U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

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In the Matter of JOHN M. GRASSO and U.S. POSTAL SERVICE,
POST OFFICE, Wakefield, MI

*Docket No. 99-858; Submitted on the Record;*
*Issued February 16, 2001*

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DECISION and ORDER

Before DAVID S. GERSON, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant has established that he sustained a recurrence of disability beginning September 10, 1997 causally related to his accepted herniated nucleus pulposus L4-5; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's recommended discogram as not medically warranted.

On March 12, 1991 appellant, then a 37-year-old letter carrier, filed a notice of occupational disease, alleging that, as a result of his federal employment duties, he sustained a herniated disc in his low back. The claim was accepted for herniated nucleus pulposus L4-5.

On November 8, 1991 the claimant began working limited duty for two hours per day. His duties included casing letters and flats. If needed, appellant would assist in sorting letter mail. The physical requirements of his limited-duty letter carrier position were sitting and standing for two hours per day, intermittent simple grasping for two hours per day and intermittent reaching above the shoulder for 30 minutes a day.

On September 29, 1997 appellant filed a notice of recurrence of disability. Appellant alleged that, since January 14, 1991, his back complaints have continued to worsen. Appellant indicated that his present condition was related to his original condition because it had been ongoing for six years and continued to get worse.

Submitted with the claim was a statement, dated September 25, 1997, wherein the employing establishment indicated that appellant was working two hours a day casing letters and flats and helping sort mail. The employing establishment noted that appellant was able to sit or stand as needed, and that appellant had not informed them of his back pain or that he was continuing to see a doctor for back pain.

In a report dated September 10, 1997, Dr. Paul Van Pernis, a Board-certified family practitioner, noted that appellant continued to have back pain which worsened at work. Dr. Van Pernis opined that appellant needed a magnetic resonance imaging (MRI) and stated, "If

I do not hear from you as to whether or not he can proceed with either an MRI or further surgery as per Dr. John E. Lonstein, I will simply have to put him on permanent disability." By letter dated September 30, 1997, the Office authorized the MRI scan.

By letter dated October 20, 1997, the Office informed appellant that it needed more information.

In response thereto, appellant submitted a statement dated November 3, 1997, wherein he stated that his back had been getting progressively worse over the last six years. He further noted that going to work for two hours and standing in mainly one spot causes extreme pain. Appellant noted that he had to walk bent over which was not comfortable. Appellant stated that occasionally he will sit on a stool, but it is only a temporary relief because then he gets sharp pains in his lower back and spine. Appellant further stated that, although his lifting restriction was 10 pounds, he could not lift anything one-half that weight without pain in his back. Appellant also noted that reaching above his shoulder causes him to have pain in his lower back. Finally, he noted that he had no pain free time anymore including at night when he cannot get a restful sleep.

Appellant further submitted an attending physician's report dated October 1, 1997, wherein Dr. Van Pernis opined that appellant was disabled until further evaluations and tests were completed. The Office provided Dr. Van Pernis with a duty status report and he completed this report with appellant's status as of the October 1, 1997 examination. The Office listed appellant's job as requiring appellant to stand or sit for 2 hours per day, bend for 10 to 15 minutes a day and reach above shoulder for ½ hour per day. Dr. Van Pernis opined that appellant could not perform these duties and that appellant was totally disabled.

In an October 31, 1997 medical report, he answered various questions propounded by the Office. Dr. Van Pernis noted that appellant was still complaining of decreased range of motion of the lumbosacral spine. He noted that he had positive straight leg raising from 15 to 20 degrees bilaterally, that he had pain as soon as he flexes the lumbosacral spine from the vertical position. Dr. Van Pernis noted that appellant still walked with a stooped posture. He diagnosed chronic low back pain. Dr. Van Pernis further opined:

> "I am not aware of a specific injury that occurred on January 14, 1991 and in fact the history that I have from [appellant] is that his pain began in the summer of 1990 and has persisted since that time. He certainly has significant disability at the present time as he has pain in doing the work he is doing. His back pain and the difficulty he has standing or sitting for prolonged periods of time is what contributes to his inability to perform his current job."

An MRI was performed on November 17, 1997, by Dr. William D. Witrak, a Board-certified radiologist. He noted low lumbar arthritic findings with no significant abnormality.

