

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of BASIL C. CORTESE and DEPARTMENT OF THE NAVY,  
PHILADELPHIA NAVAL SHIPYARD, Philadelphia, PA

*Docket No. 03-946; Submitted on the Record;  
Issued November 3, 2003*

---

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issue is whether appellant sustained an L4-5 herniated nucleus pulposus, causally related to his accepted employment injuries or to factors of his federal employment.

The Office of Workers' Compensation Programs accepted that on May 13, 1985 appellant, then a 36-year-old rigger, sustained lumbar paravertebral sprain and a right herniated nucleus pulposus (HNP) at L5-S1 as he was untangling a gear. He underwent an L5 laminectomy on March 10, 1986 and received appropriate compensation benefits for subsequent periods of disability. On June 26, 1987 appellant was diagnosed with work-injury-related post-traumatic radiculopathy and intermittent weakness of the left leg.<sup>1</sup> On September 22, 1988 he began vocational rehabilitation for a two-year degree in computer engineering technology.

On April 10, 1989 appellant was granted a schedule award for five percent permanent impairment of his left leg. He requested reconsideration of this award, which was denied by the Office on August 24, 1989.

Appellant submitted a June 10, 1998 magnetic resonance imaging (MRI) scan of the lumbar spine which was reported as demonstrating "evidence of previous surgery at the levels of L5-S1 and probably L4-5; disc degeneration at the levels of L4-5 and L5-S1 with moderate to marked osteoarthritis involving L5-S1 joint; left-sided disc herniation at the level of L5-S1 surrounded by scarring and fibrosis; [and] mainly scarring on the right side at the level of L4-5 with perhaps a tiny fragment of disc in the center."

A June 16, 1998 report from Dr. James T. McGlynn, a Board-certified orthopedic surgeon, reported as appellant's diagnosis "long[-]standing back pain secondary to work-related injury with evidence of scar tissue, herniated disc and DJD [degenerative joint disease]." In a September 1, 1998 report, he diagnosed recurrent lumbar strain and failed back strain with

---

<sup>1</sup> Previous work injuries were noted as occurring in June 1982 and November 1984.

radicular symptoms following normal activities of daily living. In a September 4, 1998 report, Dr. McGlynn diagnosed long-standing degenerative disc disease with failed back syndrome and noted that appellant was at risk for reoccurring disabling episodes of back pain which would require bed rest and intermittent physical therapy. He noted that appellant's prognosis was poor for complete recovery. Dr. McGlynn reiterated these diagnoses in reports continuing through 1999.

By report dated January 19, 2000, Dr. Richard J. Levenberg, a Board-certified orthopedic surgeon, noted decreased sensation in the L5 nerve distribution and indicated that the MRI scan from June 1998 showed a recurrent disc herniation at L4-5 on the right. Dr. Levenberg disagreed with the radiologist's interpretation of the MRI scan and opined that there was significant nerve root compression in the lumbar spine.

A repeat MRI scan was performed on February 28, 2000 and was reported as showing a left sided laminectomy at L5-S1 with associated scarring, chronic appearing disc bulging and bony degenerative changes, no frank acute recurrent HNP, but with L5-S1 foramina narrowing, worse on the left. A moderate sized disc protrusion/herniation at L4-5, worse to the right and posteriorly with surrounding enhancing granulation tissue and/or scar, was noted. Moderate central canal narrowing was also noted at that level, but the rest of the examination was unchanged from 1998. Mild posterior disc bulging at L3-4 was noted, without significant change from the previous study.

On March 2, 2000 appellant noted that Dr. Levenberg had diagnosed a herniated disc at L4 and he requested authorization for surgery. Appellant claimed that he aggravated his condition by working every day and requested that he be placed back on the periodic rolls for receipt of wage-loss compensation benefits.

In a March 1, 2000 report, Dr. Levenberg diagnosed moderate stenosis and noted "[Appellant is employed in a sedentary position and is requesting that he be taken out of work. He feels that if he is taken out of work and given the ability to rest, his symptoms may decrease. However, medically, I have a difficult time justifying the inability [to work] at a sedentary position where he can change his position as needed."

