

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of RAYMOND A. DALTON and U.S. POSTAL SERVICE,  
POST OFFICE, Boston, MA

*Docket No. 99-2510; Submitted on the Record;  
Issued February 23, 2001*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
VALERIE D. EVANS-HARRELL

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation effective October 28, 1989 on the grounds that he had no further condition or disability causally related to his April 26, 1989 employment injury; and (2) whether appellant has established any continuing employment-related disability after October 28, 1989.

This case is before the Board for the fourth time. By decisions dated May 30, 1991<sup>1</sup> and February 3, 1994,<sup>2</sup> the Board found that appellant had not met his burden of proof to establish that his back condition and disability commencing April 27, 1989 were causally related to his April 26, 1989 employment injury.<sup>3</sup> By decision dated September 18, 1996,<sup>4</sup> the Board remanded the case for the Office to obtain a rationalized report on the issue of whether appellant's back condition was causally related to his motorcycle accident occurring on or about April 24, 1989 or the employment incident occurring on April 26, 1989.

Following further development of the case record, by decision dated July 9, 1998, the Office accepted appellant's claim for a temporary aggravation of degenerative disc disease but also found that the condition had ceased as of October 26, 1989.<sup>5</sup> On July 16, 1989 appellant

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<sup>1</sup> Docket No. 90-2050 (issued May 30, 1991).

<sup>2</sup> Docket No. 93-439 (issued February 3, 1994).

<sup>3</sup> On April 26, 1989 appellant, then a 26-year-old letter carrier, filed a claim alleging that on that day as he was walking down stairs he caught his heel in between stair boards, lost his balance and pulled his lower back trying to regain his balance. The record indicates that appellant stopped work on April 27, 1989. Appellant's supervisor noted that appellant had been involved in a motorcycle accident two days earlier which prevented him from performing his duties on April 24, 1989.

<sup>4</sup> Docket No. 94-2434 (issued September 18, 1996).

<sup>5</sup> The Office initially informed appellant of the acceptance of his claim by letter dated September 19, 1997, but did not include appellant's appeal rights. At the request of appellant's representative, the Office reissued the

requested a hearing. In a letter dated March 16, 1999, appellant, through his representative, requested reconsideration instead of a hearing and submitted additional evidence. By decision dated May 4, 1999, the Office denied modification of its July 9, 1998 decision.

The Board finds that the Office met its burden of proof to terminate appellant's compensation effective October 28, 1989 on the grounds that he had no further condition or disability causally related to his April 26, 1989 employment injury.

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>6</sup> The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.<sup>7</sup> The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>8</sup>

Following a remand of the case from the Board, on November 20, 1996, the Office referred appellant to Dr. Patrick A. Cullen, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated December 10, 1996, Dr. Cullen discussed appellant's history of injury and listed findings on examination. He noted that a prior magnetic resonance imaging (MRI) study showed "a small central and right-sided protrusion of the disc, which is just beginning to compress a territory of the right S1 nerve just as it buds from the thecal sac."<sup>9</sup> He obtained x-rays, which showed "an exceptionally minimal degenerative joint disease at the 5-1 level." Dr. Cullen related:

"My impression is degenerative osteoarthritis of the [lumbosacral] spine, chronic sprain of L5, S1. It is most likely the degenerative osteoarthritis at the L5, S1 facet. There are no objective findings suggesting nerve root impingement at this time. Therefore, I think the disc changes are degenerative. The sensation of the right lower extremity is due to the degenerative osteoarthritis of the [lumbosacral] spine. The way I look at it appears that the incident of April 26, 1989 slipping and falling on the steps is just another traumatic sprain of the [lumbosacral] spine similar to the one that occurred in the motorcycle accident and may[be] others that occurred before and maybe after. It was just a convenient avenue for him to quit working and go on disability and I do [not] think that the MRI findings of the disc are of any specific significance to me. As a matter of fact, in my mind I see very little in the way of any serious problem going on here. I think that the motorcycle accident and the slip on the steps were just two very minor incidents of a chronic [lumbosacral] spine degenerative change. I think there is a huge amount of exaggeration and a tremendous amount of psychological overlay.

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decision accompanied by appeal rights.

<sup>6</sup> *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

<sup>7</sup> *Id.*

<sup>8</sup> *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>9</sup> The MRI was obtained on February 20, 1991.

“In answer to the questions I think that [appellant] did temporarily aggravate a preexisting condition with both the motorcycle accident of April 24, 1989 and the slip and fall incident of April 26, 1989. The April 26, 1989 accident at work definitely aggravated a preexisting back condition. However, I think that these aggravations of both the motorcycle and work[ers’] comp[ensation] injury have ceased a long time ago. I think what he is experiencing now is chronic degenerative osteoarthritis of the [lumbosacral] spine with a massive suprstemporal exaggeration.”

Dr. Cullen recommended against further medical treatment and opined that appellant should “go out and get a job and probably a very low stress job, probably a low physical and mental stress. I do not think he can be a letter carrier of any kind again.” In an accompanying work restriction evaluation, Dr. Cullen found that appellant could work for 8 hours per day with restrictions of no lifting over 50 pounds. He indicated that the lifting limitation was due to the employment injury.

