

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

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**T.H., Appellant**

**and**

**DEPARTMENT OF AGRICULTURE, FOREST  
SERVICE, Hines, OR, Employer**

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**Docket No. 09-2269**

**Issued: August 18, 2010**

*Appearances:*

*Todd S. Hammond, Esq., for the appellant*

*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge

COLLEEN DUFFY KIKO, Judge

MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On September 11, 2009 appellant, through his representative, filed a timely appeal from a March 30, 2009 merit decision of the Office of Workers' Compensation Programs denying his claim for a recurrence of disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

**ISSUE**

The issue is whether appellant established that he sustained a recurrence of disability on or after October 23, 2004 causally related to his employment injury.

On appeal, appellant, through counsel, argued that the report by the second opinion physicians was based on an incomplete physical examination and an inaccurate history. Further, the physicians did not provide any explanation or objective findings to support their conclusion that appellant's current condition was not related to his employment injury. Appellant contends that he submitted several medical reports providing well-reasoned opinions supporting his claim.

## **FACTUAL HISTORY**

The Office accepted that on August 14, 1991 appellant, then a 38-year-old supervisory forest technician, sustained cervical and lumbar strains while he was pulling and moving cut trees during an inspection of a contractor's work on a thinning unit. A few days prior, appellant had also experienced back pain at work while unloading and loading fire equipment and jumping from the bed of the truck. He did not miss time from work.<sup>1</sup> In June 1992 appellant resigned from his federal employment to run a self-owned music store. The Office subsequently closed his case.

On April 21, 2004 appellant underwent a facet block at L5-S1. He experienced little relief and had a standing body cast.<sup>2</sup> In October 1999 appellant was involved in a nonwork-related rear end motor vehicle accident. He underwent a two-level cervical fusion with fixation plate in 2000.<sup>3</sup> The Office reopened appellant's case on April 30, 2003 and expanded his claim to include permanent aggravation of degenerative disc disease and cervical disc displacement.

On December 9, 2004 appellant filed a claim for an October 23, 2004 recurrence of disability. He claimed that his back condition continued to deteriorate and that he experienced increasing chronic pain and depression.

On November 22, 2004 Dr. Mark G. Belza, a Board-certified neurologist, stated that appellant experienced ongoing pain symptoms. He reported that appellant sold his store because he could not keep up with the workload or lifting boxes. On physical examination, there was a decreased range of motion of about 50 percent in the low back and significant splinting with extension and flexion of the low lumbar spine. Dr. Belza diagnosed cervical and lumbar spondylosis and chronic neck and low back pain. He opined that appellant would be unable to sustain gainful employment for the next year due to ongoing symptomatology in his neck and low back. On February 9, 2005 Dr. Belza stated that diagnostic tests revealed degenerative changes and instability of the lumbosacral motion segment. Appellant continued to have chronic, debilitating low back pain, for which he recommended surgical stabilization. As he deferred surgical intervention, Dr. Belza recommended a one-year total temporary disability, during which time appellant's care would be managed by psychiatry.<sup>4</sup>

In a November 18, 2004 report, Dr. Thomas M. Fitzpatrick, Board-certified in family medicine, stated that appellant was advised not to work due to his back condition. He discussed

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<sup>1</sup> Appellant previously injured his neck in December 1990 for which he underwent a cervical laminectomy and fusion on January 16, 1991.

<sup>2</sup> In a November 2, 2000 decision, the Office denied appellant's claim for a September 18, 1992 recurrence. This decision was set aside by a June 13, 2001 hearing representative decision and the case was remanded for further development. By decision dated June 25, 2002, the Office found that appellant's residuals from his employment injury had resolved.

<sup>3</sup> This surgery was not authorized or paid for by the Office.

