

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

D.G., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Des Moines, IA, Employer)

**Docket No. 07-316
Issued: October 10, 2007**

Appearances:
Martin Ozga, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 15, 2006 appellant, through counsel, filed a timely appeal from a September 12, 2006 decision of an Office of Workers' Compensation Programs' hearing representative affirming the termination of his compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this termination appeal.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation effective December 24, 2005 on the grounds that he no longer had any residuals or disability causally related to his accepted temporary aggravation of a preexisting back condition; and (2) whether appellant established that he had any continuing employment-related residuals or disability after December 24, 2005.

FACTUAL HISTORY

On February 7, 1969 appellant, then a 22-year-old mail hander, filed a traumatic injury claim alleging that he injured his back on January 30, 1969 when he threw a mailbag onto a mail

truck.¹ He returned to his usual job on February 23, 1969. On April 7, 1969 the Office accepted the claim for a temporary aggravation of a preexisting back condition. The Office placed appellant on the periodic rolls for temporary total disability beginning January 5, 1973.

On July 20, 1972 appellant filed a traumatic injury claim alleging that in May 1967 he injured his back when he twisted it trying to throw bags into a trailer as it was about to leave.² The Office denied this claim as being untimely filed.

On December 11, 1975 the Office issued a loss of wage-earning capacity decision based upon appellant's ability to earn wages as a maintenance service dispatcher. By decision dated October 29, 1977, an Office hearing representative set aside the December 11, 1975 loss of wage-earning capacity decision on the grounds that appellant continued to be totally disabled.

On April 20, 1978 the Office issued a loss of wage-earning capacity decision and adjusted appellant's compensation based upon his actual earnings as a security guard.

By decision dated September 9, 1982, the Office terminated appellant's wage-loss compensation and his medical benefits transferred to the Office of Personnel Management. On January 28, 1983 an Office hearing representative vacated the September 9, 1982 decision.

By decision dated July 18, 1984, the Office found the evidence insufficient to establish that appellant had any continuing residuals or disability due to his accepted January 30, 1969 employment injury. This decision was set aside and remanded for further development on October 18, 1984 by an Office hearing representative.

On December 18, 1986 the Office issued a notice of proposed termination of compensation which was finalized by decision dated January 21, 1987. By decision dated July 8, 1987, an Office hearing representative set aside the January 21, 1987 decision and remanded for further development of the evidence.

On April 14, 1998 the Office issued a notice of proposed modification of the 1978 loss of wage-earning capacity based upon appellant's ability to earn wages as a manager (merchandise). By decision dated June 29, 1998, the Office modified the April 20, 1978 loss of wage-earning capacity decision based upon appellant's ability to earn wages in the selected position of manager (merchandise). A hearing representative affirmed this decision on March 3, 1999.

On November 20, 2002 Dr. Cassim M. Igram, a treating Board-certified orthopedic surgeon, noted that appellant had a spinal fusion approximately 31 years ago and that he sustained a work injury to the lumbar spine following the fusion. He stated that appellant required a wheelchair accessible van with a lift and a chair lift for his home due to his medical condition. Appellant related "his symptoms have been somewhat static over the years" but that he had difficulty getting in and out of his van and sitting down and getting up from chairs. As to

¹ The Office assigned file number A10-155050.

² The Office assigned file number A10-205458. In 1967 appellant underwent a spinal fusion of L4, L5 and S1.

his employment injury, he stated that he did not note any new radicular pain as it related to the work-related incident.

In a February 14, 2003 report, Dr. Charles Denhart, a second opinion Board-certified orthopedic surgeon, reviewed the medical reports, statement of accepted facts and provided findings on physical examination. He diagnosed chronic low back pain, L4-5 spondylolisthesis, diabetes mellitus, L5 vertebral body sacralization, chronic obstructive pulmonary disease, status post lumbar fusion with possible nonfusion and possible scar formation, hypertension, obesity, history of cirrhosis of the liver, probable right meralgia paresthetica and status post polio which affected appellant's right lower extremity. Dr. Denhart opined that appellant continued to have residuals from his January 30, 1969 employment injury, which had exacerbated his preexisting back condition. In response to the Office's question, he concluded that the purchase of a van and van lift would be helpful in allowing appellant to "move over longer distances."