In response to a query from the Office regarding the date the employment-related aggravation of appellant’s preexisting back condition ceased, Dr. Cullen stated that “[appellant’s] temporary aggravation of his preexisting degenerative disease ceased on October 26, 1989.”

The Board has carefully reviewed the opinion of Dr. Cullen and finds that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue in the present case. [He] provided a thorough factual and medical history and accurately summarized the relevant medical evidence. Moreover, Dr. Cullen analyzed the factual and medical history and his findings on physical examination and reached conclusions regarding appellant’s condition, which comported with this analysis.<sup>10</sup> He provided medical rationale for his opinion by explaining that the findings upon examination did not show any residuals of appellant’s temporary aggravation of his degenerative disc disease. Dr. Cullen opined that the employment-related aggravation of appellant’s back condition ceased on October 26, 1989. The Board, therefore, finds that the Office met its burden of proof to terminate appellant’s compensation effective October 26, 1989, on the grounds that the weight of the medical evidence established that he had no further employment-related condition or disability.

The Board further finds that the case is not in posture for decision on the issue of whether appellant has established any continuing employment-related disability after October 28, 1989, due to a conflict in medical opinion.

Given that the Board has found that the Office properly relied upon the opinion of the Office referral physician, Dr. Cullen, in terminating compensation, the burden of proof shifts to appellant to establish that he remains entitled to compensation after that date.<sup>11</sup> To establish causal relationship between the claimed disability and the employment injury, appellant must

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<sup>10</sup> See *Melvina Jackson*, 38 ECAB 443 (1987).

<sup>11</sup> *George Servetas*, 43 ECAB 424 (1992).

submit rationalized medical opinion evidence based on a complete factual and medical background supporting such causal relationship.<sup>12</sup>

Appellant submitted office visit notes from Dr. Patrick M. McGookey, a Board-certified neurologist. In a form report dated November 4, 1997, he diagnosed right S1 radiculopathy and chronic lumbar radiculopathy and checked “yes” that the condition was caused or aggravated by employment. In an office visit note dated March 30, 1998, Dr. McGookey diagnosed right S1 radiculopathy and stated:

“I do feel his radiculopathy is related to the work incident. There is a question whether or not he had preexisting degenerative changes which is totally impossible to say right now as he was injured in 1989 and enough time has passed that this alone would show degenerative changes. Even if he had degenerative changes prior to 1989, he had no history of a radiculopathy or back pain according to my information until his work-related injury.”<sup>13</sup>

Appellant further submitted a report dated March 20, 1999 from Dr. Jane L. Simenson, who is Board-certified in family practice. He related:

“After reviewing [appellant’s] current studies and consultative notes, my conclusion would be that his disability was caused by his work-related injury on April 26, 1989. It is unlikely that he would have been carrying that heavy bag of mail upstairs had he sustained a significant injury on the motorcycle three days earlier.

“[Appellant’s] exam[inations] and studies have consistently shown his left L5-S1 disc protrusion. His pain level has waxed and waned through the years and has never completely resolved with any of his treatments. I do not believe that this can be construed as aggravating a preexisting condition but was in fact an acute disc herniation, which has not resolved with medical management.

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<sup>12</sup> *John M. Tornello*, 35 ECAB 234 (1983).

<sup>13</sup> In an office visit note dated August 25, 1998, Dr. McGookey diagnosed right lumbar radiculopathy and recommended evaluation by a neurosurgeon. He further noted appellant’s history of an employment injury and found that appellant was not totally disabled. In an office visit note dated March 3, 1999, Dr. McGookey noted that appellant’s radiculopathy began “at the time of his accident in 1989....”

“At this time, I believe [appellant] is under consideration for neurosurgical decompression and it would seem that this is an appropriate course of action.”<sup>14</sup>

The Board finds that a conflict exists in the medical opinion evidence between appellant’s physicians, Dr. McGookey and Dr. Simenson, who attributed appellant’s current back condition to his employment injury and Dr. Cullen, the Office referral physician, who found that appellant did not have any further employment-related back condition or disability as of October 26, 1989.

Section 8123(a) of the Federal Employees’ Compensation Act provides in pertinent part: “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.”

On remand the Office should refer appellant, together with a statement of accepted facts, questions to be addressed and the entire case record to an impartial medical examiner to determine whether appellant had any condition or disability subsequent to October 26, 1989 causally related to his accepted employment injury. The impartial medical examiner should also provide an opinion regarding whether appellant’s diagnosed condition of a herniated nucleus pulposus was causally related to his April 26, 1989 work injury. After such further development as it deems necessary, the Office shall issue a *de novo* decision.

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<sup>14</sup> In a report dated March 15, 1999, Dr. E. Joy Arpin, a Board-certified neurosurgeon, discussed appellant’s history of a 1989 employment injury and found that a December 1998 MRI showed “a herniated nucleus pulposus at L5-S1 centrally and slightly to the left.” She recommended a microdiscectomy but noted that “he may not receive the beneficial relief, as it has been a significant length of time since the original injury.”

The decisions of the Office of Workers' Compensation Programs dated May 4, 1999 and July 9, 1998 are set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Dated, Washington, DC  
February 23, 2001

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Member

Valerie D. Evans-Harrell  
Alternate Member