<sup>4</sup> In May 26 and June 28, 2004 reports, Dr. Belza diagnosed chronic neck and low back pain, degenerative disc disease and spondylosis. He recommended appellant undergo an anterior cervical discectomy and fusion at C3-4 and L5-S1. These surgeries were authorized by the Office, however, appellant elected not to undergo the procedures.

with appellant the possibility of performing an additional surgery to replace discs instead of another fusion. On physical examination, appellant was in obvious distress and sitting quite stiffly. Dr. Fitzpatrick diagnosed severe back pain due to multiple levels of degenerative disc disease and severe depression.

On December 8, 2004 appellant underwent a transforaminal epidural steroid injection at L5-S1.

By letters dated January 18 and February 17, 2008, the Office advised appellant of the deficiencies of his recurrence claim and requested he provide additional information.

In a February 10, 2005 letter, appellant stated that he liquidated his music store in October 2004. He claimed that his back condition progressively degenerated and that he became unable to operate the store.

In an April 28, 2005 decision, the Office denied the claim for a recurrence of disability on the grounds that appellant did not provide sufficient medical evidence. It found that appellant experienced intervening activities, including working in his store, which may have contributed to his condition.

On June 9, 2005 appellant filed a request for a telephonic hearing before an Office hearing representative that was held on January 25, 2006.

In a November 16, 2005 report, Dr. Belza stated that he had treated appellant since 1992 for his neck and low back employment injuries and that he was familiar with appellant's condition. Since the 1991 injury, appellant experienced episodic severe incapacitating periods of low back pain related to edema in his disc. Objective findings on physical examination included decreased range of motion in the low back. Dr. Belza stated that appellant's limited range of motion in his low back was related to an intrinsic injury to the L5-S1 disc in 1991. He opined that appellant injured his disc to such a degree that it continued to be a source of his ongoing symptomatology and resulted in his being unable to continue working in his music shop. Diagnostic studies including a magnetic resonance imaging (MRI) scan and single-photon emission computerized tomography (SPECT) scans, showed the deranged disc at L5-S1. Dr. Belza noted that it was well documented in medical literature that discogenic pain can be episodic in nature and that the intrinsic derangement in the disc itself was the reason for appellant's ongoing need for treatment over the years. Appellant's symptoms had not ceased to bother him since the initial onset in 1991 and his back pain and limited range of motion on examination supported causal relations.

By decision dated May 11, 2006, an Office hearing representative vacated the April 28, 2005 decision and remanded the case for the Office to refer appellant for a second opinion evaluation.

On November 14, 2006 Dr. Fitzpatrick reviewed appellant's medical and occupational history. He performed a full physical examination revealing pain in the low back with any range of motion of the bilateral lower extremities. Appellant demonstrated right neck pain at C7 with radiation into his right shoulder and painful right lateral epicondyle. Dr. Fitzpatrick diagnosed neck and back injuries with chronic pain and severe depressive disorder.

The Office referred appellant to Dr. Jau-Shin Lou, a Board-certified neurologist, and Dr. Stephen J. Thomas, a Board-certified orthopedic surgeon. In a February 9, 2007 report, Drs. Lou and Thomas described appellant's medical history. Physical examination revealed limited range of motion in the neck and lumbosacral due to pain. Appellant demonstrated diffuse tenderness in the midline from the occipital area to C7 and mild pain in the right and left paravertebral areas. His crossed leg was 30 degrees on the right and totally limited on the left due to pain. Appellant was able to sit comfortably and squat about 50 percent, however, his gait was somewhat guarded and slow. Drs. Lou and Thomas diagnosed status post cervical discectomy at C6-7, status post cervical fusion at C4-7 and degenerative cervical and lumbar disc disease. They opined that appellant's condition was waxing and waning due to the nature of the degenerative disease and that his current symptoms were not related to his work injury in 1991. Drs. Lou and Thomas stated that appellant's accepted conditions were fixed and stable. They found that appellant's inability to manage his music store was not due to the accepted conditions but rather was due to the natural progression of the degenerative disc disease in the cervical and lumbar spines. Drs. Lou and Thomas found appellant was not totally disabled from operating the music store and that he should be able to perform light-duty jobs. Drs. Lou and Thomas also provided lifetime work restrictions.