In an April 21, 2003 report, Dr. Douglas M. Cooper, a second opinion Board-certified orthopedic surgeon, opined that appellant's accepted employment injury exacerbated a preexisting condition. However, he was unable to determine whether appellant continued to have residuals from his employment injury. Dr. Cooper concluded that appellant was capable of working with restrictions. In a May 28, 2003 supplemental report, he diagnosed chronic low back pain and degenerative disc disease which were unrelated to the 1969 employment injury. Dr. Cooper opined that "most likely the lifting and twisting aggravation that he sustained had has (sic) ceased." He noted usually a pulled ligament or muscle lasts from two to three months and that since he had not physically examined appellant back then he could not provide a specific date when the aggravation had ceased.

On February 11, 2004 the Office referred appellant to Dr. Lonnie R. Mercier, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. Igram, a treating physician, who opined that appellant continued to have residuals from his employment injury, and Dr. Cooper, an Office referral physician, who opined that appellant no longer had any residuals due to his 1969 employment injury.

On February 26, 2004 Dr. Mercier reviewed the medical history. On physical examination he diagnosed status post L4-S1 lumbar fusion, apparent January 30, 1969 lumbar strain and chronic low back pain syndrome. Dr. Mercier opined that appellant's chronic low back pain was more likely related to a preexisting spinal problem than to his January 30, 1969 strain or sprain. He opined that the January 30, 1969 employment injury would have resolved within two to three months. Dr. Mercier also concluded that any aggravation of a preexisting back condition caused by the employment injury had resolved. He opined that, while appellant was disabled due to his chronic pain, the need for a chair lift and wheelchair accessible van was not due to his accepted January 30, 1969 employment injury.

On March 10, 2004 the Office issued a notice of proposed termination of benefits based upon Dr. Mercier's report, which was finalized on April 12, 2004. Appellant disagreed with the Office decision terminating his benefits and requested an oral hearing before an Office hearing representative.

In a report dated October 18, 2004, Dr. Robert C. Jones, an examining Board-certified neurosurgeon, based upon a review of the medical opinion evidence concluded that appellant had sustained a permanent aggravation of his preexisting condition.

By decision dated February 22, 2005, an Office hearing representative set aside the April 12, 2004 decision terminating appellant's compensation. He found that Dr. Mercier was not considered an impartial medical examiner as there was no conflict in the medical opinion evidence between Drs. Cooper and Igram. Thus, Dr. Mercier was considered a second opinion and was not entitled to the special weight accorded to an impartial medical examiner. The hearing representative found an unresolved conflict in the medical opinion evidence between Dr. Mercier and Drs. Igram and Jones on the issue of whether appellant continued to have any residuals or disability due to his accepted January 30, 1969 employment injury.

On April 7, 2005 the Office referred appellant to Dr. Charles Taylon, a Board-certified neurosurgeon, to resolve the conflict in the medical opinion evidence. On May 9, 2005 Dr. Taylon provided a review of appellant's injury and medical treatment. Following examination, he concluded that the January 30, 1969 employment injury had resolved. Appellant related that he did not lift anything heavier than a gallon of milk, "shops in a riding cart," and "has not hunted or fished since 1969." The physical examination showed "significant pain-type behavior" which was nonorganic in nature. Dr. Taylon reported 90 degrees straight leg raising bilaterally with tenderness in the lower back at the slightest palpitation, decreased range of motion and no sensory abnormalities. He noted that the MRI scans revealed degenerative and postoperative changes in the spine. Dr. Taylon also noted a congenital lesion in the cauda equine which was unrelated to the 1969 employment injury. He noted that appellant had a lumbar spine fusion but no evidence of any ongoing acute problem. Dr. Taylon opined that the January 30, 1969 employment injury caused a temporary aggravation of appellant's preexisting back condition, which included a diagnosed polyneuropathy, thoracic stenosis with spondylitis and cervical stenosis. He noted that he could not find any evidence by way of x-ray scan or on examination to establish that appellant's condition worsened in 1969. The available information showed subjective complaints of increased pain. Dr. Taylon concluded that appellant was not at the point where he required mechanized lifts, vans or wheelchairs. He concluded that the injury in 1969 temporarily aggravated appellant's back condition.