On May 12, 2000 the Office advised appellant that he was being referred for a second opinion as to whether the diagnosed L4-5 disc herniation was causally related to his May 13, 1985 injury. A statement of accepted facts was prepared and appellant was referred to Dr. Steven J. Valentino, a Board-certified orthopedic surgeon.

By report dated May 31, 2000, Dr. Valentino reviewed appellant's history, beginning with the May 13, 1985 injury, reviewed the diagnostic study results and noted that in 1985 only central bulging was evidenced at L4-5, in February 1989, mild age-related degenerative disc bulging without evidence of nerve root compression was noted at L4-5, in December 1989, L4-5 manifested mild desiccation with age-related findings without any acute or traumatic nature evident, in 1998, L4-5 showed disc degeneration with scarring on the right and perhaps a tiny fragment of disc in the center; and in 2000, there was a moderate sized herniated protrusion at L4-5, worse on the right and posteriorly, with mild bulging at L3-4. He performed a physical examination and reported mild synovitis and effusion at the L4-5 facets bilaterally, but otherwise

a normal spinal examination. Dr. Valentino noted that straight leg raising tests were negative, Spurling's maneuvers and stretch tests were negative, Fabere's tests were negative with no evidence of bursitis, reflexes were normal, there was no evidence of reflex sympathetic dystrophy and the lower extremities revealed normal ranges of motion. Dr. Valentino diagnosed resolved lumbar strain and resolved L5-S1 disc herniation and noted that appellant had recovered without residuals. He continued: "[Appellant's] current subjective complaints of low back and leg symptoms are apportioned to nonindustrial-related degenerative disc disease, which has been preaccelerated by his history of smoking. Additionally, he also has a protruding herniated disc at L4-5 which is likely the result of the normal age-related process which has been preaccelerated. The latter finding is not related to his industrial-related accident." Dr. Valentino found that there were no objective findings of any residual of appellant's work-related injury based on the normal orthopedic and neurologic examination. He reiterated: "Once again, the L4-5 disc herniation is not related to the May 13, 1985 work injury based on the fact that diagnostic studies done immediately after the May 13, 1985 incident revealed no evidence of disc herniation at this level."

By decision dated November 3, 2000, the Office denied appellant's claim to include the condition of HNP at L4-5.

By letter dated March 12, 2001, appellant requested reconsideration and submitted further medical evidence. In a January 4, 2001 report, Dr. Carl R. Goodman, Board-certified in physical medicine and rehabilitation, reviewed appellant's history of multiple work-related back injuries and his present complaints. He reported appellant's chronic low back pain complaints and diagnosed status post HNP L5-S1, operated; HNP L4-5, nonacute; bulging disc L3-4, nonacute; cauda equina syndrome with partial impotence; and multilevel lumbar radiculopathy L3 through S1, bilateral. Dr. Goodman noted that appellant had a 17-year history of radiculopathy, which even preceded the 1985 injury, which involved the L4, L5 and S1 nerve roots. He stated that although the records stated that there was only a bulging disc at L4-5, it did not "take a great stretch of the imagination medically to understand that the bulging disc can easily evolve into a herniated disc." Dr. Goodman indicated that it was not clear when it occurred, but that it was present prior to 1998 and he speculated that it likely dated as far back as 1983. He disagreed with Dr. Valentino and argued that the changes at L4-5 were "undoubtedly related to the series of injuries which [appellant] has sustained beginning as early as 1975 and clearly present in the medical records as early as 1983.

Appellant also submitted a January 29, 2001 report from Dr. Steven D. Grossinger, a Board-certified neurologist, which noted that appellant had had work-related back injuries in 1975, 1977, 1982, 1983 1984 and 1985, with two episodes in 1984. He indicated that appellant's pain was chronic and persistent in the lumbar region and radiated towards the left buttocks and that on May 13, 1985 radiologic imaging demonstrated disc bulging at L4-5.

In an April 13, 2001 opinion, an Office medical adviser noted that a bulging disc is not a herniated disc and that bulging discs do not necessarily herniate without the influence of some triggering event. He noted that bulging discs were found in 35 percent of the population and opined that Dr. Goodman's conclusion was speculative, unsupported and unrationalized. The medical adviser also noted that Dr. Grossinger did not address causal relation.