In a medical report dated December 9, 1997, Dr. Lonstein, a Board-certified orthopedic surgeon, stated that he had reviewed appellant's MRI scan and that it showed that the disc at the L4-5 level was different in that it was narrower and shows loss of normal signal that were on the MRI scan. Discograms would be the next logical step.

In a medical report dated December 31, 1997, Dr. Van Pernis stated that the MRI suggested narrowing of the L4-5 disc and indicated that the neurosurgeon suggested a discogram.

On March 11, 1998 the Office medical adviser reviewed appellant's records and suggested that the Office deny the requested discogram and then refer appellant to a Board-certified orthopedic surgeon, who specializes in spine surgery for evaluation and a second opinion.

By letter dated March 13, 1998, the Office informed appellant that the requested discogram was not authorized at this time and that the case was being referred for a second opinion evaluation.

On March 25, 1998 the Office requested a second opinion from Dr. Robert H.N. Fielden, a Board-certified orthopedic surgeon. In a medical report dated April 23, 1998, Dr. Fielden diagnosed appellant as suffering from chronic pain syndrome. He noted that all physicians agree that appellant has some softening and bulging of the L4-5 level disc, which has been described as herniated but which in fact is not herniated but only soft and bulging and degeneration. As it loses fluid content, the bulge decreased but so does the height of the disc. Dr. Fielden noted that this was not abnormal but a process of aging. He opined that "to be a true surgical candidate, there should be some local evidence of nerve root impingement unrelieved by conservative measures, symptomatic narrowing of the spinal or nerve root canal, or instability of the spine from either injury or degenerative facets and discs." Dr. Fielden noted that none of these findings have ever been noted. He concluded:

> "As Dr. Anderson said very strongly a few years ago, there is nothing physically wrong with [appellant]. I have no doubt that his back became sore with the work activity. I would think that every one of his colleagues would have days like that. The only difference is that [appellant] complained enough that he was considered disabled by himself and by his treating physicians. (the Squeaky wheel all over again.) He has not progressed to an inability to work and requires antidepressant medication. If he were amenable to it, he could be offered a course in counseling for pain management but only with the contract that he be prepared to return to work without restrictions despite muscular complaints. Otherwise absolutely no other treatment is indicated."

Due to the conflict of opinion between the second opinion physician, Dr. Fielden, and appellant's treating physicians, Drs. Van Pernis and Lonstein, the Office referred appellant to Dr. Jed Downs, who is Board-certified in preventive, occupational and internal medicine. In his June 26, 1998 report, Dr. Downs stated:

> "[Appellant] does not have a surgical problem with his back. Although there is some jump tenderness at L4[-]5 which could suggest some discogenic back pain, at this juncture I do not find evidence of any spinal instability, in part because paraspinal quadratus lumborum and hip flexor spasm prevents there from being any instability. It would be impossible to show instability on flexion/extension views of his spine given his poor range of motion. I am of the opinion that

[appellant's] been grossly undermanaged from the standpoint of treating mechanical back pain."

Dr. Downs opined that the preponderance of the evidence does not really support the diagnosis of herniated nucleus pulposus, but rather, supports disc bulge or degenerative changes of the disc. He further opined that appellant developed mechanical back pain, the original cause in history. Dr. Downs noted that this commonly occurred with combinations of flexion or extension in conjunction with rotation and/or side bending which is common in mailhandling activities. Dr. Downs opined that appellant was not able to perform his job duties as a letter carrier or case mail, but could be helped with conservative management which has not happened. He opined that appellant could perform the two hours a day limited-duty position he had, though in conjunction with a rehabilitation program. Dr. Downs did not believe that appellant should advance in hours until he had appropriate treatment.

With regard to the discography, he opined that, although not all these tests were available to him, based on the reports he did not think that appellant needed a discography at this time. Dr. Downs noted:

"A discography is a workup to perform lumbar fusion. Lumbar fusion in [appellant's] case would have a dismal result given his associated mechanical and myofascial difficulties which have arisen over time. The decision with regards to discography should be deferred until such time as significant effort has been made to treat the myofascial and mechanical components of his back pain at which point in time it would be more easily judged whether or not he actually has significant discogenic pain and spasms. Certainly he does not have extremely acute pain at the L4[-]5 levels and there were other triggers which were palpated on today's exam[ination] which caused him more pain than actual palpation of the spine."

