 1997.

The Office responded in a letter dated February 25, 1997 that it was paying appellant continuing compensation based on four hours of lost time a day, in accordance with Dr. O'Brien's July 29, 1996 report which indicated that he was capable of working four hours a day. The Office stated that, although Dr. Grogan opined that appellant was totally disabled December 10, 1996, he had failed to identify any change in appellant's physical findings or provide medical rationale to support his inability to perform part-time light-duty work activities. The Office indicated that it had scheduled appellant for a second opinion to determine if he had any residuals from his March 2, 1996 work injury.

In a report dated February 14, 1997, Dr. Grogan stated that appellant had an ongoing lumbosacral radiculopathy which significantly affected both his work and leisure activities. He stated:

> "His work activities tend to exacerbate his symptoms. It is my feeling that he is permanently and totally disabled from performing any duties requiring lifting and bending. It would appear that he is totally disabled from any duties at the [employing establishment] except duties which would be only of a sit-down nature. His problems did worsen from [August 3] through [December 10, 1996]."

In a March 1, 1997 letter to the employing establishment, appellant stated that his lower back condition had worsened due to work-related activities when he returned to work from August to November 1996.[1]

On March 3, 1997 Dr. Grogan noted appellant's back pain "seemed to be mainly sciatica of the right leg" and stated that his magnetic resonance imaging (MRI) scan was unremarkable. He noted appellant "[h]ad "severe incapacitating low back pain of unclear etiology" though he had degenerative disease at L3-4. Dr. Grogan noted he was totally disabled for any type of meaningful employment, "[h]e has tried to work part time at the [employing establishment] but this has exacerbated his pain."

On March 4, 1997 the Office referred to Dr. C. Nelson Burden, a Board-certified orthopedic surgeon, for a second opinion to determine whether appellant had sustained a change in the nature and extent of his accepted condition after returning to work on August 3, 1996 and whether he was totally disabled as of December 10, 1996.

In a report dated March 20, 1997, Dr. Burden stated:

[1] By letter dated April 14, 1997, the employing establishment asserted that appellant had alleged a recurrence of disability at the time of his heart attack in November 1996. The record does not indicate that appellant ever filed a formal claim for recurrence of disability. The Office, however, treated this case as a recurrence claim.

> "It is my opinion this 43-year-old mailman allegedly has had problems with his back gradually increasing over a period of 20 years as a mailman and presents at this examination for orthopedic evaluation largely with a symptomatic pattern of complaints which bear very little objective evidence of significant orthopedic impairment. It is my opinion based on the orthopedic evaluation of this patient that he has had considerable care and rehabilitative efforts in bringing him to a state of carrying out the full duties of a mailman. However, he has not been able to equate this with his symptomatic pattern complaints, which interfere with his total function expected of the industrial service activity. It is my opinion [that] [appellant] has a capacity to carry on the activities of a mailman but obviously he objects to and believes he is not capable of doing lifting above the weight of 20 pounds. It is also apparent based on the complexity of his symptomatic pattern that he refuses and has a problem concerning repeated bending or rotating his lower back.
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> "In summary orthopaedically [appellant] presents very little objective evidence of impairment. There is no surgery indicated and [appellant] at this time is not a candidate for extensive rehabilitative efforts grooved in an orthopedic fashion. His prognosis in getting back to work as a mailman depends on overcoming his symptomatic pattern and coordination of consideration of his heart condition and resulting depression which summates into a problem mandating consideration over and above his orthopaedic mild impairment."

The Office determined there was a conflict in the medical evidence between Drs. Grogan and Burden and referred appellant to Dr. Louis Fuchs, a Board-certified orthopedic surgeon, for an impartial medical examination

In a report dated May 27, 1997, Dr. Fuchs opined that appellant was capable of performing the light-duty activities outlined in the statement of accepted facts; *i.e.*, those indicated in Dr. O'Brien's July 29, 1996 report, for four hours a day.

In a supplemental report dated September 18, 1997, Dr. Fuchs stated that "concerning causality, I feel [appellant's] conditions of employment have materially aggravated his back problems and feel this will be a permanent aggravation. I feel he is still limited to four hours a day."

In a report dated November 21, 1997, Dr. Grogan stated:

> "Due to [appellant's] lower back condition, sorting, racking or casing of letter size mail has proven to worsen pain in his low back and hips. This has been proven in 1996. In 1996 this reexacerbat[ed] his condition to the point of being on total disability."