By decision dated June 14, 2001, the Office denied modification of the November 3, 2000 decision. The Office found that the medical evidence did not support that the L4-5 herniation in 1998, was related to the 1985 L5-S1 herniation or the May 13, 1985 injury and noted that appellant was capable of performing his sedentary-duty position as noted by Dr. Levenberg.

On July 26, 2001 appellant requested reconsideration, arguing that he had seven traumatic back injuries during the course of his federal employment. In support, he submitted a June 28, 2001 report from Dr. Grossinger, which noted that “injury to the low back, particularly with repeated incidences [sic] of trauma, effects [sic] a variety of structures including the muscles, tendons, ligaments, discs, vertebrae, blood vessel supply and nerve structures.” Dr. Grossinger noted that focusing on only the question of L4-5 disc herniation missed the main source of the problem injury to the nerve supply. He opined that appellant’s ongoing disability was due to lumbar radiculopathy and injury to other spine structures which were caused by the work injuries in the 1980s.

Two old reports from Dr. Slater were additionally submitted from 1988 and 1990, which diagnosed post-traumatic lumbar radiculopathy.

Appellant submitted a July 25, 2001 Form CA-2a, claim for recurrence of disability commencing in March 1998, causally related to the May 13, 1985 employment injury.<sup>2</sup>

By decision dated October 25, 2001, the Office denied modification on the grounds that the medical evidence did not support that the L4-5 herniation was related to the L5-S1 herniation or the May 13, 1985 injury and that Dr. Goodman’s and Dr. Grossinger’s reports were of diminished probative value and lacked rationale.

On January 8, 2002 appellant again requested reconsideration and submitted another report from Dr. Grossinger, who claimed that appellant’s ongoing symptomatology argued against Dr. Valentino’s conclusions that his work-related injury had ceased. Dr. Grossinger opined that appellant’s ongoing symptoms of back pain and radiating discomfort resulted directly from his back injuries and work activities during the 1970s and 1980s and that his neurologic examination was consistent with lumbar radiculopathy.

The Office determined that there was a conflict in medical opinion between Drs. Grossinger and Goodman and Valentino. Appellant was referred, together with a statement of accepted facts, questions to be addressed and the relevant case record, to Dr. Alan E. Hibberd, a Board-certified orthopedist, for an impartial medical examination. In the statement of accepted facts, the Office noted that appellant had sustained other sprain and strain low back injuries in 1977, 1982, 1983 and two in 1984 and that, although he lost some time due to these injuries, he was able to return to his usual employment after each injury.

On March 7, 2002 Dr. Hibberd reviewed appellant’s factual and medical history and the relevant case records, examined and tested appellant and stated that, his right sided complaints and HNP at L4-5 did not appear until 1998. Dr. Hibberd noted that up until June 1998

---

<sup>2</sup> This claim also has not been adjudicated by the Office and is not now before the Board on this appeal.

appellant's symptoms were exclusively on the left and had culminated in the L5-S1 rupture in 1985, with resultant radicular complaints. He noted that in December 1998, appellant had an obvious disc herniation at L4-5 to the right which explained appellant's positive straight leg raising test at that time and his right leg symptomatology and which constituted a new event not noted on previous examinations. However, Dr. Hibberd noted that as of March 7, 2002 appellant's symptoms were primarily on the left side of his buttocks and opined that with appellant's chronic symptomatology and the distribution of his pain, it was more consistent with a referred pain from a degenerative spine than from ongoing radiculopathy. Dr. Hibberd opined that appellant's main symptoms were primarily related to the degenerative disease and segmental instability at the L5-S1 level, which manifested by episodes of significant back discomfort and referred pain to the extremities. He opined, therefore, that within a reasonable degree of medical certainty the L4-5 herniation was not connected to the 1985 work injury and subsequent surgery, but that appellant did have work-related disability stemming from the May 13, 1985 L5-S1 disc herniation and subsequent surgery and instability, such that he should do only sedentary work with the ability to change positions frequently.

