

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRIAN TRIBBLE and U.S. POSTAL SERVICE, DULLES
PROCESSING & DISTRIBUTION CENTER, Dulles, VA

*Docket No. 02-1080; Submitted on the Record;
Issued September 17, 2002*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant met his burden of proof in establishing that his lumbar condition is causally related to his June 20, 1996 employment injury, thereby entitling him to medical benefits for treatment of his lumbar condition; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing before an Office hearing representative.

On June 20, 1996 appellant, then a 39-year-old mailhandler, was taking mail from a bulk mail carrier when the carrier collapsed, striking appellant in the head. He returned to work on limited duty on July 27, 1996 and worked intermittently until October 1, 1996 when he stopped working and filed a claim for recurrence of disability. Appellant received continuation of pay for the periods he did not work from June 25 through October 16, 1996.

In a June 25, 1996 report, Dr. James R. Howe, a Board-certified neurosurgeon, described appellant's employment injury and stated that appellant complained of an aching sensation in the neck, both shoulders, down the front of his chest and into his low back. In a September 4, 1996 report, Dr. Howe noted that, in the employment injury, appellant was struck on the vertex with his head being forcibly jammed downward. He indicated that, as a result of the employment injury, appellant sustained an exacerbation of his cervical spondylosis at C4-5 resulting in radicular pain. Dr. Howe also noted that an electromyogram (EMG) showed a carpal tunnel syndrome which was not directly related to the employment injury. He commented that, because of radicular pain, appellant had a partially frozen right shoulder. Dr. Howe stated that appellant continued to be unable to work at full, unrestricted activity. In an October 7, 1996 report, he indicated that appellant had giveaway weakness of the left arm and hypalgesia of the left hand. Dr. Howe instructed appellant to stop working.

On April 30, 1997 appellant underwent surgery for cervical spondylosis with radiculopathy. Dr. Howe performed an anterior cervical discectomy at C4-5. The Office accepted appellant's claim for cervical strain, herniated C4-5 nucleus pulposus, and adhesive

capsulitis of the right shoulder.¹ The Office began payment of temporary total disability compensation effective October 17, 1996.

In a July 21, 1999 report, a physical therapist reported that appellant was complaining of low back pain. He related that appellant indicated he had symptoms of back pain since the employment injury but his complaints had not been addressed. Appellant stated that he had leg pain for approximately 18 months. The therapist noted appellant had a decreased lumbar lordosis.

In a November 12, 1999 letter, the Office noted that appellant had requested treatment for a lumbar problem. The Office noted that appellant's claims had been accepted for cervical strain, right carpal tunnel syndrome, herniated cervical disc, anterior cervical discectomy at C4-5 and adhesive capsulitis of the right shoulder. The Office stated that it had not accepted that appellant had sustained a lumbar condition as a result of an employment injury. Therefore, it would not authorize medical treatment for a lumbar problem. The Office informed appellant of the need to submit probative medical evidence to establish that his lumbar condition was causally related to any of his employment injuries.

In a December 11, 1999 letter, appellant stated that he had experienced back pain after the June 20, 1996 employment injury but his physician had concentrated on treating his cervical condition. He indicated that he had undergone a medical examination and would submit additional medical evidence in the near future.

In a February 7, 2000 decision, the Office denied appellant's claim on the grounds that the medical evidence of record did not establish that appellant's lumbar condition was causally related to his employment injuries.

Appellant subsequently submitted a December 9, 1999 report from Dr. Charles R. Ubelhart, an orthopedic surgeon, who reviewed appellant's medical records and commented that Dr. Howe had found that appellant had pain from the cervical region to the lumbar region. The cervical pain overshadowed appellant's low back condition because of the herniated cervical disc and radicular arm pain. He stated that appellant's first mention of a back condition, therefore, was in Dr. Howe's June 25, 1996 report and not the July 21, 1999 report of a physical therapist. He indicated that the June 20, 1996 employment injury compressed appellant's spine, herniating the cervical disc and transmitted the forces through the entire spine, overloading the lumbar region. The back condition became more evident over time. Dr. Ubelhart indicated that physical therapists had reported on appellant's back complaints since October 1997. He pointed out that appellant had never experienced any lumbar problems prior to the June 20, 1996 employment injury. He stated that a magnetic resonance imaging scan showed degenerative changes at L5-S1 with a small amount of central prolapse of disc material. At the L4-5 disc appellant had some asymmetry and bulging of the disc material laterally. He concluded that the June 20, 1996 employment injury caused an axial compression resulting in a sprain of the lumbar disc spaces.

¹ Appellant's had a previous claim, arising from an August 4, 1992 forklift accident, accepted for a cervical strain. The Office subsequently accepted appellant's claim for carpal tunnel syndrome of the right arm, for which he underwent surgery.

Dr. Ubelhart stated that the mild injury seen in the area of the lumbar discs caused appellant's lumbar radicular symptoms in the right leg.

In a May 1, 2000 merit decision, the Office found that Dr. Ubelhart's report was insufficient to warrant modification of its prior decision.

