

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

DONALD E. LANDES, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Blue Bell, PA, Employer**

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**Docket No. 05-474
Issued: October 13, 2005**

Appearances:
Donald E. Landes, 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
DAVID S. GERSON, Judge

JURISDICTION

On December 16, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated October 26, 2004 which terminated his compensation effective that day. Pursuant to 20 C.F.R. § 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues on appeal are: (1) whether appellant met his burden of proof to establish that he had a recurrence of disability beginning January 23, 2004 causally related to the June 20, 2002 employment injury; and (2) whether the Office properly terminated appellant's compensation benefits effective October 26, 2004.

FACTUAL HISTORY

On June 24, 2002 appellant, then a 56-year-old mail carrier, filed a traumatic injury claim alleging that on June 20, 2002 he injured his back when he slipped and fell. He did not stop

work on June 20, 2002; however, appellant returned in a light-duty capacity.¹ On September 30, 2002 the Office accepted the claim for lumbar strain and contusion of the buttocks. The Office authorized physical therapy from June 28 to October 28, 2002.

Appellant received treatment from Dr. Xiaobin X. Li-Burns, a Board-certified internist, who diagnosed buttocks contusion, lumbar strain and recommended therapy. He also indicated that appellant could return to work with restrictions of no lifting over 20 pounds and no pushing or pulling over 20 pounds and continue physical therapy. In his July 17, 2002 report, Dr. Li-Burns released appellant to regular activity.

In his August 16, 2002 report, Dr. Li-Burns advised that appellant had displacement of the lumbar intervertebral disc without myelopathy and advised continued therapy.²

Appellant also received treatment from Dr. James G. Moran, a Board-certified physiatrist, who noted that an August 6, 2002 magnetic resonance imaging (MRI) scan of the spine revealed multilevel degenerative changes. He diagnosed right paracentral disc protrusion at L4-5, multilevel lumbar degenerative disc disease with right lower limb radicular symptoms and right gluteal contusion.

In a September 11, 2002 report, Dr. Roy M. Lerman, a Board-certified physiatrist, advised that appellant was treated for complaints of right-sided lower back pain and right lower extremity weakness. He advised that symptomatically, he was feeling better. Dr. Lerman indicated that appellant related that he was having weakness in the right foot and ankle and occasional catching on the tip of the foot. He diagnosed multilevel foraminal stenosis with degenerative disc disease and right peroneal neuropathy at the fibular head. Dr. Lerman recommended exercise.

In an October 24, 2002 report, Dr. Perry Dornstein, a Board-certified internist, noted that appellant related that he would get a foot drop after being on his feet; however, on physical examination, he advised that appellant did not have a foot drop. He diagnosed lumbar radiculopathy and lumbar strain and changed his restrictions to no lifting over 50 pounds, no pushing or pulling over 50 pounds and no driving over three hours a day. Dr. Dornstein also advised continued physical therapy.

Appellant continued to seek treatment and receive physical therapy.

In a January 30, 2004 report, Dr. Lerman advised that appellant had been treated for right sided lower back pain and indicated that he last saw him in September 2002. He noted that appellant related that he was “never 100 percent better.” Dr. Lerman diagnosed multilevel

¹ The record reflects that appellant was in a motor vehicle accident on June 28, 2002 and was hit from behind and subsequently reported stiffness in the lumbar spine. He also indicated that he attended a picnic on June 30, 2002 and sat all day. Additionally, appellant indicated that he developed back pain after washing his car in July 2002.

² In a July 17, 2002 physical therapy report, the physical therapist indicated that appellant’s symptoms were better and that he could discontinue therapy as his goals were met. In a July 26, 2002 report, the physical therapist indicated that he reported a reaggravation of his condition on July 24, 2002 with extreme buttock and radicular pain, limiting his functional activities.

degenerative disc disease with neuroforaminal stenosis, L3-4 right paracentral herniated nucleus pulposus (HNP) and right peroneal neuropathy in the fibular head. He indicated that appellant's symptoms had progressed such that he was unable to work and recommended a trial of epidural steroid injections for a right L4 selective approach.

On March 2, 2004 the Office referred appellant for a second opinion examination to Dr. Anthony W. Salem, a Board-certified orthopedic surgeon, to determine whether his current complaints were related to his June 20, 2002 work injury.

Appellant filed a notice of recurrence on March 24, 2004 alleging a recurrence of disability on January 23, 2004 related to the June 30, 2002 employment injury. He related that he stopped work on January 23, 2004 and that prior to the injury appellant did not have a problem with his back or his right foot.