By decision dated April 4, 2002, the Office denied modification, finding that the medical evidence did not support that the L4-5 herniation was related to the L5-S1 herniation or the May 13, 1985 work injury.

By letter dated June 3, 2002, appellant again requested reconsideration and submitted three medical reports; two from Dr. Slater dated June 26, 1987 and May 9, 1988 who stated that appellant's continued pain symptoms on the left were attributable to the L5-S1 HNP. Dr. Slater did not address a right-sided L4-5 disc herniation in either report.

The third medical report was from Dr. Grossinger, a Board-certified osteopathic neurologist, who noted on May 2, 2002 that appellant's "ongoing symptoms of back pain and radiating pain and discomfort in both legs resulted from post-traumatic injury to his lumbar spine and lumbar nerve roots, that have a causal relationship to the numerous work-related injuries that were previously mentioned." He noted that the flare-ups noted in Dr. Slater's 1986 and 1987 reports were due to the progressive nature of his injury and that his symptoms today were a continuation of the same, such that that was proof of the causal relation with his earlier work injuries. Dr. Grossinger noted: "There is a greater likelihood that the disc herniation is a result of destabilizing factors of seven traumatic injuries to the upper and lower back and subsequent disc surgery performed in 1986, rather than simple degenerative factors." He opined that post-traumatic radiculopathy was the primary cause for appellant's chronic radiating back and leg pain and not the herniated L4-5 disc, such that he should be entitled to benefits for that chronic radiating pain.

In a decision dated June 17, 2002, the Office denied modification of its decisions. The Office noted that it had accepted that there were permanent effects resulting from appellant's L5-S1 HNP and its remedial surgery and that his claim remained open for injury-related medical expenses and time lost for treatment. The Office noted that appellant was only partially disabled from work due to the effects of these earlier injuries and was capable of performing sedentary duty. It opined, however, that the medical evidence of record did not demonstrate that appellant's L4-5 HNP was causally related to his 1985 work injuries. The Office opined that appellant's years of back pain and radiating leg pain were related to his accepted work injuries

and that the HNP at L4-5 on the right was not the primary cause of his chronic pain. The Office further found that the impartial opinion of Dr. Hibberd constituted the weight of the medical evidence and outweighed Dr. Grossinger's opinion, as Dr. Hibberd based his opinion upon objective evidence of record such as the MRI and EMG testing results, whereas Dr. Grossinger's opinion was more subjective.

The June 17, 2002 decision was reissued on August 23, 2002.

On October 8, 2002 appellant requested reconsideration of the August 23, 2002 decision. In support he submitted four medical reports; one from Dr. Grossinger, two from Dr. Slater and one from Dr. Robert H. Cram dated June 14, 1982. The report from Dr. Grossinger criticized the statement of accepted facts, noting omissions of a few work injuries and claimed that Dr. Hibberd neglected to read fully all of appellant's medical documentation indicating that right-sided pain was not something new. Dr. Grossinger opined that testing and evaluation of appellant demonstrated numerous episodes of low back pain, left-sided pain, right-sided pain and on many occasions bilateral lower extremity pain radiating from the lumbar region. He further noted that the Office had documented evidence of prior disc pathology at L4-5 dating from a 1984 MRI, which showed a bulging disc at that level, such that this was not new, that the instability of appellant's lumbar spine caused his pain to radiate intermittently down the left and right legs and bilaterally on occasion and that it had worsened over time. Dr. Grossinger noted that the Office had focused solely on the May 1985 injury and ignored all the rest of the injuries and he opined that the disc herniation at L4-5 was not the primary cause for appellant's problems. He further noted that the herniation was the result of progression rather than a new event and that there was evidence of nerve root injury, which had contributed to appellant's recurrent low back symptoms. Dr. Grossinger opined that appellant was disabled as a result of his recurrent lumbar injuries.

The June 14, 1982 report from Dr. Cram noted that appellant was having pain referred down the back of the right buttock and right upper thigh.

Dr. Slater's September 24, 1991 report noted that appellant's back pain was spreading into the anterior portion of both legs. His March 24, 1992 report, received October 15, 2002, noted that appellant had continuous low back pain radiating down the legs since his May 15, 1985 injury and that he received no benefits from surgery.

