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

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| **M.L., Appellant** | ) | |
| **and** | ) | **Docket No. 06-835** |
| | ) | **Issued: October 27, 2006** |
| **U.S. POSTAL SERVICE, BRENTWOOD STATION, Washington, DC, Employer** | ) | |

*Appearances:*
*Appellant, pro se*
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On February 28, 2006 appellant filed a timely appeal from the June 16, 2005 merit decision of the Office of Workers' Compensation Programs, which denied his claims for wage loss beginning July 18, 1999. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the Office's decision.

### ***ISSUE***

The issue is whether appellant's November 13, 1987 employment injury caused a recurrence of disability on or about January 28, 2004 or caused intermittent wage loss after July 18, 1999.

### ***FACTUAL HISTORY***

On November 13, 1987 appellant, then a 29-year-old letter carrier, sustained an injury in the performance of duty: "I was lifting a sack of mail from the truck, slip and stumble, dropping the sack on the cart, because the pavement was icy." The Office accepted his claim for low back strain, groin strain and a herniated nucleus pulposus at the L5-S1 level. The Office authorized a

May 26, 1994 lumbar laminectomy and discectomy. Appellant received compensation for wage loss.[1]

On January 3, 1991 appellant sustained an injury in the performance of duty when he dragged a heavy sack of mail. The Office accepted that claim for low back strain.[2] On August 13, 1991 appellant sustained a third injury in the performance of duty while carrying a satchel: "I was trying to deliver mail without a postal vehicle. Carrying the satchel created more damage to my preexisting injury." The Office accepted this claim for a temporary aggravation of degenerative disc disease of the lumbosacral spine.[3]

Appellant returned to modified duty as a box section clerk on September 28, 1996. A psychiatric fitness-for-duty examination on November 12, 1998 found no basis for an Axis I diagnosis but did find that appellant's history at the employing establishment and his personality disorder -- with indications of schizoid, paranoid and possibly antisocial traits -- made it unlikely that he was suitable for work at the employing establishment. Effective July 13, 1999, appellant was removed from employment on grounds that he was unfit for duty.

On July 29, 2003 appellant wrote to advise the Office that he was unable to work:

> "My [c]ase number is A25-320-348, I worked for the U.S. Postal Service and I injured myself in 1987 and I had back surgery lumbar discectomy in 1993. I am not able to work at the present time because of severe lower back pain. I never fully recovered from my back surgery and my [d]octor indicated that I had a percentage of disability after my back surgery. I am seeking medical attention and disability. I appreciate your immediate response."

On May 21, 2004 appellant filed a claim alleging that his November 13, 1987 employment injury caused a spontaneous recurrence on or about January 28, 2004. He indicated that he stopped work on February 9, 2004.[4] Appellant explained that he never fully recovered from his condition. He had good days and bad days dealing with the pain in his back: "The recurrence happened in January 2004. My condition is related to my original injury because I never suffer with back pain like this until my original injury [on] November 13, 1987 and my back surgery lumbar discectomy." Appellant also submitted a claim for intermittent wage loss beginning July 18, 1999.

Appellant also informed the Office that he had another injury: "I was pushing a piece of furniture in my home and I sprain[ed] my back. I did recovered from that incident and the medical report are enclosed. I have no other back injury." The record indicates that appellant

[1] OWCP File No. A25-0320348.

[2] OWCP File No. A25-0404559.

[3] OWCP File No. A25-0414940. The Office combined appellant's three case files and designated the earliest as the master file.

