

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of GEORGE H. BURKHARDT and U.S. POSTAL SERVICE,  
NORTH MICHIGAN STREET POST OFFICE, Edon, Ohio

*Docket No. 96-2670; Submitted on the Record;  
Issued August 24, 1998*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether appellant has met his burden of proof in establishing that he sustained spinal stenosis or an aggravation of spinal stenosis, in the performance of duty causally related to an accepted December 22, 1994 lumbar injury.

The Office of Workers' Compensation Programs accepted that appellant, then a 59-year-old letter carrier, sustained a lumbosacral strain on December 22, 1994 in the performance of duty while lifting a container of oranges from the back of his postal truck. Appellant worked light duty from December 23, 1995 to January 2, 1996. The Office also accepted a January 4, 1995 recurrence of disability.<sup>1</sup> On February 28, 1995 appellant filed a notice of recurrence of disability on and after February 16, 1995 of the December 22, 1994 injury. He noted constant pain since the December 22, 1994 injury, which had recently worsened. Appellant described difficulty with lifting, walking and bladder control. Following the claimed February 16, 1995 recurrence of disability, appellant returned to limited-duty work on April 18, 1995. He submitted medical evidence in support of his claim.

In a January 4, 1995 report, Dr. Vijay Jain, an attending family practitioner, noted appellant's complaints of low back, right hip and leg pain continuously since December 22, 1994. Dr. Jain diagnosed right sciatica with possible lumbar disc disease. In a January 11, 1995 report, Dr. Jain noted that appellant was "much improved" and wanted to return to work. Dr. Jain diagnosed myalgia paresthetica of the right thigh, low back pain and recommended follow-up testing. Dr. Jain released appellant to return to work without limitations.

In a February 16, 1995 report, Dr. Jain held appellant off work until February 24, 1995.

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<sup>1</sup> The record indicates that Dr. Jain held appellant off work from January 4 to January 11, 1995.

A February 20, 1995 lumbar magnetic resonance imaging (MRI) scan report demonstrated a subligamentous L4-5 disc protrusion, and no significant spinal stenosis. A March 3, 1995 computed tomography (CT) scan and myelogram showed L4-5 spinal stenosis and “some disc bulging” at L4-5, with “probable[] slight prominence of the ligamenta flava and some osteoarthritic changes in the facet joints all contributing to an apparent stenosis.”

In a March 4, 1995 surgical report, Dr. Jeffrey J. Berus noted performance of decompressive laminectomies at L4-5 with bilateral foraminotomies at the L4-L5 level. Dr. Berus stated pre- and post-operative diagnoses of “[s]evere L4-5 spinal stenosis with neurologic deficit.” Dr. Berus held appellant off work through April 17 1995, and released him to light-duty work, with no driving a mail route for three months, as of April 17, 1995.<sup>2</sup>

By decision dated April 27, 1995, the Office denied appellant’s claim for recurrence of disability on the grounds that causal relationship was not established. Appellant disagreed with this decision, and requested a telephonic hearing with a representative of the Office’s Branch of Hearings and Review.

A telephonic hearing was held on February 29, 1996. During the hearing, appellant stated that his back pain and other symptomatology worsened from the December 22, 1994 injury through the time he filed his claim for recurrence of disability on February 16, 1995. Appellant stated that there were no intervening injuries between December 22, 1994 and February 16, 1995. He noted a December 1985 cervical spine procedure, but denied any significant low back problems prior to December 22, 1994. Appellant submitted additional medical evidence after the hearing.

