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

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| **D.S., Appellant**<br><br>**and**<br><br>**DEPARTMENT OF AGRICULTURE, JOB CORPS PROGRAM, Lorana, WI, Employer** | **Docket No. 07-125**<br>**Issued: June 25, 2007** |

*Appearances:*
*James G. Chakeres, Esq.,* for the appellant
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

### *JURISDICTION*

On October 17, 2006 appellant filed a timely appeal from an August 11, 2006 nonmerit decision of the Office of Workers' Compensation Programs which denied his request for reconsideration. He also appealed March 22 and May 3, 2006 nonmerit decisions of the Office which denied his requests for reconsideration and a December 20, 2005 merit decision of the Office that denied modification of its prior decision terminating his compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim as well as over the nonmerit decisions.

### *ISSUES*

The issues are: (1) whether the Office met its burden of proof to terminate appellant's compensation benefits effective April 5, 2004; (2) whether appellant met his burden of proof to establish that he had any disability after April 5, 2004 causally related to the February 2, 1981 employment injury; and (3) whether the Office properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

## *FACTUAL HISTORY*

On February 2, 1981 appellant, then a 39-year-old central standards officer, injured his back after falling on a sheet of ice at work. He stopped work on the same day, returned to light duty briefly in August 1985, before stopping work again. Appellant did not return to work. The Office accepted his claim for acute lumbosacral strain, herniated disc at the L4-S1 levels, bulging disc at the L4-5 level, a decompressive laminectomy at L4-5 and L5-S1 on June 26, 1981 and a resolved episode of depression and paid appropriate compensation.

On July 11, 1981 Dr. Richard Foltz, a Board-certified orthopedic surgeon, diagnosed degenerative disc disease at L4-5 and L5-S1, with spinal stenosis. Dr. Foltz noted that testing revealed mild, diffuse disc bulging at the L4-5 level. Appellant underwent a decompressive laminectomy at L4-5 and L5-S1 on June 26, 1981. On December 5, 1991 Dr. Foltz found appellant "totally disabled" while, in a December 24, 1991 report, he stated that appellant could work eight hours per day within restrictions.

In developing the claim, the Office referred appellant to Dr. Mark Kircher, a Board-certified orthopedic surgeon, who in a December 8, 2000 report noted that appellant had been referred to him "apparently for establishment of a doctor to see him."[1] However, Dr. Kircher stated that he did not treat back conditions on a chronic basis but observed that appellant reported continuing complaints for which he was totally disabled. He opined that appellant seemed to be in no acute distress and recommended that he follow up with another physician.

The Office subsequently referred appellant to Dr. David R. Silva, an osteopath and a Board-certified physiatrist, for a second opinion. The Office's statement of accepted facts noted that appellant's date-of-injury job as a central standards officer involved maintaining the employing establishment's behavioral tracking system by receiving event reports and recording pertinent data or appropriate forms, compiling various other reports and transcripts and inspecting dorms for safety hazards and cleanliness.

In a March 1, 2001 report, Dr. Silva reported appellant's history and noted examining appellant. He diagnosed "status post work-related injury of February 2, 1981 with related: L4-5, L5-S1 disc bulge with subsequent laminectomy at L5 and partial laminectomies at L4 and S1." On examination, Dr. Silva noted that appellant was moderately obese and presented with a "well-healed surgical incision over the central low back region." He indicated that appellant had fair range of motion on forward flexion and extension, lateral side bending and rotation but did not provide specific measurements. Dr. Silva advised that appellant described a "tearing type sensation" in his left lower back but noted that there was "no obvious spasm." He then stated that straight-leg raising did not produce radicular pain but did produce "a tightness or spasm in the back or what he describes as a tearing-type sensation in low back region." Dr. Silva explained that he did not "find any evidence of an ongoing radiculopathy through the left lower extremities, although [appellant] does complain of moderate pain through the left leg." He

[1] The Office also previously referred appellant for a second opinion examination. In an April 19, 1990 report, Dr. Gay R. Anderson, a Board-certified orthopedic surgeon, opined that appellant's lumbar laminectomy had healed and that he could work within restrictions, while, in an October 18, 1995 report, Dr. Warren J. Roberts, a Board certified orthopedic surgeon, opined that appellant's continuing disability remained due to his employment injury.