By decision dated March 16, 2007, the Office denied appellant's claim for an October 23, 2004 recurrence of disability on the grounds that the weight of the medical evidence rested with the well-rationalized opinion of Drs. Lou and Thomas.

On September 11, 2007 appellant, through his representative, filed a request for reconsideration. He argued that Drs. Lou and Thomas did not explain why they found that the progression of the degenerative disc disease was totally independent of the August 14, 1991 employment injury.

By decision dated December 10, 2007, the Office denied modification of the March 16, 2007 decision on the grounds that the opinion of Drs. Lou and Thomas represented the weight of the medical evidence. It found that the evidence of file showed several intervening factors leading to appellant's claimed disability, including the operation of his music store and gymnastics club, his nonwork-related motor vehicle accident and his jumping from a truck.

In a February 29, 2008 medical report, Dr. Belza stated that appellant was injured on the job in August 1991 and sustained neck and low back injuries. He diagnosed chronic pain syndrome, history of two previous neck surgeries with subsequent fusion from C4 to C7 and severe degenerative disc disease at L5-S1. Dr. Belza opined that appellant's chronic spine problems were secondary to his on-the-job injury in 1991. On April 10, 2008 Dr. Belza opined that appellant's need for disability was due to his August 14, 1991 employment injury.

In a December 9, 2008 report, Dr. Fitzpatrick opined that appellant experienced a spontaneous return and increase of disability due to the accepted conditions of his August 14, 1991 occupational injury without any intervening causes. He stated that appellant's initial injury in 1991 was caused by his bending over to pick up small trees resulting in a sharp pain in the right lower back which radiated into the right lower extremity. A subsequent MRI scan documented a herniated disc at L5-S1, for which appellant underwent multiple forms of nonsurgical, conservative treatment. He cited to medical literature which supported that with a bony or cartilaginous injury, the joint space and soft tissue is never the same and progressively

deteriorates. Dr. Fitzpatrick opined that the degeneration of appellant's lumbar or lumbosacral disc was permanently aggravated and accelerated by the August 14, 1991 occupational injury. He stated that the joint space and soft tissue in appellant's spine never returned to the preinjury condition, resulting in advanced breakdown and aging of the lumbar spine and progressive deterioration. Further, he opined that this progressive deterioration and disc disease caused further disability and physical limitations for appellant, along with constant pain.

Dr. Fitzpatrick treated appellant since 2001 and documented pain caused by the accepted conditions of the lumbar and cervical spine. Appellant consistently presented in his office in pain requiring uncomfortable leaning forward and was limited in any physical activity, including sitting. Dr. Fitzpatrick found that appellant was unable to perform the duties necessary of operating his music store prior to its liquidation in October 2004 and that he was precluded from engaging in any form of substantial gainful employment since that time. He provided limitations restricting any physical activity to no more than four hours a day with frequent changes of positions and extended breaks. Moreover, Dr. Fitzpatrick opined that there was no basis in the medical or claim record to support the finding that the operation of appellant's music store and gymnastic club required extensive labor or constituted a significant intervening factor that caused or contributed to appellant's disability. He pointed to factual statements that showed that appellant did not perform heavy lifting in the music store or at his former spouse's gymnastic club and that even the postal service driver would carry appellant's packages inside the music store.

On December 10, 2008 appellant, through his representative, filed a request for reconsideration.

In a March 30, 2009 decision, the Office denied modification of the prior decisions finding that the weight of the medical evidence continued to rest with Drs. Lou and Thomas, who found that appellant did not experience a worsening of his condition and that he was not disabled from operating his music store.

### **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 has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness."<sup>5</sup> A person who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable, and probative evidence that the disability for which she claims compensation is causally related to the accepted injury. This burden of proof requires that an employee furnish 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

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<sup>5</sup> R.S., 58 ECAB 362 (2007); 20 C.F.R. § 10.5(x).

supports that conclusion with sound medical reasoning.<sup>6</sup> Where no such rationale is present, medical evidence is of diminished probative value.<sup>7</sup>

### ANALYSIS

The Office accepted that appellant sustained cervical and lumbar strains, aggravation of lumbar disc disease and cervical disc displacement due to his employment. The issue is whether appellant established that he sustained a recurrence of disability on or after October 23, 2004 causally related to his employment injury.

