

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

ROMEO CASTILLO, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Washington, DC, Employer**

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**Docket No. 03-1689
Issued: January 28, 2005**

Appearances:

Eric G. Dawson, M.D., for the appellant

Ian H. Eliasoph, Esq., for the Director

Oral Argument December 2, 2004

DECISION AND ORDER

Before:

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

JURISDICTION

On June 23, 2003 appellant filed a timely appeal from a March 6, 2003 decision of the Office of Workers' Compensation Programs terminating his compensation and medical benefits. Appellant also appealed an April 16, 2003 decision denying modification of the March 6, 2003 decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the case.

ISSUES

The issues on appeal are: (1) whether the Office met its burden of proof to terminate appellant's compensation and medical benefits effective March 22, 2003; and (2) whether appellant established that he had any continuing disability after March 22, 2003.

FACTUAL HISTORY

On June 12, 2002 appellant, then a 50-year-old clerk, injured his lower back while transferring mail and attempting to catch a case that fell. Appellant's claim was accepted for lumbar sprain and strain. Appellant stopped work on June 12, 2002 and did not return.

Appellant submitted a report from Dr. Patrick P. McCarty, a Board-certified emergency room physician, who noted a history of June 12, 2002 and diagnosed a lumbar strain. Thereafter, appellant came under the treatment of Dr. Eric G. Dawson, a specialist in orthopedics, who noted treating appellant on June 14, 2002 for a work-related injury occurring on June 12, 2002. He diagnosed lumbar discopathy at L4-5, lumbosacral myofasciitis, sacroiliac sprain, mild nerve impingement at L5 nerve root bilaterally and L5 myelopathy, and advised that appellant was totally disabled. In reports dated July 25 and August 13, 2002, he noted a significant exacerbation of lower back pain, spasm and stiffness at L4-5 and L5-S1. On August 27, 2002 Dr. Dawson diagnosed lumbar discopathy with L5 nerve impingement and signs of sciatica on the left side, and noted that appellant was totally disabled from work. In attending physician's reports dated September 20, October 8 and 22, and November 19, 2002, Dr. Dawson diagnosed disc rupture at L4-5 and left sciatica, and noted with a checkmark "yes" that appellant's condition was caused or aggravated by an employment activity. In reports dated October 8 to November 19, 2002, he noted that appellant experienced exacerbations regarding the lumbar spine with positive physical findings upon examination. Dr. Dawson diagnosed L5 radiculopathy, sciatica, disc rupture and nerve impingement. An electromyogram (EMG) dated September 4, 2002 revealed lumbar disc syndrome, lumbar radiculopathy at L5-S1. A magnetic resonance imaging (MRI) scan of the spine dated September 6, 2002 revealed a moderate-sized broad-based central paracentral disc herniation impinging on the right L5 nerve root and a mild disc bulge at L3-4. Appellant was also treated by Dr. Daniel Ignacio, a Board-certified orthopedist, who in a report dated September 16, 2002, noted a history of injury and diagnosed lumbar disc syndrome and lumbar radiculopathy.

On October 28, 2002 the Office referred appellant for a second opinion evaluation by Dr. Robert A. Smith, a Board-certified orthopedist. In a report dated November 14, 2002, Dr. Smith indicated that he reviewed the records provided to him and performed a physical examination of appellant. He noted an essentially normal objective physical examination. Dr. Smith diagnosed a sprain/strain of the lumbar spine with no clinical evidence of radiculopathy. He opined that there were no residual effects of the work-related lumbar sprain/strain that occurred in June 2002. Dr. Smith concluded that appellant could return to work but suggested an independent EMG study. On February 4, 2003 an EMG was performed at Dr. Smith's request which revealed left peroneal neuropathy, left tarsal tunnel syndrome and no evidence of radiculopathy of the left lower extremity and paraspinal muscles. In a supplemental report dated January 3, 2003, Dr. Smith noted that the EMG revealed no active radiculopathy but suggested a nonwork-related condition of polyneuropathy. He concluded that appellant's work-related injury had resolved and that appellant would not require any further treatment.

Thereafter, appellant submitted a December 17, 2002 attending physician's report from Dr. Dawson who diagnosed lumbar disc rupture and radiculopathy and indicated with a checkmark "yes" that the condition was caused by appellant's employment. Also submitted was a report dated January 14, 2003 which noted appellant's continued complaints of lumbar pain, spasm, stiffness, loss of range of motion, tenderness at L5-S1, positive straight leg raises and signs of discopathy. He advised that appellant could not return to work.

On January 24, 2003 the Office issued a notice of proposed termination of compensation and medical benefits on the grounds that Dr. Smith's examination established that appellant had no continuing disability due to his employment injury.

