

On June 25, 2003 appellant, then a 60-year-old engineering equipment operator, filed a traumatic injury claim alleging that on June 24, 2003 he sprained his lower back while working in loose sand. On October 14, 2003 the Office accepted his claim for a lumbar strain. Compensation and medical benefits were paid.

Appellant received medical treatment with Dr. R.S. Ellis, a Board-certified family practitioner. In a disability certificate completed on July 22, 2003, he indicated that appellant had been under his medical care since June 24, 2003 and that he could return to work on July 28, 2003 with restrictions of no bending, shoveling or lifting more than 20 pounds. In a progress note dated September 15, 2003, Dr. Ellis indicated that appellant complained of pain which seemed to be localized around the D10 vertebra. He diagnosed intervertebral disc disease. Dr. Ellis indicated that appellant had normal range of motion.

In a medical report dated September 17, 2003, Dr. Susan Samlaska, a Board-certified anesthesiologist with a subspecialty in pain medicine, indicated that appellant had lower thoracic pain at the T11-12 level and lumbar degenerative disc bulge at the L3-4 level. In a medical report dated November 19, 2003, she indicated that he had mid to lower thoracic pain and upper lumbar pain. Dr. Samlaska noted a component of myofascitis that did not respond to trigger point injection or Lidoderm patches. In a February 3, 2004 report, she indicated that there may have been some misinterpretation as to the location of appellant's pain symptoms on the previous visits. Dr. Samlaska noted: "Given his symptoms and the lack of response from the trigger point injection previously done, it is possible that [appellant] had some torn ligaments in his back." She also noted a herniated disc at the T8-9 level.

In a February 12, 2004 attending physician's report, Dr. Ellis opined that appellant had a lumbar strain that was related to his employment activities of June 24, 2003. He noted that his back area was tender and movement limited and painful.

On March 3, 2004 the employing establishment submitted a memorandum indicating that, effective March 4, 2004, it could not accommodate appellant's work restrictions.

In a March 18, 2004 report, Dr. Samlaska stated that appellant's pain symptoms could be secondary to a bulging disc noted in his studies or there may be a soft tissue damage component to his complaints. She indicated that appellant had lumbar degenerative disc disease, disc protrusions at T8-9 and L3-4 levels and probably myofascitis. Dr. Samlaska indicated that he told her that he was shoveling at the time of the onset of his pain symptoms.

In a medical report dated April 21, 2004, Dr. Ellis indicated that he did not believe that appellant "is or will be capable of work as a laborer, as he was at the time of the injury." He indicated that sedentary or nonstrenuous work would be within his capabilities. By letter dated May 4, 2004, the Office asked that Dr. Ellis respond to certain questions. In a letter dated May 5, 2004, he noted that appellant complained of low back pain and was incapable of returning to his usual occupation as a laborer. He also recommended consultation with a neurosurgeon. In a letter dated June 2, 2004, Dr. Ellis responded to the Office's questions by indicating that appellant had reached maximum medical improvement with regard to his back condition. Appellant appeared to be comfortable at rest but did not tolerate bending, stooping, squatting and lifting. He had an essentially normal range of movement in flexion, hypertension, rotation and lateral flexion of this back. Dr. Ellis concluded: "This would indicate that the lumbar strain has basically resolved." He noted that appellant had a preexisting lumbar problem that was aggravated by the injury of June 24, 2003, but the aggravation "seems to have essentially resolved at his most recent visit."

On August 25, 2004 the Office issued a notice of proposed termination of wage-loss and medical benefits. The Office found that the medical evidence established that appellant's accepted condition, a lumbar strain caused by his June 24, 2003 work accident, had resolved. The Office also noted that the evidence indicated that his symptoms were the result of degenerative disc disease which was a separate diagnosis that had not been accepted as related to his injury.

Appellant responded to the notice of proposed termination in a letter dated September 2, 2004. He contended that his back condition had not resolved.