[4] On June 11, 2004 appellant explained that he was working for a temporary agency and that he received his last pay on February 7, 2004.

developed a worsening of his lower back pain and a burning-like sensation involving the back of his left leg when he moved some furniture on the weekend of September 14, 2002. The record also shows that he visited the emergency room on December 15, 2003 with a chief complaint of "psych/back pain."[5]

In support of his claim for compensation, appellant submitted an April 20, 2004 report from Dr. Jerome Smith, a Board-certified internist, who stated:

> "The patient relates that, on November 13, 1987, he slipped and stumbled in some snow while lifting a mailbag from the mail truck. The patient, at that time, was at work. The patient since then had been experiencing lower back pain with radicular symptoms involving the legs. He underwent diagnostic studies with an EMG [electromyogram] done on January 27, 1988 which was consistent with compression of nerve root at L5 on the left. The patient had a CT [computerized tomography] scan of the lumbar spine done on February 17, 1988 which showed central disc herniation at the L5-S1. The patient, because of persistence of symptoms, underwent laminectomy and discectomy at L5-S1 on May 26, 1994. The patient indicates that following his surgery he continues to experience lower back pain with episodes of exacerbation. He relates that early this year, in January, he began experiencing constant lower back pain. He denies any events that could have precipitated the worsening of his symptoms. The patient describes severe lower back pain. He describes also numbness involving both legs and feet. He had an MRI [magnetic resonance imaging] scan of the lumbar spine done on January 23, 2004. That study showed no evidence of recurrence of herniated lumbar disc. That, however, was described enhancing scars involving L4-5 postoperative surgical sites.
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> "This patient, since his initial visit with me on September 16, 2002, has been requiring narcotic analgesics in order to obtain relief of pain. He is currently taking Hydrocodone. His physical examination done on March 19, 2004 was remarkable for minimal lumbar flexion. The neurological examination was unremarkable. My overall impression is status post laminectomy and discectomy at L5-S1 for herniated lumbar disc May 26, 1994, chronic low back pain most likely at this point secondary to postoperative scarring at L4-5.
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> "It is my medical opinion that this patient is unable to work due to chronic lower back pain secondary to the diagnoses stated above."

On June 9, 2004 Dr. Smith added: "This is to certify that [appellant] is disabled from working due to chronic lower back pain from February 9, 2004 as I mentioned in my letter dated April 20, 2004."

[5] Appellant would later testify that he pushed a dresser and turned it around into a corner, that his back starting hurting him more than usual and that he was prescribed medication. He testified that he did not remember the reason he went to the emergency room on December 15, 2003.

In a decision dated August 4, 2004, the Office denied appellant's claim of recurrence beginning January 28, 2004 and his claim for intermittent wage loss beginning July 18, 1999. The Office concluded that it could not be determined if appellant's current back problems were due to scarring from his laminectomy surgery in 1994 or an injury suffered from lifting furniture at home in 2002. The Office added that it had received no medical evidence regarding any disability for work from 1999 to 2002, when he lifted furniture at home.

Appellant requested an oral hearing before an Office hearing representative. He submitted a February 18, 2004 neurological consultation from Dr. Durgada Basavaraj who reported a history of injury at work in 1994 (sic) and subsequent spine surgery. He noted that appellant continued to have this back pain and left lower extremity discomfort, which bothered him almost all of the time constantly. Dr. Basavaraj reported no history of any other injury. He stated that an MRI scan showed "a scar tissue with an increased enhancement with a contrast that may be causing this pressure on the nerve coming to the left lower extremity, so I think it is worth pursuing epidural injection or neurosurgical intervention or evaluation."

After the oral hearing, which was held on April 20, 2005, the Office received a May 10, 2005 note from Dr. R. Scott Graham, a neurologist: "[Appellant] has a long history of low back pain which predates his 2002 incident moving furniture. I did not follow him at this time, but there seems to be clear documentation of low back pain ever since the 1994 surgery."

The Office received the January 23, 2004 MRI scan report that Dr. Smith referenced in his April 20, 2004 report. Postsurgical change was demonstrated at L4-5 with no significant canal abnormality. There was prominence with mild enhancement of the exiting left L4 nerve root. Postsurgical change was demonstrated at L5-S1 with partly enhancing soft tissue density adjacent the left L5 nerve root. No significant mass-effect on the thecal structures was apparent.

