

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JEFFREY D. BARNETT and U.S. POSTAL SERVICE,
POST OFFICE, Danville, VA

*Docket No. 00-27; Oral Argument Held September 20, 2000;
Issued February 15, 2001*

Appearances: *Kendrix M. Easley, Esq.*, for appellant; *Sheldon G. Turley, Jr., Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's wage-loss compensation, effective September 12, 1995, on the basis that he no longer had any continuing disability as a result of his October 5, 1994 employment injury; and (2) whether appellant established that his claimed disability after September 11, 1995 was causally related to his October 5, 1994 employment injury.

The Office accepted that appellant, then a 23-year-old part-time flexible city carrier, sustained a mild left shoulder strain and a mid-back strain as a result of an October 5, 1994 employment incident when appellant slipped on some acorns and fell to the ground. He returned to work following his employment injury in a limited-duty capacity. Appellant resumed his regular duties on December 6, 1994. He, however, sustained recurrences of disability on February 17 and July 12, 1995. Following his most recent recurrence of disability, appellant returned to limited duty on September 12, 1995.¹ He received appropriate wage-loss compensation through September 11, 1995.

In a decision dated February 22, 1996, the Office terminated appellant's compensation effective September 12, 1995 on the basis that he no longer had any continuing disability as a result of his October 5, 1994 employment injury. The Office based its determination on the September 1995 reports of appellant's then-treating physicians, Drs. Alton F. Gross and

¹ Shortly after his return to duty, the employing establishment notified appellant of its intention to terminate his employment for alleged misconduct. Appellant was subsequently dismissed for cause on November 22, 1995. In a decision dated April 26, 1996, the Merit Systems Protection Board upheld the employing establishment's termination of appellant.

Jeffrey P. Crittenden, both of who concluded that appellant was able to resume his former duties.²

On March 19, 1996 appellant requested an oral hearing which, due to a series of postponements, was not held until November 19, 1998. Following his February 1996 termination of benefits, appellant underwent surgery to repair a herniated disc in his lower back. At the November 19, 1998 hearing, appellant submitted additional medical evidence, which included an October 29, 1997 operative report from Dr. Joel M. Singer, a Board-certified neurosurgeon, who performed a hemilaminotomy and discectomy at L5-S1. Appellant alleged that his herniated disc at L5-S1 was causally related to his October 5, 1994 employment injury. He further argued that his employment-related disability did not cease until after his October 1997 surgery.

In a February 8, 1999 decision, the Office hearing representative affirmed the Office's decision dated February 22, 1996. Additionally, the hearing representative found that appellant failed to establish a causal relationship between his accepted employment injury of October 5, 1994 and his herniated disc at L5-S1 and requisite surgery in October 1997.

On May 24, 1999 appellant requested reconsideration. In support of his request, he submitted a May 17, 1999 report from Dr. Singer who explained that when he initially examined appellant in February 1996 his neurologic examination was within normal limits and although appellant had no mechanical signs in his lumbar spine, he did have pain.³ When appellant returned to Dr. Singer's care approximately 20 months later, his prior intermittent back pain had become constant and appellant had also developed leg pain. Dr. Singer explained that appellant's severely degenerative disc at L5-S1 had gone on to herniate. He further stated, "there is a temporal relationship between [appellant's] original injury and complaints of pain and the leg pain he developed which subsequently brought him to the operating room."

In a merit decision dated August 12, 1999, the Office denied modification of the prior decision.

The Board finds that the Office met its burden of proof in terminating appellant's compensation.

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.⁴ Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation

² Dr. Crittenden, a Board-certified neurologist, issued a report dated September 27, 1995 and Dr. Gross, a Board-certified orthopedic surgeon, issued his report on September 19, 1995.

³ Dr. Singer first examined appellant on February 12, 1996. In addition to noting a normal physical and neurologic examination, Dr. Singer reported evidence of a central disc bulge at L5-S1. He stated "it would be hard pressed at this time for [the disc bulge] to be the cause of [appellant's] symptoms." Dr. Singer advised that appellant was not a surgical candidate at the time.

⁴ *Curtis Hall*, 45 ECAB 316 (1994).

without establishing either that the disability has ceased or that it is no longer related to the employment.⁵

As previously noted, the Office's February 22, 1996 decision to terminate compensation was based on the September 1995 reports of Drs. Gross and Crittenden, appellant's treating physicians. At the oral argument, appellant contended that both reports were unreliable because the physicians based their respective opinions exclusively upon reviewing an August 1995 surveillance videotape that misrepresented appellant's physical capabilities.⁶ Additionally, appellant argued that the physicians' conclusions were the product of highly suggestive and misleading questions posed by the employing establishment's postal inspector. As such, appellant contends that the September 1995 opinions of Drs. Gross and Crittenden lack probative value and, therefore, the Office failed to meet its burden to justify termination of benefits.⁷

