U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

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In the Matter of JAMES A. DEMERS and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Butte, MT

*Docket No. 01-1899; Submitted on the Record;*
*Issued July 1, 2002*

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DECISION and ORDER

Before ALEC J. KOROMILAS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant established that he was disabled from January 1 through January 9, 2001 due to an employment-related recurrence of disability.

On April 9, 1990 appellant, then a 39-year-old mail distribution clerk, developed back pain while lifting and sorting flats. He received continuation of pay for the period he did not work. On June 25, 1990 appellant developed severe back pain while turning and twisting at work. He underwent surgery on July 27, 1990 for spondylolisthesis of the L5-S1 disc, during which a herniated L5-S1 disc was found, excised and treated with fusion from L4 to S1. The Office of Workers' Compensation Programs accepted appellant's claim for permanent aggravation of the spondylolisthesis with herniated disc. Appellant received temporary total disability compensation from June 25, 1990 through June 6, 1991. He returned to work on June 7, 1991. On March 4, 1992 appellant developed back pain while bending into a hamper. He received continuation of pay from March 9 through April 23, 1992. The Office then began payment of temporary total disability compensation for periods in which appellant did not work. On March 27, 1997 appellant underwent surgery for spondylolisthesis and failed fusion at L5-S1. Dr. Charles Buehler, a Board-certified orthopedic surgeon, performed foraminotomies bilaterally at L4-5 and L5-S1, laminectomy at L4 and instrumental pedicle screw fixation from L4 to the sacrum. Appellant returned to work, four hours a day, on January 20, 1998 to a light-duty position offered by the employing establishment. He eventually increased his working time to eight hours a day.

On January 11, 2001 appellant filed a claim for recurrence of disability. He indicated that he bent over at home on December 31, 2000 to pick up some items from the floor. Appellant's supervisor indicated that appellant called on January 2, 2001 to report the incident and indicate that he was unable to work. He returned to work, four hours a day, on January 23, 2001 and eight hours a day on January 29, 2001.

In a February 26, 2001 letter, the Office accepted appellant's claim for aggravation of disc degeneration and lumbar disc displacement. In a March 12, 2001 letter, the Office indicated

that, while appellant was seeking compensation for the period January 1 through 26, 2001, he did not have sufficient medical documentation to show that he was disabled for the period January 1 through 9, 2001. The Office requested that appellant submit sufficient medical evidence in support of his claim. In an April 20, 2001 decision, the Office denied appellant's claim for compensation for the period January 1 through 9, 2001. Appellant requested reconsideration. In a May 23, 2001 decision, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted in support of the request was immaterial and therefore insufficient to warrant review of the prior decision.

The Board finds that appellant has not met his burden of proof that he sustained an employment-related recurrence of disability due to his employment injuries.

Appellant has the burden of establishing by reliable, probative and substantial evidence that the recurrence of a disabling condition for which he seeks compensation was causally related to his employment injury. As part of such burden of proof, rationalized medical evidence showing causal relationship must be submitted.[1]

In a December 31, 2000 note, a physician with an illegible signature, placed appellant off work until January 4, 2001 due to injury. In a January 2, 2001 report, dictated and initiated by Dan Duncan, a physician's assistant, and carrying the typed signature of Dr. Buehler, it was stated that appellant was bending over at home to pick up some things when he felt a pop in his back near his surgical incision. The report indicated that appellant had immediate pain and spasm. The report noted that appellant had significant palpable spasms in the lumbar spine but had full reflexes and full motor strength. The diagnosis was lumbosacral strain/sprain. The report contained a comment stating that the condition was likely an exacerbation of appellant's previous injury to his low back.

In a January 9, 2001 report, Dr. Buehler stated that appellant bent over at home on December 31, 2000 when he injured his back and had pain since that time. He diagnosed lumbosacral strain and sprain. In an accompanying form report with Dr. Buehler's name as signed by a nurse, it was indicated that appellant was unable to work as of January 10, 2001. In a January 19, 2001 form report, again with Dr. Buehler's name as signed by a nurse, it was stated that appellant could return to limited-duty work on January 23, 2001.

In a March 2, 2001 form report, Dr. Buehler stated that appellant was first examined on January 2, 2001 and first treated on January 9, 2001. He indicated that the period of total disability was January 10 to 18, 2001. In a March 20, 2001 form report, Dr. Buehler stated that appellant was totally disabled from January 2 to 19, 2001 and was partially disabled from January 19 to January 29, 2001. Dr. Buehler did not make any mark on the form where it asked whether the diagnosed condition was caused or aggravated by employment activity.

The Office discounted the January 2, 2001 report and the January 9, 2001 form report because they were initialed by a physician's assistant or by a nurse. The Office concluded that the reports, therefore, did not constitute medical evidence because they were not signed by a

[1] *Dominic M. DeScala*, 37 ECAB 369 (1986).

physician. The Board has held that the reports of a physician's assistant[2] or a nurse[3] cannot be considered medical evidence because physician's assistants and nurses are not physicians as defined by the Federal Employees' Compensation Act.[4] A report of a physician's assistant that was countersigned by a physician would be considered medical evidence.[5] However, there is no evidence of record to establish that the reports initialed by the physician's assistant or the nurse were countersigned by Dr. Buehler or expressed his findings and opinion. These reports therefore cannot be considered medical evidence.

In the March 2, 2001 form report, Dr. Buehler stated that appellant was totally disabled from January 10 to 18, 2001. In the March 20, 2001 form report, he stated that appellant was totally disabled from January 2 to 19, 2001. However, Dr. Buehler did not indicate in either report that appellant's disability was causally related to his employment injury. The only report of record addressing the cause of appellant's disability in January 2001 was the January 4, 2001 report which, as noted above, cannot be considered medical evidence. Appellant has not submitted any competent medical evidence which definitively stated that his disability from January 1 to 9, 2001 was causally related to his employment injuries.

The decisions of the Office of Workers' Compensation Programs dated May 23 and April 20, 2001 are hereby affirmed.

Dated, Washington, DC
July 1, 2002

Alec J. Koromilas
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[2] *Lyle E. Dayberry*, 49 ECAB 369 (1998).

[3] *Vicki L. Hannis*, 48 ECAB 538 (1997).

[4] 5 U.S.C. § 8101(2).

[5] *See Lyle E. Dayberry*, *supra* note 2.