On June 16, 2005 the Office requested clarification from Dr. Taylon on the issue of whether appellant's 1969 injury was temporary and whether any aggravation of his preexisting injury had resolved.

In a supplemental report dated September 26, 2005, Dr. Taylon, opined that appellant continued to suffer residuals related to his 1967 back condition but that the 1969 aggravation caused by the accepted injury had resolved. He stated that appellant did not currently have residuals related to the 1969 injury.

On October 25, 2005 the Office issued a notice of proposed termination of benefits.

In a letter dated November 3, 2005, appellant's counsel disagreed with the proposed termination and submitted additional evidence. He stated that appellant objected to the determination that he had not sustained a permanent aggravation based on Dr. Taylon's report.

Counsel also contended that the medical evidence did not support Dr. Taylon's conclusion that appellant sustained a temporary aggravation of his preexisting back condition. In an April 27, 2005 report, Dr. Paul Babikian, M.D., diagnosed tremor and generalized weakness secondary to gait disorder, which he suspected was related to neuropathy secondary to diabetes and possibly his spine disease. A review of a lumbar magnetic resonance imaging (MRI) scan showed "previous posterior bony effusion, Grade 1 spondylolisthesis in L4 and L5, neural foramina narrowing, and mild spinal stenosis." A cervical MRI scan revealed "cervical lordosis, degenerative disc disease, and congenitally modest central canal with disc bulge resulting in central canal stenosis at multiple levels." Dr. Babikian reported a review of a thoracic MRI scan revealed "congenital and acquired degenerative spinal stenosis and multilevel bony dominant neural foramina narrowing."

On June 23, 2005 Dr. John Piper, a Board-certified neurosurgeon, noted that appellant had a history of a back injury while working for the post office, which was treated with fusion. A review of the objective evidence revealed some degenerative disc disease and some degree of stenosis that was forming in various areas. Appellant noted numbness in his leg but no radicular pain. Dr. Piper noted that there were no surgical options to offer appellant for his pain and no active symptoms related to his stenosis. No further treatment was recommended.

In reports dated July 26 and August 24, 2005, Dr. Thomas D. Hansen, M.D., diagnosed secondary muscle spasm, facet arthritis and lumbar disc degeneration. In a September 14, 2005 report, he diagnosed back pain with paraspinous musculature spasm. Dr. Hansen reported a history of low back pain but did not address causal relation.

By decision dated November 30, 2005, the Office finalized the termination of appellant's compensation benefits effective December 24, 2005.³ The Office found the weight of medical opinion represented by Dr. Taylor's impartial medical reports. The reports of Drs. Babikian, Hansen and Piper were insufficient to create a conflict with Dr. Taylon.

In a letter dated December 7, 2005, appellant requested an oral hearing before an Office hearing representative. A hearing was held on June 28, 2006 at which appellant was represented by counsel and testified. Subsequent to the hearing, appellant resubmitted medical evidence for the period 1967 to 2005, which included copies of the reports by Drs. Babikian, Hansen and Piper. Appellant also submitted a December 6, 2005 report by Dr. Hansen, who stated, "that the exacerbation that occurred in 1969 was basically an aggravation of his degenerative disc disease." Dr. Hansen disagreed with Dr. Taylon that appellant exhibited significant pain behavior based upon the physical examination he performed. He opined that appellant required continued medical treatment for pain and fairly significant paraspinous spasm. With respect to appellant's lumbar condition, Dr. Hansen concluded that there was "no focal neurologic deficit" although appellant had pain complaints and degeneration was seen on diagnostic testing.