In this case, both of appellant's then-treating physicians reviewed the videotape and concluded that under the circumstances appellant was able to resume his prior employment duties without restriction. Although appellant ostensibly questioned Dr. Crittenden's judgement, he nonetheless continued to seek treatment from Dr. Crittenden in the months following the issuance of his September 27, 1995 report.⁸ There is no indication from the record that either Dr. Gross or Dr. Crittenden subsequently expressed any reservations about their respective opinions regarding appellant's ability to resume work. Furthermore, while it would seem most prudent for appellant to have raised his concerns about the accuracy of the August 1995 videotape directly with either Dr. Gross or Dr. Crittenden, there is no indication from the record that appellant pursued such a course of action. This opportunity clearly presented itself when appellant sought further treatment from Dr. Crittenden in November and December 1995. Thus, while appellant surmised that his treating physicians would have offered a different opinion had the August 1995 surveillance videotape not improperly influenced them, appellant apparently made no effort to clarify the situation and he has failed to submit any evidence in support of his contention. Consequently, appellant's unsubstantiated allegation that the August 1995 videotape

⁵ *Jason C. Armstrong*, 40 ECAB 907 (1989).

⁶ Appellant testified that the employing establishment surreptitiously taped him on three occasions during the period August 7 through August 29, 1995. The video purportedly depicted appellant performing various physical tasks such as lifting and carrying boxes, carrying an infant's crib mattress and sitting astride a motorcycle. These activities were ostensibly inconsistent with appellant's previously reported physical limitations. Armed with the surveillance video and a list of prepared questions, a postal inspector approached Drs. Crittenden and Gross to solicit their respective opinions regarding appellant's continued disability. Counsel for the Director, Office represented at the hearing that, while the surveillance video had initially been submitted to the Office, the tape had long since been returned to the employing establishment and thus, was not part of the record.

⁷ At the September 20, 2000 hearing, appellant offered additional evidence for the Board's consideration, including a copy of the August 1995 surveillance videotape. Inasmuch as this evidence was not part of the record at the time the Office issued its August 12, 1999 decision, the Board advised appellant that it could not consider any newly submitted evidence. 20 C.F.R. § 501.2(c).

⁸ It is not entirely clear from the record whether appellant continued to receive medical care from Dr. Gross after September 1995. However, Dr. Crittenden's office notes for November and December 1995 indicate that he kept Dr. Gross apprised of appellant's ongoing treatment.

improperly influenced Drs. Gross and Crittenden is insufficient to call into question the probative value of their September 1995 reports.

Appellant also challenged the Office's reliance upon the opinions of Drs. Gross and Crittenden on the basis that the questions posed by the postal inspector were highly suggestive and misleading. Additionally, appellant argued that the opinions of Drs. Gross and Crittenden are not rationalized inasmuch as they merely responded "yes" or "no" to the questions posed.

Having reviewed the questions posed to both Drs. Gross and Crittenden by the employing establishment's postal inspector, the Board disagrees with appellant's characterization of these questions as leading. While the questions are very fact specific, they do not appear to have been drafted in a manner to solicit a particular response. Furthermore, several questions specifically request a detailed explanation in support of the physicians' response. Additionally, while both physicians responded either "yes" or "no" to a number of questions posed, this does not, of itself, indicate that their respective opinions lack adequate rationale. To the contrary, Dr. Crittenden provided a narrative response to all but one of the eight questions posed to him and he clearly explained the basis for his conclusion with references to appellant's physical examination results as well as the results of objective studies administered. Accordingly, the Board finds that the Office met its burden of proof in terminating appellant's compensation.

The Board also finds that appellant failed to meet his burden of proof to establish that his claimed herniated disc at L5-S1 that required surgery in October 1997 was causally related to his October 5, 1994 employment injury.

A claimant seeking compensation under the Federal Employees' Compensation Act⁹ has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence, including that any specific condition or disability for work for which he claims compensation is casually related to the employment injury.¹⁰ Casual relationship is a medical question that can generally be resolved only by rationalized medical opinion evidence.¹¹ Where, as in the instant case, appellant claims that a condition not accepted or approved by the Office was due to his employment injury, he bears the burden of proof to establish that the condition is casually related to the employment injury.¹² The Board finds that appellant has not met that burden.

The record on appeal does not include a rationalized medical opinion attributing appellant's herniated disc at L5-S1 to his accepted employment injury of October 5, 1994. Although Dr. Singer expressed the opinion that there was a "temporal relationship" between appellant's original injury and his subsequent need for surgery in October 1997, he did not otherwise offer a reasoned explanation for his conclusion. Furthermore, while the Office

⁹ 5 U.S.C. §§ 8101-8193.

¹⁰ *Jacquelyn L. Oliver*, 48 ECAB 232, 235-36 (1996).

¹¹ *Robert G. Morris*, 48 ECAB 238 (1996).

¹² *Jacquelyn L. Oliver*, *supra* note 10.

accepted a mid-back strain as a result of appellant's October 5, 1994 employment injury, Dr. Singer operated on the lumbosacral region (L5-S1) of appellant's spine. Assuming arguendo that appellant's October 5, 1994 employment injury affected his lumbar spine, the record lacks any rationalized evidence explaining how appellant's accepted back strain either caused or contributed to his disc bulge at L5-S1 that eventually herniated some three years following his accepted employment injury. Accordingly, the Office properly denied appellant's claim for compensation.

The August 12, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
February 15, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member