By decision dated January 9, 2003, the Office denied modification of the prior decision. The Office noted that Dr. Hibberd had reviewed all of the evidence of record including the noted reports of Drs. Cram and Slater and that the opinion of Dr. Grossinger had previously been considered. The Office found that Dr. Hibberd's report continued to constitute the weight of the medical evidence of record.

The Board finds that appellant has not established that he sustained a HNP at L4-5, causally related to his May 1985 accepted employment injuries or to factors of his federal employment.

A claimant has the burden of establishing by the weight of reliable, probative and substantial evidence that the injury claimed was caused or aggravated by his federal

employment. As part of this burden, a claimant must submit a rationalized medical opinion, based upon a complete and accurate factual and medical background, showing a causal relationship between the injury claimed and factors of his federal employment.<sup>3</sup> Causal relationship is a medical issue that can be established only by medical evidence.<sup>4</sup> The Board notes that the fact that a condition manifests itself or worsens during a period of employment does not raise an inference of an employment relationship.<sup>5</sup>

Appellant alleged that he sustained an L4-5 disc herniation causally related to his May 13, 1985 injuries and to injuries occurring prior to that date. He claimed that the herniation was misdiagnosed until it became apparent on a June 10, 1998 MRI scan. Appellant also claimed, in the alternative, that the L4-5 central disc bulge noted in 1985 and the mild age-related degenerative disc bulging in 1989, evolved into the herniated fragmented L4-5 disc diagnosed in 1998.

The Office's second opinion specialist, Dr. Valentino noted that in 1985 only central bulging was evidenced at L4-5, in February 1989, mild age-related degenerative disc bulging without nerve root compression was noted at L4-5, in December 1989, L4-5 manifested mild desiccation with age-related findings without any acute or traumatic nature evident, in 1998, L4-5 showed disc degeneration with scarring on the right and perhaps a tiny fragment of disc in the center and in 2000, there was a moderate sized herniated protrusion at L4-5, worse on the right and posteriorly, with mild bulging at L3-4. He performed a physical examination and reported mild synovitis and effusion at the L4-5 facets bilaterally, but otherwise found a normal spinal examination. Dr. Valentino noted that a wide variety of orthopedic tests were negative with no evidence of bursitis and that reflexes and ranges of motion were normal. He diagnosed resolved lumbar strain and resolved L5-S1 disc herniation, noted that appellant had recovered without residuals and opined that his current subjective complaints of low back and leg symptoms were apportioned to nonindustrial-related degenerative disc disease. Additionally, he noted that appellant also had a protruding herniated disc at L4-5, which was likely the result of the normal age-related process which had been preaccelerated and was not related to his 1985 employment injuries. Dr. Valentino opined that the L4-5 disc herniation was not related to the May 13, 1985 work injury, based on the fact that diagnostic studies done immediately after the May 13, 1985 incident revealed no evidence of disc herniation at this level.

Appellant's treating physiatrist, Dr. Goodman noted that, although the records indicated that there was only a bulging disc at L4-5, it did not "take a great stretch of the imagination medically to understand that that bulging disc can easily evolve into a herniated disc." He indicated that it was not clear when it occurred, but that it was present prior to 1998 and speculated that it likely dated as far back as 1983. Dr. Goodman disagreed with Dr. Valentino and argued that the changes at L4-5 were "undoubtedly related to the series of injuries which [appellant] has sustained beginning as early as 1975 and clearly present in the medical records as early as 1983."

---

<sup>3</sup> *Steven R. Piper*, 39 ECAB 312 (1987); *see* 20 C.F.R. § 10.115.

<sup>4</sup> *Mary J. Briggs*, 37 ECAB 578 (1986); *Ausberto Guzman*, 25 ECAB 362 (1974).

<sup>5</sup> *Paul D. Weiss*, 36 ECAB 720 (1985); *Hugh C. Dalton*, 36 ECAB 462 (1985).