The Office found that the reports of appellant's treating physician, Dr. Van Pernis, were not medically sufficient to support total disability and the claimant's inability to perform the limited-duty position. The Office further noted that, both Dr. Fielden, the second opinion physician and Dr. Downs, the impartial medical examiner, indicated that appellant was not totally disabled and provided well-reasoned reports with objective findings to support their opinions. Accordingly, the Office found that appellant had not established a recurrence. The Office further found that, although Drs. Van Pernis and Lonstein opined that the discogram was necessary, these doctors did not provide sufficient reasoning to support the medical necessity of surgery, whereas both Drs. Field and Downs, who agreed the discogram was not medically necessitated, provided reports.

The Board finds that appellant has failed to establish that he sustained a recurrence of disability.

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence, a recurrence of total disability and to show that he or she cannot perform such light duty. As part of this burden, the

employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.[1]

In this case, appellant's treating physician, Dr. Van Pernis, opined that appellant was not capable of performing his limited-duty position. Appellant was then referred to Dr. Fielden, who disagreed, finding that there was nothing physically wrong with appellant. As there existed a conflict between appellant's treating physician, Dr. Van Pernis and the physician who performed the second opinion evaluation for the Office, Dr. Fielden, the Office referred appellant to Dr. Downs for an independent medical examination. Dr. Downs opined that appellant could perform the limited-duty position, although he did not believe appellant should advance in hours until he had received appropriate treatment.

When a case is referred to a referee medical specialist for the purpose of resolving a conflict in medical opinion, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[2] In the case at hand, Dr. Downs resolved the conflict between Drs. Van Pernis and Fielden by noting that appellant was capable of performing his limited-duty job. Dr. Downs' opinion is based on a review of appellant's medical history and a physical evaluation. Dr. Downs, in a complete and rationalized opinion, found that appellant could perform his limited-duty assignment. He based his opinion on the fact that appellant had a lot of muscle contracture, guarding and/or chronic spasm and had multiple joints where his motion was restricted but could be restored. Accordingly, as Dr. Downs was the independent medical examiner and he found that appellant could continue to perform his limited-duty position, the Board affirms the Office's denial of appellant's claim for a recurrence because the medical and factual evidence failed to demonstrate that the claimed recurrent disability was the result of a worsening of appellant's accepted condition.

The Board further finds that the Office properly denied the recommended discogram.

Section 8103(a) of the Federal Employees' Compensation Act states, in pertinent part:

> "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 the period of disability, or aid in lessening the amount of monthly compensation."[3]

In this case, Drs. Van Pernis and Lonstein recommended the discogram. However, Dr. Fielden, the second opinion physician, disagreed, noting that to be a surgical candidate, appellant should have some local evidence of nerve root impingement unrelieved by conservative measures, symptomatic narrowing of the spinal or nerve root canal, or instability of the spine from either injury or degenerating facets and disc. He found that none of the conditions

[1] *Terry R. Hedman*, 38 ECAB 222 (1986); *see also Kim Kiltz*, 51 ECAB ____ (Docket No. 98-1907, issued March 9, 2000).

[2] *Sherry A. Hunt*, 49 ECAB 467, 471 (1998).

[3] 5 U.S.C. § 8103(a).

existed, in that his examinations have always been normal except for some guarding and pain. Dr. Fielden further stated that surgery "would not only not relieve his pain but may well give him good reason to have it." Due to the conflict between the opinions of appellant's treating physician and the second opinion physician, the Office also requested that Dr. Downs resolve this conflict. He opined that appellant did not need a discography at this time. Dr. Downs noted that a discography is a workup to performing a lumbar fusion and that a lumbar fusion in appellant's case would have a dismal result given his associated mechanical and myofascial difficulties. He recommended deferring such decision until such time as a significant effort had been made to treat appellant's myofascial and mechanical components of his back pain. As Dr. Downs' opinion is well rationalized, it is entitled to great weight,[4] and the Office properly denied appellant's request for a discogram.

The August 5, 1998 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
February 16, 2001

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member

[4] *Sherry A. Hunt, supra* note 2.