By decision dated September 12, 2006, an Office hearing representative affirmed the termination of appellant's compensation on the grounds that appellant's accepted condition had resolved. The Office hearing representative found the weight of the medical opinion evidence

³ Appellant was restored to the Civil Service Retirement annuity rolls effective December 25, 2005.

rested with the opinion of Dr. Taylon, the impartial medical examiner. He also found the medical evidence submitted at the hearing was insufficient to create a new conflict.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.⁴ After it has determined that an employee has disability causally related to his 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.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

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.⁷

Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."⁸ Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background must be given special weight.⁹

ANALYSIS -- ISSUE 1

The Board finds that the Office properly determined that there was a conflict in the medical opinion evidence between Dr. Igram, an attending Board-certified orthopedic surgeon, and Dr. Mercier an Office referral Board-certified orthopedic surgeon, as to whether appellant had any continuing residuals or disability causally related to his accepted January 30, 1969 employment injury. The Office accepted appellant's claim for aggravation of a preexisting back condition. Dr. Igram opined that appellant continued to have residuals and disability due to the accepted employment-related conditions and required a wheelchair accessible van and home chair lift. Dr. Mercier opined that the accepted employment-related conditions had resolved and a wheelchair accessible van and home chair lift were not warranted.

⁴ *Paul L. Stewart*, 54 ECAB 824 (2003).

⁵ *Elsie L. Price*, 54 ECAB 734 (2003).

⁶ *See Del K. Rykert*, 40 ECAB 284 (1988).

⁷ *James F. Weikel*, 54 ECAB 660 (2003).

⁸ 5 U.S.C. § 8123(a); *see also Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

⁹ *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Gary R. Sieber*, 46 ECAB 215 (1994).

The Office referred appellant to Dr. Taylon, selected as the impartial medical specialist. In a report dated May 9, 2005, Dr. Taylon reported that the physical examination showed “significant pain-type behavior” which “is nonorganic in nature.” He opined that the temporary aggravation of the preexisting back condition had resolved. A review of the MRI scans revealed various changes in the spine, which Dr. Taylon concluded were unrelated to appellant’s 1969 employment injury. Based upon a review of the objective evidence and physical examination, the physician opined that the January 30, 1969 employment injury caused a temporary aggravation of appellant’s preexisting back condition, which had resolved. In a September 26, 2005 supplemental report, Dr. Taylon stated that appellant continued to suffer from his 1967 back condition, but had no disability or residuals from his accepted January 30, 1969 employment injury.

The Board finds that Dr. Taylon’s opinion is based on a proper factual and medical background and is entitled to special weight. He found that appellant no longer had any residuals or disability causally related to the accepted employment injuries of aggravation of the preexisting back condition. Dr. Taylon’s conclusion is supported by a thorough examination, objective evidence and rationale.

Prior to the termination of compensation appellant submitted additional medical evidence including an April 27, 2005 report by Dr. Babikian, a June 23, 2005 report by Dr. Piper and reports dated July 26, August 24 and September 14, 2005 by Dr. Hansen. The Board finds that these reports are insufficient to overcome the weight properly accorded to Dr. Taylon’s opinion. In an April 27, 2005 report, Dr. Babikian diagnosed tremor and generalized weakness secondary to gait disorder, which he suspected was “related to neuropathy secondary to diabetes and possibly his spine disease. He offered no opinion as to the cause of appellant’s condition nor did he refer to appellant’s 1969 employment injury and, therefore, his report lacks probative value.¹⁰ Similarly, Dr. Hansen’s report which diagnosed secondary muscle spasm, facet arthritis and lumbar disc degeneration in his July 26 and August 24, 2005 reports and back pain with paraspinous musculature spasm lacks probative value. He did not address whether appellant’s disability was causally related to his accepted employment injury.¹¹ In his June 23, 2005 report, Dr. Piper reported that appellant sustained a back injury at the employing establishment which had been treated by fusion surgery. He diagnosed some degenerative disc disease, stenosis and paraspinous back area pain. Dr. Piper’s report cannot be considered properly rationalized given his reliance on an inaccurate employment injury history.¹² Thus, these reports are of diminished probative value and insufficient to create a conflict with the opinion of Dr. Taylon.

On appeal appellant’s attorney contends that since the Office accepted that the January 30, 1969 injury permanently aggravated a preexisting back condition, the Office is estopped, based on principles of *res judicata* from terminating compensation on the grounds that

¹⁰ *Mary A. Ceglia*, 56 ECAB ____ (Docket No. 04-113, issued July 22, 2004).