Dr. Grossinger noted that appellant had had work-related back injuries in 1975, 1977, 1982, 1983 1984 and 1985, with two episodes in 1984, indicated that appellant's pain was chronic and persistent in the lumbar region and radiated towards the left buttocks and noted that on May 13, 1985 radiologic imaging demonstrated disc bulging at L4-5. Dr. Grossinger noted that "injury to the low back, particularly with repeated incidences [sic] of trauma, effects [sic] a variety of structures including the muscles, tendons, ligaments, discs, vertebrae, blood vessel supply and nerve structures." He noted that focusing on only the question of L4-5 disc herniation missed the main source of the problem, injury to the nerve supply and opined that appellant's ongoing disability was due to lumbar radiculopathy and injury to other spine structures which were caused by the work injuries in the 1980s. Dr. Grossinger also claimed that appellant's ongoing symptomatology of back pain with radiating discomfort resulted directly from his work activities during the 1970s and 1980s.

The Federal Employees' Compensation Act, at 5 U.S.C. § 8123(a), in pertinent part, provides: "If there is a 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."

In this case, the Office properly found that a conflict in medical opinion evidence had arisen between Drs. Valentino, Goodman and Grossinger, which required resolution by referral to an impartial medical specialist.

Appellant was referred to a properly selected impartial medical specialist, Dr. Hibberd, who, based upon a detailed review of the entire case record, opined that appellant's right-sided complaints and HNP at L4-5 did not appear until 1998 and that up until June 1998 his symptoms were exclusively on the left and had culminated in the L5-S1 rupture in 1985, with resultant radicular complaints. He noted that in December 1998, appellant had an obvious disc herniation at L4-5 to the right which explained his positive straight leg raising test at that time and his right leg symptomatology; and which constituted a new event not noted on previous examinations. However, Dr. Hibberd noted that as of March 7, 2002 appellant's symptoms were primarily on the left side of his buttocks and he opined that with appellant's chronic symptomatology and the distribution of his pain, it was more consistent with a referred pain from a degenerative spine than from ongoing employment injury-related radiculopathy. He opined that appellant's main symptoms were primarily related to the degenerative disease and segmental instability at the L5-S1 level, which manifested by episodes of significant back discomfort and referred pain to the extremities. Dr. Hibberd opined that, within a reasonable degree of medical certainty the L4-5 herniation was not connected to the 1985 work injury and subsequent surgery, but that appellant did have work-related disability stemming from the May 13, 1985 L5-S1 disc herniation and subsequent surgery and instability, such that he should do only sedentary work with the ability to change positions frequently.<sup>6</sup>

The Board has frequently noted that 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

---

<sup>6</sup> See *infra* note 11.

entitled to special weight.<sup>7</sup> In this case, Dr. Hibberd's report is thorough and complete and based upon a proper factual and medical background, such that it is entitled to special weight. Accordingly, Dr. Hibberd's opinion constitutes the special weight of the medical evidence on this issue.

Later reports from Dr. Grossinger were submitted to the record which restated his beliefs in causal relation of appellant's conditions with his earlier work injuries, but as the Board has explained, additional or repetitious reports from appellant's physician are insufficient to overcome the weight accorded to an impartial medical examiner's report, where appellant's physician had been on one side of the conflict in medical opinion that the impartial medical examiner resolved.<sup>8</sup>

Therefore, these subsequently submitted reports are not highly probative and do not outweigh Dr. Hibberd's well-rationalized report, nor even create another conflict with it. Further, Dr. Grossinger noted that appellant's ongoing complaints were not primarily due to the L4-5 HNP, but were due to post-traumatic radiculopathy, a condition not accepted by the Office as being employment related.

As Dr. Hibberd's opinion constitutes the weight of the medical evidence of record, appellant has failed to meet his burden of proof to establish that his L4-5 HNP was causally related to his employment injuries or to other employment factors.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated January 9, 2003, August 23 and April 4, 2002 are hereby affirmed.

Dated, Washington, DC  
November 3, 2003

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

---

<sup>7</sup> *Aubrey Belnavis*, 37 ECAB 206, 212 (1985).

<sup>8</sup> *Harrison Combs, Jr.*, 45 ECAB 716 (1994).