On January 14, 2003 Dr. Dawson diagnosed a lumbar disc rupture and left sciatica and noted with a checkmark “yes” that appellant’s condition was caused by his work activities. On January 31, 2003 he noted findings upon physical examination of positive straight leg raises and diagnosed sciatic irritability and discopathy at L4-5 and L5-S1. In correspondence to the Office dated January 31, 2003, Dr. Dawson disagreed with Dr. Smith’s conclusions and opined that appellant did have residuals of his work-related injury. He noted in a February 11, 2003 treatment note that appellant had work-related symptoms of pain, spasm and discomfort in the lower back and left leg. Dr. Dawson noted positive straight leg raises, weakness to flexion of the knee and dorsiflexion of the ankle and advised that appellant was totally disabled due to his work-related injury. On February 11, 2003 he noted the results of a February 4, 2003 EMG which revealed bilateral radiculopathy more severe on the left than the right side, a finding which was contrary to those of Dr. Smith.

By decision dated March 6, 2003, the Office terminated appellant’s benefits effective March 22, 2003, finding that Dr. Smith’s reports constituted the weight of the medical evidence and established that appellant had no continuing disability resulting from his employment injury.

In a letter dated March 21, 2003, appellant requested reconsideration and submitted a March 18, 2003 treatment note from Dr. Dawson who noted that appellant had work-related symptoms of pain, spasm and stiffness in the lower back area with numbness, tingling and weakness extending into the left leg. He diagnosed L5 radiculopathy, more severe on the left than the right, with clinical correlation of positive straight leg raises, weakness in flexion of the knee, weakness in dorsiflexion of the ankle and a neurosensory deficit on the left side. Dr. Dawson opined that the mechanism of injury, specifically appellant moving mail and catching a case with a wrenching-type motion while in a stooped position sharply jerking him against the supportive musculature, was sufficient to cause his continuing back symptoms. He noted that this mechanism of injury would cause injury to overlying musculature tissue and lower discs, which were vulnerable to sheer forces with such injuries. Dr. Dawson indicated that the MRI scan studies revealed significant damage to the disc. In an attending physician’s report of the same day, he diagnosed lumbar discopathy with myelopathy, disc rupture at L4-5, left sciatica, and bilateral L5 radiculopathy and noted with a checkmark “yes” that the condition was caused by work activities.

In a decision dated April 16, 2003, the Office denied modification of the March 6, 2003 decision.

LEGAL PRECEDENT

Once the Office accepts a claim it has the burden of proof to justify termination or modification of compensation benefits.¹ After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.²

¹ *Eddie Franklin*, 51 ECAB 223 (1999); *Jeff M. Burns*, 52 ECAB 241 (1999).

² *Id.*

ANALYSIS

The Office accepted that appellant sustained a lumbar sprain and strain and paid appropriate compensation. The Office terminated appellant's compensation and medical benefits effective March 22, 2003 based on Dr. Smith's examination and reports. The Board finds, however, that there is a conflict in medical opinion between Dr. Smith, the Office referral physician, and Dr. Dawson, an attending physician.

Dr. Smith opined that appellant had no residuals of the work injury and that the accepted condition had resolved. He noted that appellant's examination was essentially normal. Dr. Smith diagnosed a sprain/strain of the lumbar spine with no clinical evidence of radiculopathy. On January 3, 2003 Dr. Smith noted that the EMG performed January 2, 2003 revealed no active radiculopathy. He concluded that appellant's work-related injury had resolved and that he would not require any further treatment. Dr. Dawson, however, opined that appellant continued to have residuals of his work-related lumbar sprain/strain and noted positive findings upon physical examination of pain, spasm and discomfort in the lower back and left leg, positive straight leg raises, weakness to flexion of the knee and dorsiflexion of the ankle. He diagnosed discopathy at L4-5 and L5-S1, radiculopathy and sciatic irritability. Dr. Dawson also listed MRI scan findings to support his opinion. The Board therefore finds that a conflict in medical opinion exists between Dr. Dawson and Dr. Smith.

Section 8123 of the Federal Employees' Compensation Act³ provides that if there is a disagreement between the physician making the examination for the United States and the employee's physician, the Office shall appoint a third physician who shall make an examination.⁴ As the Office relied on Dr. Smith's opinion to terminate appellant's compensation without having resolved the existing conflict,⁵ it failed to meet its burden of proof to terminate compensation and medical benefits on the grounds that appellant's disability had ceased.⁶

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits effective March 22, 2003.

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8123(a); *Shirley L. Steib*, 46 ECAB 39 (1994).

⁵ See *Craig M. Crenshaw, Jr.*, 40 ECAB 919, 923 (1989) (finding that the Office failed to meet its burden of proof because a conflict in the medical evidence was unresolved).

⁶ In light of the Board's finding regarding the first issue, the question of whether appellant established any continuing disability is moot.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs decisions dated April 16 and March 6, 2003 be reversed.

Issued: January 28, 2005
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member