noted: "no strong objective findings which would indicate an active or ongoing lumbosacral radiculopathy." Dr. Silva opined that there were no active physical findings indicating that appellant "could not perform work[-]related activities, at least in the light to medium category work activity." He also noted that appellant had irritable bowel syndrome which would likely interfere with his ability to conduct work activities. Dr. Silva concluded that, "based on my knowledge of [appellant's] prior surgery, his most recent magnetic resonance imaging (MRI) scan and my structural findings today, I would place him in the work category of a full[-]time position with a maximum lifting capacity of approximately 40 pounds on an occasional basis, 20 to 30 pounds on a frequent basis and up to 10 pounds on a constant basis." He noted that the "restrictions are based on his lumbosacral findings and do not take into account other medical diagnoses." Dr. Silva indicated that there was "no way to objectify pain" but found that appellant's "subjective complaints of pain far outweigh any physical findings or known structural findings on objective radiologic imaging and objective electromyogram (EMG) nerve conduction findings." He also noted that he was unable to find records of diagnostic testing conducted since about 1994, but stated that appellant's examination was normal except for his well-healed scar over the lumbosacral spine. On April 6, 2001 Dr. Silva listed appellant's work limitations, which included four hours of sitting, three hours of walking, two hours of standing, four hours of reaching above the shoulder, one hour of twisting, four hours of repetitive wrist movement, pushing and pulling up to 45 pounds for one hour, lifting up to 15 pounds for three hours, squatting for one hour, kneeling for two hours and climbing up to four hours.[2]

The Office issued a notice of proposed termination on January 6, 2004 finding that Dr. Silva's report established that appellant's employment-related disability had resolved.

By letter dated January 14, 2004, appellant disagreed with the proposed termination of his benefits. On February 3, 2004 his attorney contended that the Office had not proved that jobs were available and contested the Office's reliance on Dr. Silva's report, asserting that his report was stale and that he was not qualified to render an opinion on appellant's musculoskeletal condition. A June 26, 2003 diagnostic report from Dr. Robert Orbelo, a Board-certified radiologist, noted that an MRI scan of appellant's cervical spine revealed disc bulges and narrowing at each level. He diagnosed "degenerative disc disease at multiple levels." Appellant also submitted a January 23, 2004 MRI scan report from Dr. Orbelo discussing the results of testing of appellant's lumbar spine. Dr. Orbelo diagnosed postoperative changes at L5 and degenerative disc disease.

On April 5, 2004 the Office terminated appellant's wage-loss benefits, effective that same day. The Office noted that appellant's entitlement to medical benefits was not affected.

On May 6, 2004 appellant requested reconsideration and submitted additional evidence. In an April 26, 2004 report, Dr. Eleanore Barry-Prather, a Board-certified internist, noted that appellant had "many chronic illnesses," including insulin-dependant diabetes mellitus, ulcerative colitis, gastroesophageal reflux disease, erosive esophagitis, bilateral epicondylitis, osteoarthritis,

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[2] The employing establishment characterized the date-of-injury position as "normal light-duty work associated with a typical office job." This entailed light lifting and carrying of under 15 pounds, occasional reaching above the shoulder, use of fingers, walking up to one hour, intermittent standing consistent with an office job, occasional bending and occasional operation of a motor vehicle.

hyperlipidemia and a history significant for prostate cancer, as well as "chronic back pain and left leg radiculopathy." Dr. Barry-Prather concluded that "based upon these conditions and [appellant's] age ... he is disabled." On May 3, 2004 Dr. Linda Miller, a Board-certified internist, noted treating appellant for ulcerative colitis with prednisone which might adversely affect his underlying bone disease. On May 4, 2004 Dr. R.C. Lehmer, a Board-certified orthopedic surgeon, advised that appellant had bilateral lateral epicondylitis, bilateral carpal tunnel syndrome and "elbow problems."

By decision dated May 14, 2004, the Office denied modification of its April 5, 2004 decision. Appellant requested reconsideration on August 3, 2004 and forwarded an August 2, 2004 report from Dr. Barry-Prather stating that despite surgery, physical therapy and other treatments appellant had "significant chronic back pain and left greater than right radiculopathy which limits his activities." Dr. Barry-Prather stated that appellant had "trigger points in his neck, tense and tender trapezius muscles bilaterally, tender thoracic and lumbar spine, paraspinous muscles and sacroiliac joints. Appellant also has diminished flexion and extension as well as lateral bending involving his spine." Dr. Barry-Prather stated that appellant had paraspinous muscle spasm and diminished strength of the proximal muscles in both legs. She noted that his symptoms had progressed over the years.

By decision dated October 20, 2004, the Office denied modification of its April 5, 2004 decision. Appellant requested reconsideration on December 3, 2004 and provided a June 9, 2005 report from Dr. Barry-Prather who reiterated findings from her August 2, 2004 report and added that appellant was unable to walk on his toes or heels and had "decreased dorsi and plantarflexion of the left foot." In a June 17, 2005 report, Dr. Barry-Prather stated: "Back surgery and various other treatment modalities have not succeeded in allowing [appellant] to return to work, including sedentary work where prolonged sitting would aggravate his symptoms. Based upon reasonable medical certainty, [appellant is] disabled from working in any occupation five days a week due to his February 1981 on[-]the[-]job back injury."