¹¹ *Id.*

¹² *Anna M. Delaney*, 53 ECAB 384, 386 (2002) (The factors that comprise the evaluation of medical evidence include the opportunity for a physical examination and the thoroughness of the examination. Additional factors include the accuracy and completeness of the physician’s knowledge of the facts and medical history, the care of the analysis manifested and the medical rationale expressed in support of the physician’s opinion.)

his condition had been temporarily aggravated and any temporary aggravation had ceased. This contention that the Office may not readjudicate an issue which has once been decided has no merit.¹³ Just as a claimant is entitled to request review of an Office decision, *ad infinitum*, the Office is also entitled to reconsider and modify or reverse its prior decision where the evidence warrants such action.¹⁴ Thus, the principles of *res judicata* do not apply to the administration of the Federal Employees' Compensation Act.¹⁵

LEGAL PRECEDENT -- ISSUE 2

After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation shifts to appellant.¹⁶ In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that he had an employment-related disability, which continued after termination of compensation benefits.

The medical evidence required to establish a causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence, which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between appellant's diagnosed condition and the implicated employment factors.¹⁷ The opinion of the physician must be based on a complete factual and medical background of appellant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by appellant.¹⁸

ANALYSIS -- ISSUE 2

The relevant medical evidence regarding continuing employment-related residuals submitted by appellant after December 24, 2005 consists of a December 7, 2005 report by Dr. Hansen, who stated that he disagreed with Dr. Taylor that appellant exhibited significant pain behavior based upon the physical examination he performed. Dr. Hansen, based upon a review of the medical evidence, concluded that the 1969 injury aggravated his preexisting back condition. However, he offered no opinion as to whether the aggravation was permanent or

¹³ See *Howard E. Johnston*, 40 ECAB 777 (1989).

¹⁴ See *Bettye F. Wade*, 37 ECAB 556 (1986); *Patsy Rubio*, 37 ECAB 179 (1985); *Jimmie D. Brewer*, 35 ECAB 197 (1983).

¹⁵ See *Howard E. Johnston*, *supra* note 12; *Bettye F. Wade*, *supra* note 14; *Patsy Rubio*, *supra* note 14; *Jimmie D. Brewer*, *supra* note 14 (the Office may modify, terminate or rescind, respectively, compensation benefits which had been granted). See also *John R. Walker*, 36 ECAB 267 (1984); *Paul Ganelin*, 32 ECAB 1119 (1981) (an Office hearing representative has the authority to reverse or modify a prior decision of the Office); and *David Paul Proulx*, 36 ECAB 618 (1985) (the Board found that its prior decision in the case was in error).

¹⁶ See *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004); *Virginia Davis-Banks*, 44 ECAB 389 (1993); *Joseph M. Campbell*, 34 ECAB 1389 (1983).

¹⁷ *Kathryn E. Demarsh*, 56 ECAB ____ (Docket No. 05-269, issued August 18, 2005).

¹⁸ *Bobbie F. Cowart*, 55 ECAB 746 (2004); *Victor J. Woodhams*, 41 ECAB 345 (1989).

temporary or whether appellant continues to suffer from residuals of his accepted employment injury, While Dr. Hansen opined that appellant required further medical treatment for his paraspinous spasm and pain, he provided no opinion attributing this condition to appellant's accepted 1969 employment injury. As he provided no opinion as to whether the 1969 employment injury caused a permanent aggravation of appellant's preexisting condition or whether he continues to suffer residuals from the accepted 1969 employment injury, his opinion is insufficient to create a conflict with Dr. Taylor's opinion. The Board, therefore, finds that, since appellant submitted insufficient medical evidence to establish that he continued to be disabled from the accepted employment-related temporary aggravation of preexisting back condition, he has not met his burden of proof.

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation effective December 24, 2005 on the grounds that he no longer had any residuals or disability causally related to his accepted employment-related injury. The Board further finds that appellant has failed to establish that he had any continuing employment-related residuals or disability after December 24, 2005.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 12, 2006 is affirmed.

Issued: October 10, 2007
Washington, DC

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

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

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