

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

R.C., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Baton Rouge, LA, Employer**

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**Docket No. 06-515
Issued: January 12, 2007**

Appearances:
Appellant, pro se
Jim Gordon, Esq., for the Director

Oral Argument December 13, 2006

DECISION AND ORDER

Before:

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

JURISDICTION

On January 3, 2006 appellant filed a timely appeal of a decision of the Office of Workers' Compensation Programs dated November 10, 2005 which denied appellant's request for disability after February 5, 1991. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this decision.

ISSUE

The issue is whether appellant met his burden of proof to establish that he had disability for work after February 5, 1991, due to his January 17, 1988 employment injury.

FACTUAL HISTORY

This is the fifth appeal in the present case. The Board issued a decision on November 19, 1992 in which it affirmed the June 18, 1991 and April 27, 1992 decisions of the Office. The Office met its burden of proof to terminate appellant's compensation effective February 5, 1991.¹ The Board found that the weight of the medical evidence rested with the opinion of

¹ Docket No. 92-1352 (issued November 19, 1992).

Dr. Gordon P. Nutik, a Board-certified orthopedic surgeon, who served as an impartial medical specialist. Dr. Nutik determined that appellant had no disability after February 5, 1991 due to his January 17, 1988 employment injury.²

On June 2, 1997 the Board issued a decision in which it found that appellant had not met his burden of proof to establish that he had disability after February 5, 1991 due to his January 17, 1988 employment injury.³ The Board noted that, because the Office had properly terminated appellant's compensation effective February 5, 1991, the burden of proof shifted to appellant to show that he was disabled after that date. The Board reviewed the additional medical evidence submitted by appellant and determined that it did not contain sufficient probative value to show that he had employment-related disability after February 5, 1991.

In the third appeal,⁴ the Board issued a decision on July 29, 2002. It set aside the July 20, 2000 decision of the Office on the grounds that the Office improperly denied appellant's request for reconsideration of his claim. The Board found that appellant submitted a March 16, 1998 report of Dr. Stephen J. Flood, an attending Board-certified orthopedic surgeon, which constituted new and relevant medical evidence and required reopening of his claim for further merit review. The Board remanded the case to the Office for proper review of appellant's claim on the merits to be followed by an appropriate decision.

In the fourth appeal,⁵ the Board found that appellant had not met his burden of proof to establish that he had disability on or after February 5, 1991 due to his January 17, 1988 employment injury. The Board found that the March 16, 1988 report from Dr. Flood and an August 16, 2000 report from Dr. Jack F. Loupe, a Board-certified orthopedic surgeon, did not provide adequate medical rationale in support of their conclusions on causal relationship. The facts and the circumstances of the cases are set forth in the Board's prior decisions and are incorporated herein by reference.

In a letter dated September 7, 2004, appellant filed a petition for reconsideration. In an April 4, 2005 order, the Board dismissed appellant's petition as untimely.

By letter dated July 19, 2005, appellant requested reconsideration before the Office and submitted additional evidence.

In a January 4, 2005 report, Dr. Loupe noted appellant's history of injury and treatment. Appellant had returned to work in late 1989, but stopped working in 1990 due to increased back pain. He noted that a June 10, 1991 discogram performed by Dr. L.W. Glorioso, a Board-certified diagnostic radiologist, was normal at the L4-5 disc but was "structurally abnormal with fissuring and bulging of the disc." Dr. Loupe indicated that these findings were virtually

² Dr. Nutik also noted that appellant had indicated that, on November 27, 1990, appellant was rear-ended in a nonwork-related incident.

³ Docket No. 94-2110 (issued June 2, 1997).

⁴ Docket No. 01-1157 (issued July 29, 2002).

⁵ Docket No. 03-698 (issued August 3, 2004).

identical to those of a discography performed two years before and advised that the L5-S1 disc was the cause of appellant's pain. He stated that the findings on examination were related to "traumatic annular tears and also with degenerative fissuring. It is impossible for me to distinguish between the two. If this was a degenerative fissure I would have to say that it was not symptomatic prior to the accident, then according to the patient remained symptomatic after the accident." Dr. Loupe opined that appellant was symptomatic and continued to show mechanical findings referable to his lower back."