The Office also received a March 12, 2004 x-ray report, which found multilevel moderate degenerative disc disease throughout virtually the entire lumbar spine, with disc space narrowing most prominent at L1-2, L2-3 and L4-5. A minimal retrolisthesis was also present between L2 and L3, likely due to underlying degenerative disc disease and facet arthritis. Facet arthritic changes were also present, particularly involving the lower two levels of the lumbar spine.

A February 11, 2005 MRI scan report found stable postsurgical changes, basically unchanged operative findings, and a possible small left L5-S1 herniated nucleus pulposus with nerve root entrapment.

In a decision dated June 16, 2005, the Office hearing representative affirmed the denial of compensation. The hearing representative found no evidence in the record that appellant was not capable of performing his assigned duties after October 16, 1998, the last day he was in pay status. He noted no record of any medical treatment of appellant's low back condition between March 27, 1997 and September 16, 2002, a period of more than five years, and no record of any further treatment until his emergency room visit on December 15, 2003. The hearing representative found that Dr. Smith's April 20, 2004 opinion was of insufficient probative value to establish a recurrence of disability. He also found that Dr. Basavaraj's February 18, 2004 statement that scar tissue "may be causing pressure" on the nerve going to appellant's left lower

extremity was speculative and suffered from other deficiencies, including the incorrect history that appellant had no history of any other back injury.

## ***LEGAL PRECEDENT***

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 resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[6]

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 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.[7]

## ***ANALYSIS***

Appellant filed a claim alleging that his November 13, 1987 employment injury caused a recurrence of disability on or about January 28, 2004. The employment injury caused a low back strain, groin strain and a herniated nucleus pulposus at L5-S1, for which he underwent a lumbar laminectomy and discectomy in 1994. He returned to work as a box section clerk in September 1996. After a psychiatric fitness-for-duty examination found it unlikely that he was suitable for work at the employing establishment, he was removed from federal employment in July 1999. With his claim of recurrence in 2004, appellant bears the burden of proof to establish that he was unable to work on or about January 28, 2004 and that this inability was causally related to his November 13, 1987 low back injury.

The only medical evidence supporting appellant's claim of recurrence comes from his internist, Dr. Smith. In an April 20, 2004 report, Dr. Smith noted that appellant began to experience constant lower back pain in January of that year and that he denied any events that could have precipitated the worsening of his symptoms. He noted that a January 23, 2004 MRI scan revealed enhancing scars involving L4-5 postoperative surgical sites. Dr. Smith diagnosed chronic low back pain "most likely at this point secondary" to the laminectomy and discectomy at L5-S1. "It is my medical opinion," he stated, "that this patient is unable to work due to chronic lower back pain secondary to the diagnoses stated above." On June 9, 2004 Dr. Smith reported that appellant was disabled for work from February 9, 2004 due to chronic lower back pain.

Although this evidence is generally supportive of appellant's claim, Dr. Smith's opinion is not well explained. The Board has reviewed the operative report from May 26, 1994 and can

[6] 20 C.F.R. § 10.5(x) (1999).

[7] *Dennis E. Twardzik*, 34 ECAB 536 (1983); *Max Grossman*, 8 ECAB 508 (1956); 20 C.F.R. § 10.121(a).

find no indication that any surgical procedure was performed at the L4-5 level. So it is unclear how appellant's laminectomy with facetectomy and foraminotomy at L5-S1, left side, and discectomy at L5-S1, caused the enhancing scars involving "L4-5 postoperative surgical sites." Dr. Smith did not explain how such scars cause chronic lower back pain. Moreover, he did not explain why scars from a 1994 operation would cause a spontaneous worsening of appellant's back pain in 2004, which appears to be the crux of appellant's claim. Medical conclusions unsupported by rationale are of diminished probative value.[8] The Board finds that Dr. Smith's opinion is of diminished probative value because he did not support his conclusion with convincing medical rationale.