Appellant submitted a September 1, 2004 report from Dr. Ellis, who indicated that, appellant had no improvement with regard to his low back pain over recent months. He stated:

"I do not believe that [appellant's] complaint is related to progressive spine deterioration due to age. It is my considered opinion that his complaint of persistence and severe pain are work-related injuries.

Appellant also submitted an August 20, 2004 report from Dr. Dale K. Johns, a Board-certified neurosurgeon, who indicated that appellant experienced mechanical low back pain, probably due to discogenic disease and the possibility of interspinous ligament tear. He noted that there was no evidence of lumbar radiculopathy and no Waddell's signs were present. Dr. Johns suggested a bone scan and discography. In a note of the same date, he stated that his "feeling" was that the mechanical low back pain was secondary to discogenic disease.

On November 3, 2004 appellant underwent a discogram at L2-3, L3-4, L4-5 and L5-S1.

By decision dated December 1, 2004, the proposed termination of benefits was made final effective December 30, 2004.

In a December 2, 2004 report, Dr. Ellis reviewed appellant's history and stated:

"It is the recommendation of the neurosurgeon who has been consulted relative to [appellant's] injury that he have surgical correction of his lumbar spine problem. It is my opinion that the impairment is due to the injury that took place on June 24 2003 and I believe that no other self[-]injuries before or after the June 24, 2003 injury [have] taken place."

On January 28, 2005 appellant requested a review of the written record.

By decision dated June 15, 2005, the hearing representative affirmed the Office's decision terminating benefits. The hearing representative mainly relied on Dr. Ellis' report dated "June 10, 2004" which he interpreted as "clearly and unequivocally stat[ing] that [appellant's] injury-related condition has resolved...." He further contended that Dr. Ellis' reports to the contrary did not provide any explanation as to what caused him to change his opinion.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.¹ After it has been 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

ANALYSIS

In the instant case, the Office improperly terminated appellant's benefits. Initially, the Board notes that the Office improperly placed the burden of proof with appellant to prove that he was disabled due to his employment injury. However, as the Office had already accepted his claim for lumbar sprain and paid appropriate benefits, the burden shifted to the Office to prove that appellant's disability had ceased or was no longer related to his employment.³

The hearing representative's decision is based largely on a "June 10, 2004" report by Dr. Ellis which the hearing representative interpreted as "clearly and unequivocally stat[ing] claimant suffered a preexisting lumbar condition, which was aggravated by the injury and the aggravation had resolved." The hearing representative is actually referring to Dr. Ellis' June 2, 2004 report wherein he responded to various questions propounded by the Office. In this report, he stated, "The persisting lumbar problem was aggravated by the injury of [June 24, 2003]. The aggravation seems to have essentially resolved at his most recent visit." The use of the qualifying phrase "seems to have essentially resolved" does not clearly state that appellant no longer had any disability from his work-related incident. In a September 1, 2004 report, Dr. Ellis stated, "It is my considered opinion that [appellant's] complaint of persistence and severe pain are work-related injuries." On December 2, 2004 Dr. Ellis stated that his lumbar condition was due to the June 24, 2003 employment injury. Accordingly, he did not opine that appellant's disability from the accepted work-related condition had ceased or was no longer related to his employment. Accordingly, Dr. Ellis' opinion does support termination of appellant's benefits. Moreover, neither Dr. Johns nor Dr. Samlaska indicated that his disability related to his work injury had ceased. Accordingly, the Office has not met its burden and improperly terminated appellant's benefits.

CONCLUSION

The Office did not meet its burden of proof in terminating appellant's compensation and medical benefits effective May 30, 2005.

¹ *Gewin C. Hawkins*, 52 ECAB 242 (2001); *Alice J. Tysinger*, 51 ECAB 638 (2000).

² *Mary A. Lowe*, 52 ECAB 223 (2001).

³ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 15, 2005 and December 1, 2004 are reversed.

Issued: January 20, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board