In a January 19, 2005 addendum, Dr. Loupe noted that in 1994 Dr. Nutik advised that appellant could return to work as a mail carrier with some restrictions. He explained that "[i]t was and is my opinion that he was not able to do the work of a mail carrier because of the condition of his lower back." Dr. Loupe stated that appellant was not able to do the work of a mail carrier because of the condition of his lower back. He explained that, even with the restrictions implemented in 1994, appellant was not able to perform the duties of his mail carrier position.

In a March 7, 2005 report, Dr. James Butler, a Board-certified orthopedic surgeon, noted that appellant was seen for complaints of back pain radiating to his neck and buttocks area. He advised that appellant came in to discuss his injuries as related to his motor vehicle accident of January 17, 1988. Dr. Butler noted that he had treated appellant since that time and opined that the symptoms had "never completely resolved and are not likely to resolve." He opined that appellant's continued low back pain was "proximally caused and [causally] related to his motor vehicle accident of January 17, 1988, and has never resolved and has been supported by objective diagnostic tests previously performed."

In a June 10, 2005 report, Dr. Stephen J. Flood, a Board-certified orthopedic surgeon, noted appellant's history of injury and treatment. He explained that appellant related that he did not have back pain prior to the motor vehicle accident and continued to have pain since the accident. Dr. Flood opined that appellant's continuing disability was "medically probably related to the rear-end motor vehicle accident."

In a June 20, 2005 report, Dr. Loupe explained that the mechanism of injury to appellant's lumbar spine was caused by the employment-related accident of January 17, 1988. He stated:

"There are always severe displacement forces applied to vehicular occupants involved in motor vehicle collisions. These forces are the result of the momentum of the moving vehicles. Typically when a person sustains an injury to a disc in his lower back in a motor vehicle accident it is the result of severe flexion, extension, rotational and lateral flexion forces stressing the structures beyond the strength of their integrity. In [appellant's] case, more probably than not flexion, extension and rotary forces caused a tear in the L5-S1 disc. Such forces are violent ones and can injure even a normal lumbar disc and much more easily injure a lumbar disc with degenerative change within it."

Dr. Loupe opined that appellant's lower back pain was arising from the abnormal L5-S1 disc and that "this disc was more probably than not injured in the motor vehicle accident of January 17, 1988."

In a July 8, 2005 report, Dr. Butler noted that appellant had continued complaints of low back pain which radiated to both legs. He noted that appellant had a history of injury to his lower back on January 17, 1988 and that "[t]raumatic forces on this low back area, more likely than not, caused him to have this injury to the lower back at the L5-S1 dis[c] space level." Dr. Butler further advised that appellant "more likely than not had some degenerative disc disease prior to the accident in question, but the accident in question caused further traumatic injury to a susceptible, structurally weak lumbar disc at the L5-S1 level." Dr. Butler opined that "further structural injury to the L5-S1 disc" was caused by the January 17, 1988 motor vehicle accident.

By decision dated November 10, 2005, the Office denied modification of the January 10, 2003 decision.

LEGAL PRECEDENT

After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation shifts to appellant. 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.⁶

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. 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.⁷

ANALYSIS

The Board has previously determined that the Office met its burden of proof to terminate appellant's compensation, effective February 5, 1991, on the grounds that he had no disability due to his January 17, 1988 employment injury, accepted for cervical and lumbar strains and temporary aggravation of degenerative disc disease of the lumbar spine. The Board found that

⁶ *Talmadge Miller*, 47 ECAB 673, 679 (1996); *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

⁷ *Victor J. Woodhams*, 41 ECAB 345, 351-52 (1989).

the weight of the medical evidence rested with the February 5 and May 2, 1991 reports of Dr. Nutik, a Board-certified orthopedic surgeon, who served as an impartial medical specialist.⁸

Following the Board's August 3, 2004 decision, appellant submitted several medical reports from Dr. Loupe. In his January 4, 2005 report, Dr. Loupe noted that appellant had actually returned to work in late 1989, but had stopped working in 1990 due to increased back pain. While he examined a June 10, 1991 discogram, which was normal, he indicated that the findings were identical to those of a discography performed two years prior. Dr. Loupe stated that the L5-S1 disc was the cause of appellant's pain and opined that his findings were related to "traumatic annular tears and also with degenerative fissuring." However, he indicated that it was impossible for him to distinguish between the two. Dr. Loupe advised that, if appellant had a degenerative fissure, it was not symptomatic prior to the accident; however, it became symptomatic after the accident. He opined that appellant was symptomatic and continued to show mechanical findings referable to his lower back. The Board has held that an opinion that a condition is causally related to an employment injury because the employee was asymptomatic before the injury but symptomatic after it is insufficient, without supporting rationale, to establish causal relationship.⁹

In a January 19, 2005 addendum, Dr. Loupe reiterated that appellant was not able to perform the duties of a mail carrier because of the condition of his lower back despite the restrictions implemented in 1994. However, he did not address why appellant was unable to work as of 1991.¹⁰ On June 20, 2005 Dr. Loupe opined that appellant's lumbar spine condition was caused by the employment-related accident of January 17, 1988 and discussed the "severe displacement forces applied to vehicular occupants involved in motor vehicle collisions." He opined that "these forces are the result of the momentum of the moving vehicles" and explained that injuries to discs in the low back were the result of "severe flexion, extension, rotational and lateral flexion forces stressing the structures beyond the strength of their integrity." Dr. Loupe opined that the January 17, 1988 employment-related accident was the cause of appellant's lower back pain and that "this disc was more probably than not injured in the motor vehicle accident of January 17, 1988." However, Dr. Loupe did not address the nonwork-related automobile accident which appellant alleged occurred in November 1990, nor did he seem aware that appellant had a second accident in any of the aforementioned reports. While he attempted to explain the mechanism of injury in his latest report, it does not contain a complete history of injury, and therefore, his conclusion is not properly premised. It is well established that medical

⁸ 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." 5 U.S.C. § 8123(a). In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight. *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

⁹ *John F. Glynn*, 53 ECAB 562 (2002).

¹⁰ See *id.*; see also *Linda I. Sprague*, 48 ECAB 386 (1997) (medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship).

reports must be based on a complete and accurate factual and medical background and medical opinions based on an incomplete or inaccurate history are of diminished probative value.¹¹

In a March 7, 2005 report, Dr. Butler opined that appellant's symptoms had "never completely resolved and are not likely to resolve." He opined that appellant's continued low back pain was "proximally caused and [causally] related to his motor vehicle accident of January 17, 1988, and has never resolved and has been supported by objective diagnostic tests previously performed." However, Dr. Butler did not appear to be aware of the nonwork-related automobile accident in 1990, in which appellant alleged that he was rear-ended. Medical conclusions based on an inaccurate or incomplete factual history are of diminished probative value.¹² In a July 8, 2005 report, Dr. Butler opined that "[t]raumatic forces on this low back area, more likely than not, caused him to have this injury to the lower back at the L5-S1 dis[c] space level." He also opined that despite having some degenerative disc disease prior to the accident "further structural injury to the L5-S1 disc" was caused by the January 17, 1988 motor vehicle accident. However, again, his report did not mention or indicate that he was aware of the second accident, which may or may not have been a contributing factor to appellant's condition.¹³

In a June 10, 2005 report, Dr. Flood noted that appellant related that he did not have back pain prior to the accident and continued to have pain since the accident and opined that appellant's continuing disability was "medically probably related to the rear-end motor vehicle accident." However, as noted above, an opinion that a condition is causally related to an employment injury because the employee was asymptomatic before the injury but symptomatic after it is insufficient, without supporting rationale, to establish causal relationship.¹⁴ Furthermore, without a discussion of the second motor vehicle accident, his report is incomplete.¹⁵

Although appellant alleged that his disability commencing after February 5, 1991 was due to his accepted employment injury, the medical evidence of record does not establish that his claimed disability during the time frame was related to his accepted employment injuries.¹⁶ The Board finds that appellant has failed to submit rationalized medical evidence establishing that his disability from February 5, 1991 was causally related to his accepted employment injury, and thus, he has not met his burden of proof.

¹¹ *James R. Taylor*, 56 ECAB ____ (Docket No. 05-135, issued May 13, 2005).

¹² *M.W.*, 57 ECAB ____ (Docket No. 06-749, issued August 15, 2006).

¹³ *Id.*

¹⁴ *See supra* note 9.

¹⁵ *See supra* note 12.

¹⁶ Appellant has also supported his position by noting that he was found disabled by the Social Security Administration. However, the Board has held that a finding of disability under another federal statute does not establish disability under the Act. *John E. Cannon*, 55 ECAB 585 (2004).

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he was disabled after February 5, 1991 due to his January 17, 1988 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the November 10, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 12, 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