In a May 30, 2000 letter, appellant requested a hearing before an Office hearing representative, which was conducted on October 30, 2000. In a February 2, 2001 decision, the Office hearing representative stated that there was a lack of contemporaneous medical evidence for treatment of appellant's lower back condition at the time of the June 20, 1996 employment injury. He found, however, that Dr. Ubelhart's report raised an uncontroverted inference of causal relationship between the employment injury and appellant's lumbar condition sufficient to require further development. He therefore set aside the Office's May 1, 2000 decision and remanded the case for referral of appellant, together with a statement of accepted facts and the case record, to an appropriate orthopedic surgeon.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Ernest Rubbo, a Board-certified orthopedic surgeon, for an examination and a second opinion on whether appellant's lower back condition was causally related to the June 20, 1996 employment injury. In a June 11, 2001 report, Dr. Rubbo noted that appellant related that he never had pain in his neck or lower back until the June 20, 1996 employment injury. He indicated that appellant continued to have intermittent complaints of myofascial type pain symptoms and had undergone surgery on his neck and his arm. Dr. Rubbo stated that his review of the medical records did not mention any injury or complaints of pain in the lower lumbar region or any radicular symptoms in the legs. He related that appellant complained of low back pain that radiated down his right side into his right calf and right leg, which had been ongoing for four to five years. Dr. Rubbo indicated that on examination appellant had a decreased range of motion of the neck with no paraspinal muscle spasm and no atrophy of the arms. He reported that appellant complained of parathesias in the arms that did not fit any type of particular dermatomal pattern. Dr. Rubbo indicated that examination of the lower back showed motion with minimal pain, no atrophy of the legs and a negative straight leg raising test in both legs. He noted that appellant had some mild discomfort with flexion past 60 degrees to both his hips and his lower back but no radicular symptoms in the legs. Dr. Rubbo indicated that a recent magnetic resonance imaging (MRI) scan showed no evidence of further disc protrusions or herniations. Dr. Rubbo concluded that appellant sustained a cervical strain and disc herniation at C4-5 which resulted in right arm radiculopathy. He stated that appellant sustained a lumbar strain at the time of the June 20, 1996 employment injury. Dr. Rubbo indicated that appellant did not describe any radicular symptoms severe ongoing back complaints at that time. He commented that most often a lumbar strain should resolve in approximately three months, given this natural history. Dr. Rubbo concluded that appellant's lumbar condition was not the result of his work-related injury and appeared more related to a strain. He stated that appellant's ongoing lower back pain might be more related to a degenerative condition in the lower back but was not related to an employment injury. Dr. Rubbo indicated that appellant's work-related injury was more related to a strain by his mechanism of injury. He stated that, if appellant had continued to have ongoing complaints, he would have been vocalizing the complaints to doctors who would have documented them.

In a July 10, 2001 decision, the Office rejected appellant's claim on the grounds that the evidence of record failed to support that a low back condition was caused by the June 20, 1996 employment injury. It therefore denied coverage for treatment of the L5-S1 bulging disc.

In an October 18, 2001 letter, appellant requested a hearing before an Office hearing representative. In a December 14, 2001 decision, the Office denied appellant's request for a hearing on the grounds that he did not make his request within 30 days of the Office's July 10, 2001 decision. The Office further considered appellant's request under its own motion and denied appellant's request for a hearing on the grounds that his claim could be equally well addressed by requesting reconsideration and submitting new evidence which established that the treatment of his lumbar condition was causally related to his employment injury.

The Board finds that the case is not in posture for decision due to a conflict in the medical evidence.

Section 8103 of the Federal Employees' Compensation Act states:

"The United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduce the degree or period of disability, or aid in lessening the amount of monthly compensation."²

In interpreting section 8103, the Board has long recognized that the Office, acting as the delegated representative of the Secretary of Labor, had broad discretion in approving services under the Act.³ The Office has the general objective of ensuring that an employee recovers from his injury to fullest extent possible in the shortest period of time. The Office therefore has broad administrative discretion in choosing means to achieve this objective. It must first be established, however, that the injury for which treatment is sought occurred in the performance of duty.

In his June 25, 1996 report, Dr. Howe noted that appellant had complaints extending down to his lower back as a result of the employment injury. Dr. Ubelhart noted that medical notes extending back to 1997 reported appellant's complaints of back pain. He concluded that the June 20, 1996 employment injury caused a compression of appellant's spine which caused a lumbar sprain. Dr. Ubelhart stated that the mild injury seen in appellant's lumbar region caused the radicular pain in his right leg. Dr. Rubbo stated that the employment injury caused a lumbar strain which would have resolved within three months. He stated that appellant's lumbar pain might be related to degenerative lumbar disc disease that was unrelated to the employment injury. Dr. Rubbo, however, did not provide any explanation for his conclusion that the degenerative conditions of the lumbar region were not related to the employment injury. He also stated that the medical evidence he reviewed did not show any complaints of back pain after the employment injury for an extended period. Dr. Ubelhart, on the other hand, stated that the

² 5 U.S.C. § 8103(a).

³ *James R. Bell*, 49 ECAB 642 (1998).

severity of appellant's cervical condition reduced the attention given to his lumbar complaints. He pointed out that Dr. Howe's June 25, 1996 and other reports dating back to 1997 contained descriptions of back pain. Dr. Rubbo's report, therefore, has reduced probative value. The reports of Drs. Ubelhart and Rubbo are virtually equal in weight and reach different medical conclusions on the type of lumbar injury that appellant sustained on June 20, 1996. The case must therefore be remanded.

Section 8123(a) states 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." To resolve this conflict, the Office should have referred the case record and a statement of accepted facts to an appropriate medical specialist for an impartial medical evaluation and opinion pursuant to 5 U.S.C. § 8123(a).

On remand, the Office should refer appellant, together with a statement of accepted facts and the case record, to an appropriate impartial medical specialist for an examination. The specialist should give a diagnosis of appellant's lumbar condition and provide his reasoned opinion on whether appellant's current lumbar condition, including the degenerative changes seen on the MRI scan, is causally related to the June 20, 1996 employment injury.⁴

The decisions of the Office of Workers' Compensation Programs dated December 14 and July 10, 2001 are hereby set aside and the case remanded for further action as set forth in this decision.

Dated, Washington, DC
September 17, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

⁴ In view of the Board's decision on this issue, it is unnecessary to address the issue of whether the Office properly denied appellant's request for a hearing.