In a report dated April 13, 2004, Dr. Salem described appellant's history of injury and treatment. He also indicated that he was wounded in Vietnam and received a 30 percent disability due to those wounds. Dr. Salem noted that appellant had been on sick leave since January 23, 2004. On examination he had negative straight leg raising, with lateral bending of 15 degrees. Dr. Salem reported no pain on palpation of the back and that appellant was able to stand on his toes and heels, although he noted that he did not come up as fully on the right side. He indicated that appellant had a grade of five in the sitting position of strength of dorsiflexion of the great toe of the foot and eversion of the foot. Dr. Salem found no weakness or atrophy of the lower extremity, a negative Tinel's sign over the peroneal nerve and normal strength throughout. He opined that appellant was not disabled and had arthritis of the low back but could work in spite of his arthritic changes. Dr. Salem explained that his current complaints were not due to his June 20, 2002 fall, although appellant may have irritated his back and that his degenerative changes and disc disease were not related to the fall. He indicated that the degenerative changes and discogenic disease were related to years of wear and tear and the normal degenerative process. Dr. Salem indicated that the duties of appellant's position, which included driving the truck and requiring him to turn repeatedly to a shelf to get mail could be an irritating factor and would be related to low back and activity at work and was most likely a permanent situation. However, he explained that appellant was able to perform his duties, as he had good strength and range of motion and his back showed degenerative changes, but was stable with no evidence of progressive changes. Dr. Salem opined that appellant's disability was related to his long-standing, progressive degenerative changes and not to his fall of June 20, 2002, as appellant had preexisting arthritis in the lower back. Additionally, he advised that he did not believe that appellant had residuals of his fall and that any limitations were solely related to his underlying arthritis and not to the work injury as there were no acute changes on the MRI scan. Dr. Salem reported no active work-related condition or objective findings due to the June 20, 2002 injury had normal strength. He concluded that appellant could return to gainful employment. In a work restriction form, Dr. Salem advised that appellant could work an 8-hour day and that he had restrictions of no pushing over 50 pounds for 6 hours a day, no pulling over 40 pounds for 6 hours a day, no lifting over 40 pounds for 6 hours a day and no climbing over 2 hours a day. He reiterated that the restrictions were based on his underlying degenerative changes in his low back.

By letter dated August 4, 2004, the Office advised appellant that it had received his notice of recurrence signed on March 23, 2004. The Office noted that he had returned to regular duty.³ The Office requested that appellant provide additional information to support his claim that his current disability and need for medical treatment were related to the accepted employment injury.

In a letter received August 25, 2004, appellant explained that subsequent to his work-related injury of June 20, 2002, he had physical restrictions and developed a foot drop, which caused pain. He noted that he underwent therapy and continued to have problems prior to January 23, 2004; however, appellant asserted that his physician's were not given the proper forms to file prior to that date.

On September 16, 2004 the Office issued a notice of proposed termination of compensation. The Office proposed to terminate appellant's compensation on the basis that the weight of the medical evidence, as represented by the report of Dr. Salem established that the residuals of the work injury of June 20, 2002 had ceased.

The Office subsequently received physical therapy notes from March 2004 reports from August 2002 that were previously received and a January 21, 2004 report from Dr. Li-Burns, who advised that appellant related a worsening of his condition. He noted that appellant was treated for his June 20, 2002 work injury and subsequently discharged from care when his condition was stabilized. Dr. Li-Burns indicated that appellant related that his pain never went completely away and that he would like to reopen his case and consider epidural injections. He repeated his previous diagnoses of lumbar strain and lumbar radiculopathy, referred appellant to a specialist for epidural injections and recommended modified restrictions on lifting over 10 pounds, no pushing or pulling over 10 pounds and no prolonged standing.

By decision dated October 26, 2004, the Office terminated appellant's compensation benefits effective that day, on the grounds that he had no continuing residuals of his employment injury. The Office also denied appellant's claim for a recurrence of disability beginning January 23, 2004.

LEGAL PRECEDENT -- ISSUE 1

Section 10.5(x) of the Office's regulations provides 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.⁴

An individual who claims a recurrence of disability resulting from an accepted employment injury has the burden of establishing that the disability is related to the accepted injury. This burden requires furnishing medical evidence from a physician who, on the basis of a

³ In a July 17, 2002 report, Dr. Li-Burns released appellant to regular duty.

⁴ 20 C.F.R. § 10.5(x); see *Theresa L. Andrews*, 55 ECAB ____ (Docket No. 04-887, issued September 27, 2004).

complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and who supports that conclusion with sound medical reasoning.⁵

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's claimed condition became apparent during a period of employment nor his belief that his condition was aggravated by his employment is sufficient to establish causal relationship.⁶

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a lumbar strain and contusion of the buttocks in the performance of duty on June 20, 2002. He filed a notice of recurrence of disability on March 24, 2004 alleging disability beginning January 23, 2004. By letter dated August 4, 2004, the Office advised appellant of the evidence needed to establish his claim. Appellant, however, did not submit any reasoned medical evidence to establish that his present condition was causally related to his accepted injury. For example, appellant did not submit a medical report in which his treating physician explained why any disability beginning January 23, 2004 would be related to the accepted injury.