In a September 1, 2005 decision, the Office denied modification of its April 5, 2004 decision. Appellant requested reconsideration on September 15, 2005 and provided several medical reports already of record. He also resubmitted a March 21, 1988 report from Dr. Rebecca D. Niehaus,[3] which stated that ulcerative colitis may have contributed to appellant's back problems and noted that "people can have joint problems with this disease and also referral of colon pain to the back." Appellant also resubmitted evidence previously of record.

By decision dated December 20, 2005, the Office denied modification of its April 5, 2004 decision.

On December 31, 2005 appellant requested reconsideration. He resubmitted certain evidence and asserted that the Office improperly evaluated the evidence. By decision dated March 22, 2006, the Office denied appellant's reconsideration request without conducting a merit review. On March 27, 2006 appellant disagreed with the Office's decision. In a May 3, 2006 decision, the Office denied appellant's request for reconsideration without conducting a merit review.

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[3] Dr. Niehaus's specialty could not be ascertained from the record.

On May 11 and July 11, 2006 appellant requested reconsideration, asserting that the Office did not properly consider his contentions and evidence.

By decision dated August 11, 2006, the Office denied appellant's reconsideration request without conducting a merit review.

## ***LEGAL PRECEDENT***

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.[4] The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[5] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[6]

## ***ANALYSIS***

The Board finds that the Office did not meet its burden of proof in terminating appellant's wage-loss compensation.

The Office based its termination decision on Dr. Silva's March 1, 2001 report. Dr. Silva, an Office referral physician, examined appellant and opined that he had no objective findings attributable to his employment-related conditions that would prevent him from working eight hours per day in a light or medium-duty position. The Board finds that the Office improperly relied upon Dr. Silva's report to terminate wage-loss compensation. To support his opinion that could return to limited-duty work, Dr. Silva advised his findings for the lumbar spine and lower extremities were normal except for appellant's well-healed surgical scar. However, he did not explain an apparent discrepancy in his report where he advised at one point that lumbosacral examination did not reveal obvious spasm while he subsequently advised that straight-leg raising produced "tightness or spasm" in the back. Likewise, Dr. Silva did not explain why appellant had work restrictions based on lumbosacral findings when he had indicated that examination of the lumbosacral spine was essentially normal. The Board has held that a medical report not fortified by sufficient explanation or rationale is of diminished probative value.[7]

The Board also notes that Dr. Silva's March 1, 2001 report was nearly three years old when the Office proposed to terminate appellant's wage-loss compensation on January 6, 2004. The Office did not explain why a report more reasonably current with the proposed termination was not procured to assess appellant's current work-related findings and restrictions closer to the time the Office sought to terminate wage-loss compensation. The Board has previously considered the age of a medical report as a factor to be considered when the Office modifies

[4] *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

[5] *Id.*

[6] *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

[7] *See, e.g. Caroline Thomas*, 51 ECAB 451, 456 n.10 (2000); *Brenda L. Dubuque*, 55 ECAB 212, 217 (2004).

benefits.[8] It should also be noted that, in forming his opinion in March 2001, Dr. Silva also relied, in part, on diagnostic testing from about 1994 and acknowledged that there was no more recent testing. Rather than relying upon a nearly three-year-old opinion, the Office should have obtained a more current medical report, which would take into account appellant's condition closer to the time his wage-loss compensation was terminated. The record contains no medical report more contemporaneous with the termination of appellant's wage-loss compensation which supports that appellant's work-related disability had ceased.

Consequently, Dr. Silva's report was insufficient to meet the Office's burden of proof in terminating appellant's wage-loss compensation effective April 5, 2004.[9]

## ***CONCLUSION***

The Board finds that the Office did not meet its burden of proof in terminating appellant's compensation benefits.

[8] *See, e.g., Keith Hanselman*, 42 ECAB 680 (1991) (a report almost two years old was deemed an invalid basis for a disability determination or loss of wage earning capacity decision); *Anthony Pestana*, 39 ECAB 980 (1988) (a three-year-old medical report was not reasonably current for purposes of a wage-earning capacity determination). *See also Ellen G. Trimmer,* 32 ECAB 1878 (1981) (the passage of time lessens the relevance of work tolerance limitations).

[9] Due to the Board's disposition of the first issue, it is unnecessary to address issues two and three.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the August 11, May 3 and March 22, 2006 and December 20, 2005, decisions of the Office of Workers' Compensation Programs are reversed.

Issued: June 25, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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