The record also indicates that Dr. Smith did not base his opinion on a complete and accurate history. Appellant denied any events that could have precipitated the worsening of his symptoms in January 2004, but he visited the emergency room just one month earlier complaining of back pain. The emergency department discharge instructions do not provide the admitting history, and appellant testified at the April 20, 2005 hearing that he did not remember the reason he went to the emergency room. So although there is no direct evidence of an incident or injury in December 2003, Dr. Smith should have taken the recent emergency room visit into account when considering possible explanations for the worsening of appellant's low back symptoms.

Dr. Smith also should have noted that appellant injured his low back in September 2002 when he pushed a dresser and turned it around into a corner. Appellant testified that thereafter his back starting hurting him more than usual and that he was prescribed medication. Indeed, it was Dr. Smith who treated appellant for this injury. He noted in a September 16, 2002 report that, in addition to a worsening of low back pain, appellant also described a burning-like sensation involving the back of his left leg. The hearing representative indicated that this was the first report of lower extremity symptoms since the 1994 surgery. Dr. Smith diagnosed status post herniated lumbar disc with acute exacerbation. Yet the history of this intervening injury is missing from his April 20, 2004 opinion. Also missing is the apparent lack of medical treatment for more than five years preceding the furniture pushing incident.

Dr. Smith made no mention of the March 12, 2004 x-ray report, which found multi-level moderate degenerative disc disease throughout virtually the entire lumbar spine, with disc space narrowing most prominent at L1-2, L2-3 and L4-5, as well as a minimal retrolisthesis between L2 and L3, likely due to underlying degenerative disc disease and facet arthritis. He should have explained whether these conditions cause low back pain and, if so, whether the worsening of appellant's low back pain might simply reflect the natural progression of an underlying degenerative condition. Medical conclusions based on inaccurate or incomplete histories are of little probative value.[9] The Board finds that Dr. Smith's opinion is of diminished probative value because it does not appear that he based his conclusion on a complete and accurate history.

[8] *Ceferino L. Gonzales*, 32 ECAB 1591 (1981); *George Randolph Taylor*, 6 ECAB 968 (1954).

[9] *See James A. Wyrick*, 31 ECAB 1805 (1980) (physician's report was entitled to little probative value because the history was both inaccurate and incomplete). *See generally Melvina Jackson*, 38 ECAB 443, 450 (1987) (addressing factors that bear on the probative value of medical opinions).

Dr. Basavaraj's February 18, 2004 neurological consultation indicates that appellant's left leg complaints may be caused by a possible scar at L4-5, which again raises the question of how this is related to the 1994 surgery at L5-S1. Regardless, Dr. Basavaraj offered no opinion on whether appellant's November 13, 1987 employment injury caused a spontaneous recurrence of disability on or about January 28, 2004.

In addition to his claim that he sustained a recurrence of disability on or about January 28, 2004, appellant filed a claim for intermittent wage loss beginning July 18, 1999, or just after he was removed from his federal employment. This claim is also in the nature of a recurrence. After being disabled as a result of his November 13, 1987 employment injury, appellant returned to modified duty as a box section clerk on September 28, 1996. His claim for compensation for intermittent wage loss beginning July 18, 1999 is, therefore, a claim that he sustained intermittent recurrences of disability. Appellant has submitted no medical opinion evidence to support any specific periods of intermittent disability or their connection to his accepted employment injuries. He has not met his burden of proof.

## ***CONCLUSION***

The Board finds that appellant has not met his burden of proof to establish that his November 13, 1987 employment injury caused a spontaneous recurrence of disability on or about January 28, 2004 or caused intermittent wage loss after July 18, 1999. The only medical opinion that supports appellant's claim is diminished in its evidentiary value because the physician did not address seemingly relevant factual and medical history and did not provide convincing rationale that his conclusion was sound and logical. The Board will affirm the denial of appellant's claim of recurrence on or about January 28, 2004 and his claim for intermittent wage loss after July 18, 1999.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the June 16, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 27, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board