The record contains a January 21, 2004 report from Dr. Li-Burns, in which he advised that appellant related that he felt a worsening of his condition and related that his pain never went completely away. He merely repeated his previous findings and prescribed restrictions. Dr. Li-Burns did not offer any opinion that appellant was unable to work or differentiate between his preexisting conditions. This report is, therefore, of limited probative value.

Dr. Lerman, in a January 30, 2004 report, opined that appellant was disabled but did not explain how disability beginning January 23, 2004 resulted from the June 20, 2002 employment injury. Without a physician's reasoned explanation of why the disability is causally related to the employment injury, appellant has not met his burden of proof.

Other medical reports are insufficient to establish a recurrence of disability as they either predate the alleged recurrence of disability or do not specifically address whether the disabling condition beginning January 23, 2004 is causally related to the employment injury. The record also contains numerous physical therapy reports; however, a physical therapist is not a "physician" within the meaning of section 8101(2) and cannot render a medical opinion.⁷

Appellant did not submit any other evidence to support a recurrence of disability beginning January 23, 2004, which was causally related to the work injury of June 20, 2002.

⁵ *Dennis E. Twardzik*, 34 ECAB 536 (1983); *Max Grossman*, 8 ECAB 508 (1956); 20 C.F.R. § 10.104.

⁶ *Walter D. Morehead*, 31 ECAB 188 (1986).

⁷ *Vickey C. Randall*, 51 ECAB 357 (2000).

LEGAL PRECEDENT -- ISSUE 2

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.⁸ Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.⁹

ANALYSIS -- ISSUE 2

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits.

To determine the extent and degree of any employment-related disability or residuals, the Office referred appellant to Dr. Salem for a second opinion examination. In an April 13, 2004 report, he noted appellant's history and findings on examination. Dr. Salem determined that appellant's had arthritic changes but was not disabled. He explained that his current complaints of degenerative changes and discogenic disease were not related to the fall at work. Dr. Salem indicated that the degenerative changes and discogenic disease were related to years of wear and tear and the normal process of degeneration. He indicated that the duties of appellant's position might irritate his back but that he was able to perform his duties, as appellant had good strength and range of motion and although his back showed degenerative changes, appellant was stable with no evidence of progressive changes. Dr. Salem opined that his present condition and limitations were related to his long-standing, progressive degenerative changes and not to his fall of June 20, 2002, as appellant had preexisting arthritis in the lower back. Additionally, he advised that he did not believe that appellant had any residuals of his fall and that any limitations were solely related to his underlying arthritis and not to the work injury as there were no acute changes on the MRI scan. Although Dr. Salem prescribed work restrictions, he advised that the restrictions were based on appellant's underlying long-standing degenerative changes in his low back.

As noted above, in a January 21, 2004 report, Dr. Li-Burns advised that appellant related that his condition had worsened. However, he did not offer any opinion that appellant was unable to work or differentiate between his preexisting conditions and his accepted injury.

The record also contains a January 30, 2004 report from Dr. Lerman, in which he diagnosed multilevel degenerative disc disease with neuroforaminal stenosis, an L3-4 right paracentral HNP and right peroneal neuropathy in the fibular head and

⁸ *Curtis Hall*, 45 ECAB 316 (1994).

⁹ *Jason C. Armstrong*, 40 ECAB 907 (1989).

opined that appellant was unable to work. Additionally, Dr. Moran noted these findings and degenerative conditions in his August 14, 2002 reports. The Board notes, however, that these conditions were not accepted by the Office.¹⁰

The Board finds that Dr. Salem's opinion establishes that appellant no longer has any residuals or disability due to his June 20, 2002 employment injuries, effective October 26, 2004. He conducted a thorough examination, found no objective residuals of the employment injury and reported no basis on which to attribute any continuing condition or disability to appellant's June 20, 2002 work injury. Consequently, the Office met its burden of proof in terminating compensation benefits.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish a recurrence of disability beginning January 23, 2004, causally related to the June 20, 2002 employment injury. Further, the Board also finds that the Office met its burden of proof in terminating appellant's compensation benefits effective October 26, 2004.

ORDER

IT IS HEREBY ORDERED THAT the October 26, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 13, 2005
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

¹⁰ See *Jaja K. Asaramo*, 55 ECAB ____ (Docket No. 03-1327, issued January 5, 2004) (where an employee claims that a condition not accepted or approved by the Office was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury).