

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of RALPH DITO and U.S. POSTAL SERVICE,  
POST OFFICE, Brooklyn, NY

*Docket No. 98-2502; Submitted on the Record;  
Issued December 11, 2000*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective April 27, 1997.

On March 22, 1979 appellant, then a 55-year-old chauffeur carrier, was taking stacks of mail off a truck when he felt a sharp pain in his lower back and was unable to straighten up for a few moments.<sup>1</sup> He stopped work on March 22, 1979 and came under the care of Dr. Ben Benatar, a Board-certified orthopedist, who diagnosed a lumbosacral strain and a possible herniated disc. The Office accepted the claim for a lumbosacral strain and low back syndrome. Appellant received continuation of pay from March 23 to April 30, 1979, when he returned to light duty. He later sustained a recurrence of disability on August 30, 1979 and was off until April 9, 1980, when he returned to limited duty on a part-time basis, working four hours per week. The record indicates that appellant was arrested for mail theft on July 16, 1980 and was suspended from his job. He has not worked since that date. Appellant has been on the periodic rolls receiving compensation for four hours of wage loss.

In conjunction with appellant's earlier claims, an x-ray conducted on March 11, 1974 was interpreted as showing minimal osteoarthritic changes.

Following the March 22, 1979 work injury, an x-ray of the lumbosacral spine and pelvis taken on March 27, 1979 revealed "sacralization of the fifth lumbar segment with narrowed L-5, S-1 and some pseudo reverse spondylolisthesis." It was noted on the x-ray report by the radiologist that the spondylolisthesis "may be due to disc disease at L4-5."

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<sup>1</sup> The Office accepted that appellant sustained two prior work-related lumbosacral strains. On February 25, 1974 appellant bent over to bag a collection of mail and could not straighten up. He was off work from February 25 until August 29, 1974 and then again from October 28, 1974 to October 17, 1975. On January 1, 1977 appellant kicked at a hard to open mailbox and felt a sharp pain in his back. He was off work from January 18 to January 31, 1977.

In an attending physician's report dated April 3, 1979, Dr. Benatar, diagnosed that appellant sustained a back sprain and a possible herniated disc at L5-S1 due to a work injury on March 22, 1979 that he described as appellant throwing sacks. He indicated that appellant could perform only light duty.

In a series of (Form CA-20) attending physician's reports dating from August 31 to December 18, 1979, Dr. Benatar stated that appellant injured his back lifting and throwing a sack of mail on March 22, 1979. He diagnosed lumbar disc syndrome with an increase of symptoms on August 30, 1979. Dr. Benatar recommended that appellant undergo a course of physical therapy. When appellant's symptoms did not subside, he had appellant for traction from February 2 to 8, 1980.

An x-ray of the lumbar spine taken on February 3, 1980 revealed narrowing of the L5-S1 interspace with normal lordic curve well maintained. It was noted that there were no abnormalities of the pars interarticularis or articulating facets.

In a May 12, 1981 report, Dr. Alice M. Murnane, a Board-certified orthopedic surgeon, performed an examination of appellant at the request of the Office. She diagnosed chronic low back syndrome related "by approximate cause to the accepted work injury" and a preexisting condition of early degenerative osteoarthritis. Dr. Murnane opined that appellant's degenerative back condition evidence since 1974 could have been aggravated by appellant's duties as a mail carrier and chauffeur that required him to lift heavy bags of mail. She concluded that appellant was mildly disabled as a result of the low back syndrome, indicated on examination of a October 22, 1979 x-ray that showed "narrowing of the L4-5 disc space with early Schmorl's nodes and early lipping of the upper borders of L4 and the lower border of L3 with sacralization of L5 and a chronic back syndrome." According to Dr. Murnane, appellant could perform sedentary work only and was to be considered partially disabled.

In an attending physician's report dated November 3, 1981, Dr. Benatar described appellant's nature of impairment as low back syndrome and also diagnosed a herniated disc. He requested authorization for an electromyogram and a computerized tomography scan. Dr. Benatar noted that there were "permanent effects" causally related to the March 22, 1979 work injury.

In a work evaluation form (OWCP-5) dated March 27, 1985, Dr. Benatar indicated that appellant could sit up to four hours per day and walk between 1 and 3 hours per day. He noted that appellant could not work an eight-hour shift and that his ability to work was "very limited -- no physical labor."

In an (OWCP-5) form completed on July 27, 1987, Dr. Benatar indicated that appellant could work four hours per day with no lifting over ten pounds.

In a September 11, 1987 report, Dr. Benatar stated that he had been treating appellant since April 1979 for his work-related injury of March 22, 1979. He described the injury as occurring when appellant lifted a heavy mailbag and threw it on a skid. Dr. Benatar noted that appellant experienced acute low back pain with radiculopathy and that he "has essentially developed a chronic low back syndrome since that time." He also stated that appellant had gone

on to develop a chronic sciatic syndrome, that appellant's x-rays showed a narrowed disc at L5-S1 and that appellant had a positive straight leg raising test in both lower extremities. Dr. Benatar concluded that appellant suffered a permanent disability as a result of the March 22, 1979 work injury and was not capable of lifting, carrying or moving mail sacks.

Appellant underwent an x-ray of the lumbosacral spine and pelvis on July 6, 1988, which revealed mild degenerative changes of the lumbar spine and hips, as well as asymmetric transitional vertebra and slight narrowing of the disc at L5-S1.

In a series of attending physician reports under letterhead of the State of New York Workers' Compensation Board beginning in July 1988, Dr. Dominic Fitzsimmons, a chiropractor, indicated that appellant suffered from a chronic lumbosacral subluxation with associated paraspinal muscle spasm and a decrease in the disc space at L5-S1. He prescribed a course of spinal manipulation.<sup>2</sup>

In a report dated July 12, 1989, Dr. Martin A. Lehman, a Board-certified orthopedic surgeon, noted that appellant was seen for recurrent pain in the neck and back that has been off and on since "an injury in 1979." He noted physical findings of restricted flexion of the lumbar spine at 55 degrees and restricted flexion of the cervical spine at 40 degrees. Dr. Lehman stated that x-rays demonstrated arthritic changes. He recommended that appellant undergo continuing chiropractic care and a magnetic resonance imaging (MRI) scan. Dr. Lehman diagnosed recurrent and chronic acute lumbar and cervical sprain.

Appellant had an MRI scan of the lumbar spine conducted on September 20, 1989, which revealed no discrete herniation but very mild bulging annulus fibroses at L3-4 and L4-5.

The employing establishment referred appellant for a fitness-for-duty examination with Dr. A.V. Carella, a Board-certified orthopedist. In his report of April 17, 1991, Dr. Carella noted physical findings that indicated that appellant had full range of motion in the cervical and lumbar spine. He opined that appellant's acute cervical and lumbosacral strains had resolved and that appellant was no longer totally disabled from work.

On February 18, 1993 the Office requested a medical report from Dr. Lehman addressing the nature and extent of appellant's work-related disability.

In a report dated May 16, 1994, Dr. Lehman noted physical findings including tenderness and spasm on the paravertebral muscles, restricted flexion of the lumbar and cervical spine and positive straight leg raising at 50 degrees. He stated that x-rays of both the lumbar and cervical spine showed arthritic changes, which an MRI scan of the lumbar spine revealed a mild bulging annulus fibroses at L3-4 and L4-5. Dr. Lehman diagnosed acute and chronic recurrent pain of the lumbosacral and cervical spine with radiculopathy to both lower extremities. He further stated that based on his history and clinical course, appellant had a significant and permanent disability causally related to the March 22, 1979 work injury.

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<sup>2</sup> Although the Office paid appellant's medical expenses for chiropractic treatment through May 15, 1989, it did not accept that appellant sustained a subluxation causally related to the March 22, 1979 work injury.

In a series of monthly reports dating from June 27, 1994 to December 30, 1996, Dr. Lehman noted that appellant continued to have acute and recurrent pain in his neck and back. He repeated in each report that appellant claimed he could not function without chiropractic treatment and that he was totally disabled and unable to work.<sup>3</sup>

By letter dated February 19, 1997, the Office referred appellant for a second opinion evaluation with Dr. Anthony Puglisi, a Board-certified orthopedic surgeon, scheduled for March 3, 1997.

In a March 4, 1997 report, Dr. Puglisi discussed appellant's history of back injuries related to lifting mail sacks of up to 65 pounds. He reported that appellant saw an orthopedic surgeon every six weeks but was unable to explain why he did that and what type of treatment he received. Dr. Puglisi noted that appellant was not under any medication for back discomfort, although appellant complained of low back pain that was described as a "seven out of ten." He recorded essentially normal physical findings and stated that "this 73-year-old man was quite chipper getting up and down from the examining table with ease." Dr. Puglisi further stated:

"I must admit that [appellant] presents to me as someone with the longest history of disability that I have yet to encounter. I have not seen anything in my physical examination to suggest that [he] at this point in time has not improved from the previous lumbosacral strain and although he still has subjective complaints, there are no clinical objective findings on examination to suggest a disc herniation, which would be the worst of his possible etiologies for such a long period of back complaints. As far as the other factors concerned, his osteoarthritic changes and transitional vertebra, certainly these things can cause [appellant] discomfort and would precluded him from work, which involves very heavy lifting, but I certainly feel that he is capable of performing sedentary type work, although quite frankly [appellant] is little interested at this time in any employment, mostly due to his age.

In an OWCP-5c form attached to the report, Dr. Puglisi indicated that appellant could perform sedentary work, with a 20-pound lifting restriction and bending no more than one hour per day.

The Office issued a notice of proposed termination of compensation on March 12, 1997, finding that the weight of the medical evidence of record established that appellant had no continuing disability as a result of appellant's March 22, 1979 work injury. He was given 30 days to submit additional evidence or argument relative to the issue of termination of his compensation.

In a decision dated April 15 1997, the Office terminated appellant's compensation effective April 27, 1997.

On March 20, 1998 appellant, by counsel, requested reconsideration.

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<sup>3</sup> These reports have been almost identical except for dates recorded.

In support of his reconsideration request, appellant submitted a June 2, 1997 report by Dr. Lehman. He noted that appellant had been most recently examined for recurrent acute and chronic sprain of the lumbar and cervical spine in "March and April 1997." Dr. Lehman stated: "[a]t that time, physical examination showed pain with restricted motion with spasm in the lumbosacral spine at 35 degrees with difficulty in bending, lifting and squatting. X-rays taken had shown arthritic changes, especially in the lower lumbar spine with degenerative disc disease." He concluded that in view of "the continued clinical course, the nature of the injury, which is now over 18 years in duration, my opinion remains that these disabilities will be permanent in nature. Dr. Lehman also enclosed a copy of his May 16, 1994 report.

In a decision dated June 26, 1998, the Office denied modification following a merit review.

The Board finds that the Office failed to meet its burden of proof in terminating appellant's compensation benefits effective April 27, 1997.

Once the Office accepts a claim it has the burden of proof of justifying modification or termination of compensation. After it has been determined that an employee has disability casually related to his employment, the Office may not terminate compensation without establishing that the disability has ceased or is no longer related to the employment injury.<sup>4</sup> The Office's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>5</sup>

In the instant case, the Office accepted that appellant sustained a lumbosacral strain and low back syndrome as a result of a work-related lifting injury on March 22, 1979. Since appellant was approved for part-time light duty on April 9, 1980, he began receiving compensation for four hours of wage loss. The issue in this case is whether the Office properly terminated appellant's compensation for four hours of wage loss as well as his entitlement to medical benefits.

The Board finds that a conflict exists in medical opinion as to whether appellant has any continuing disability or residuals causally related to the March 22, 1979 work injury.

The Office had appellant examined on March 4, 1997 by an Office referral physician, Dr. Puglisi, who opined that appellant had no objective findings to support continuing disability. He opined that appellant's low back strain had resolved and that he was capable of returning to work for eight hours per day. According to Dr. Puglisi, appellant sustained only a mild aggravation of his preexisting degenerative back condition due to his accepted work injury and that condition was resolved as well. He concluded that any mild back discomfort that appellant continued to suffer from was either age related or due to arthritis.

In contrast, appellant has submitted reports from his treating physician, Dr. Lehman dated May 16, 1994 and June 2, 1997, indicating that appellant has a recurrent lumbar sprain causally

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<sup>4</sup> *Frank J. Mela, Jr.*, 41 ECAB 115 (1989); *Mary E. Jones*, 40 ECAB 1125 (1989).

<sup>5</sup> *Mary Lou Barragy*, 46 ECAB 781 (1995).

related to his work injury that has aggravated or accelerated a degenerative disc condition at L3-4 and L4-5. According to him, therefore, appellant continues to be disabled from all work as a result of his March 22, 1979 work injury.

Section 8123 of the Federal Employees' Compensation Act provides that 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.<sup>6</sup> Because a conflict exists in this case as to whether appellant has any continuing disability or residuals causally related to his March 22, 1979 work injury, the Board finds that the Office failed to carry its burden of proof in terminating appellant's compensation.

The decision of the Office of Workers' Compensation Programs dated June 26, 1998 is hereby reversed.

Dated, Washington, DC  
December 11, 2000

David S. Gerson  
Member

Willie T.C. Thomas  
Member

Michael E. Groom  
Alternate Member

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<sup>6</sup> 5 U.S.C. § 8123(a); *see Shirley L. Steib*, 46 ECAB 309(1994); *William C. Bush*, 40 ECAB 1064 (1989).