In a March 6, 1996 report, Dr. Berus noted first examining appellant on January 11, 1995 for complaints of low back and right leg pain after lifting a container of fruit from the back of his postal truck. He noted that appellant’s symptoms decreased somewhat after treatment with “cortisone, muscle relaxants and bed-rest,” and that he was able to return to work for a brief period, but that his symptoms did resolve and again worsened. Dr. Berus noted that a February 23, 1995 MRI showed “disc protrusion” at L4-5, with “visible” spinal stenosis.” He noted that to obtain clearer images of appellant’s spinal canal, he ordered the March 3, 1995 CT and myelogram, which showed “very evident spinal stenosis at the L4-5 and L5-S1 level.” Dr. Berus explained that appellant’s progressively worsening symptoms of low back pain in early March 1995, with pain radiating into the right lower extremity, were consistent with the severe spinal stenosis demonstrated by March 3, 1995 radiographic studies. He noted that the March 4, 1995 decompressive laminectomies and foraminotomies at L4-5 and L5-S1 revealed “[m]arked spinal stenosis,” requiring “[d]ecompression of the dural sac and the nerve roots.” Dr. Berus noted that March 4, 1995 decompressive surgery had brought excellent relief of appellant’s symptoms.

In a March 28, 1996 report, Dr. Berus opined that appellant’s “injury of December 22, 1994 substantially aggravated [his] spinal stenosis symptoms.” Dr. Berus noted that although appellant most likely had spinal stenosis for a long period of time prior to the December 22,

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<sup>2</sup> Dr. Jain released appellant to work with no limitations as of June 1, 1995.

1994 injury, appellant “certainly did not have the symptoms which were present after the above stated injury. Therefore ... the injury event had a deleterious effect on [appellant’s] condition.”

In a May 21, 1996 letter, the Office hearing representative requested that an Office medical adviser review Dr. Berus’ March 8 and March 26, 1996 reports, and state whether or not the diagnosis of spinal stenosis was causally related to the December 22, 1994 injury, whether the claimed February 1995 recurrence of disability was causally related to the accepted December 22, 1994 lumbar sprain, and whether the March 4, 1995 surgery was necessitated by the effects of the December 22, 1994 injury.

In a May 22, 1996 response to the Office hearing representative’s questions, Dr. W. Thompson, an Office medical adviser, noted reviewing the medical record. He opined that the diagnosis of spinal stenosis was not established as work related. Dr. Thompson also noted that the February 20, 1995 lumbar MRI did not demonstrate spinal stenosis, and that the March 3, 1995 lumbar myelogram was “equivocal” as to the presence of spinal stenosis.

By decision dated and finalized May 31, 1996, the Office hearing representative affirmed the Office’s April 27, 1995 denial of appellant’s claim for recurrence of disability as causal relationship was not established. The hearing representative found that Dr. Berus did not submit sufficient medical rationale explaining how and why the December 22, 1994 injury caused an organic change in appellant’s underlying spinal stenosis such that surgery was required.

The Board finds that the case is not in posture for a decision due to a conflict in medical evidence between Dr. Berus, for appellant, and Dr. Thompson, the Office medical adviser, for the government.

The Federal Employees’ Compensation Act, at 5 U.S.C. § 8123(a), in pertinent part, provides: “If there is a 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.”

Dr. Thompson, for the government, opined that the diagnosis of spinal stenosis or any aggravation thereof was not work related and that the March 4, 1995 decompressive surgery was unrelated to sequelae of the December 22, 1994 lumbar injury. In contrast, Dr. Berus, for appellant, noted radiographic, clinical and surgical evidence indicative of an aggravation of preexisting spinal stenosis related to the December 22, 1994 injury. Thus, the two physicians disagree on the fundamental issue of causal relationship.

Consequently, the case must be remanded so that the Office may refer appellant, together with the case record and a statement of accepted facts, to an appropriate Board-certified specialist for an examination and a rationalized medical opinion to resolve the medical conflict regarding whether his lumbar spine condition on and after February 16, 1995, and any of the claimed periods of disability were caused or aggravated by the accepted December 22, 1994 lumbar injury or by any of his job duties when he returned to work in January 1995. Following such development as the Office deems necessary, the Office shall issue an appropriate decision in the case.

The decision of the Office of Workers' Compensation Programs dated and finalized May 31, 1996 is hereby set aside and the case remanded to the Office for further development consistent with this decision and order.

Dated, Washington, D.C.  
August 24, 1998

George E. Rivers  
Member

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member