In support of his claim, appellant submitted multiple reports from Dr. Fitzpatrick, who documented his limited range of motion in the lower back and debilitating pain. In a December 9, 2008 report, Dr. Fitzpatrick opined that appellant experienced a spontaneous return and increase of disability due to the accepted conditions of his August 14, 1991 occupational disease injury without intervening cause. He noted that he had treated appellant since 2001 and had documented significant pain from his accepted conditions. Dr. Fitzpatrick found that after the employment injury, appellant's joint space and soft tissue never returned to its preinjury condition, which resulted in advanced breakdown and aging of the lumbar spine and progressive degeneration. He found that this progressive deterioration and disc disease caused appellant to be disabled from operating his music store since 2004, as well as any other gainful employment. Dr. Fitzpatrick stated that appellant was very limited in performing any physical activity, including sitting and provided restrictions limiting physical activity to no more than four hours a day with frequent changes of positions and extended breaks. He opined that there was no basis in the factual or medical record to support that appellant's operating his music store or other activities constituted an intervening cause in his disability.

Dr. Belza treated appellant since 1992 for his neck and low back employment injuries. He stated that appellant sustained an intrinsic injury to the L5-S1 disc in 1991 resulting in a limited range of motion. Since the 1991, injury, appellant continued to experience severe incapacitating periods of low back pain related to edema in his disc. Dr. Belza noted that it was well documented in literature that discogenic pain could be episodic in nature and opined that appellant's intrinsic disc derangement was the cause of his ongoing treatment of over the years. Diagnostic testing in 2005 revealed degenerative changes and instability of the lumbosacral motion segment. Dr. Belza diagnosed cervical lumbar spondylosis and debilitating chronic neck and low back pain. He stated that appellant sold his music store in 2004 because he could not keep up with the workload and found that appellant could not sustain gainful employment due to ongoing symptomology in his neck and low back. Dr. Belza opined that appellant's disability was due to his 1991 employment injury.

The second opinion report from Drs. Lou and Thomas is in conflict with the attending physicians. On February 9, 2007 they diagnosed status post cervical discectomy at C6-7, status post cervical fusion at C4-7 and degenerative cervical and lumbar disc disease. Drs. Lou and Thomas found that appellant's condition was waxing and waning due to the nature of the degenerative disc disease. They opined that his current symptoms were not related to his 1991

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<sup>6</sup> *I.J.*, 59 ECAB \_\_\_\_ (Docket No. 07-2362, issued March 11, 2008); *Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

<sup>7</sup> See *Ronald C. Hand*, 49 ECAB 113 (1957); *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

employment injury, which were fixed and stable, but rather were related to the natural progression of the cervical and lumbar degenerative disc disease. Drs. Lou and Thomas further stated that appellant was not disabled from operating his music store and that he was able to perform light-duty jobs. They supported their conclusion that appellant's symptoms and disability were not related to his employment injury. Drs. Lou and Thomas explained how the natural progression of the underlying disease was unrelated to appellant's accepted conditions. They provided work restrictions based on the degenerative disease of the cervical and lumbar spine. The Board finds a conflict in medical opinion between appellant's attending physicians and the second opinion Office referral physicians.<sup>8</sup> For this reason, the case will be remanded to the Office for referral to an impartial medical specialist. After such further development as deemed necessary, it shall issue an appropriate decision on appellant's claim.

### **CONCLUSION**

The Board finds the case is not posture for decision.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the March 30, 2009 decision of the Office of Workers' Compensation Programs be set aside. The case is remanded for further proceedings consistent with this decision.

Issued: August 18, 2010  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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<sup>8</sup> See *Richard R. LeMoy*, 56 ECAB 341 (2005).