By decision dated April 13, 1999, the Office denied the claim for additional compensation from August 3, 1996 to November 21, 1997. The Office found that appellant did not submit sufficient medical evidence to support additional compensation payments for the periods claimed and found that Dr. Fuchs' independent medical opinion that appellant was capable of working four hours a day represented the weight of the medical evidence.

By letter dated April 30, 1999, appellant's attorney requested a review of the written record. Appellant's attorney contended that the weight of the medical evidence indicated that as of August 20, 1996 appellant was unable to work four hours a day in the modified position he accepted on August 3, 1996 due to the recurrence of his work-related back conditions and that he became totally disabled due to these conditions as of December 10, 1996. He also contended that Dr. Fuchs' referee opinion did not merit the weight of an impartial examination because he was not informed that appellant had a second accepted condition in addition to sciatica, that of low back and hipbone spurs. In support of his claim, appellant submitted a September 16, 1999 report from Dr. Grogan, in which he essentially reiterated his previous findings and conclusions.

By decision dated December 20, 1999, an Office hearing representative affirmed the Office's April 13, 1999 decision.

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

On May 30, 1996 appellant's claim was accepted by the Office for sciatica. Dr. O'Brien, a Board-certified surgeon, indicated in a duty status form dated July 29, 1996 that appellant was only partially disabled and could work four hours a day, based on his examination. Appellant accepted a modified job offer based on these restrictions and reported to work; he contended, however, that he was never able to work as many as four hours a day. His treating physician, Dr. Grogan, stated in his August 20, 1996 report that, "as of his examination of appellant on that date, [he] was capable of working only two to three hours [a] day within his physical restrictions." The employing establishment, however, paid appellant compensation for four hours a day based on Dr. O'Brien's evaluation and report. Therefore, there was a conflict over whether he was capable of working four or two to three hours a day during this period. Appellant submitted several CA-8 claim forms for wage-loss compensation, seeking compensation from August 3 through December 10, 1996, when Dr. Grogan opined that he had become totally disabled.

In its April 30 and December 20, 1999 decisions, the Office found that appellant had not submitted evidence sufficient to establish a claim for additional compensation during the period August 3, 1996 through November 27, 1997. Although appellant was claiming additional compensation based on loss of wages from August 3 through December 10, 1996, what he was actually claiming was compensation based on a recurrence of disability, which worsened into a

condition of total disability as of December 10, 1996, based on Dr. Grogan's opinion. The Office noted he was paid for four hours a day during this period and determined that he had failed to submit medical evidence sufficient to establish that he was entitled to additional compensation. The Office found that the weight of the evidence was represented by Dr. Fuchs, the referee medical examiner, who opined in his May 27 and September 18, 1997 reports that appellant could work four hours a day in accordance with Dr. O'Brien's restrictions.

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he 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 show that he cannot perform such light duty. As part of this burden, the 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.[2]

In the instant case, the Office relied on Dr. Fuchs' referee medical opinion in finding that appellant failed to establish a change in the nature and extent of his injury-related condition. Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well-rationalized and based upon a proper factual background, is entitled to special weight.[3] In the present case, Dr. Fuchs, the referee medical examiner, summarily stated in his May 27 and September 18, 1997 reports that appellant was capable of working a four hour day based on the restrictions indicated in the statement of accepted facts, but failed to provide a probative, rationalized medical report to support his opinion. In addition, Dr. Fuchs' opinion is flawed, because he was not aware that on September 23, 1996, the Office expanded appellant's claim to include the conditions of low back and hipbone spurs. Therefore, the Board finds that his opinion is not sufficiently rationalized and probative to merit the special weight of an impartial medical examiner.

On remand, the Office should refer appellant to a new impartial medical specialist, with a new statement of accepted facts which indicates that on September 23, 1996 the Office expanded appellant's claim to include the conditions of low back and hipbone spurs. After such development as it deems necessary, the Office shall issue a *de novo* decision.

[2] *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

[3] *Aubrey Belnavis*, 37 ECAB 206 (1985); 5 U.S.C. § 8123(a).

The Office of Workers' Compensation Programs' decision dated December 20, 1999 is, therefore, set aside and the case is remanded to the Office for further action consistent with this decision of the Board.

Dated, Washington, DC
December 3, 2001

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member