

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LOU MASCHERMA and U.S. POSTAL SERVICE,
POST OFFICE, Greensburg, PA

*Docket No. 00-2239; Submitted on the Record;
Issued July 5, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant sustained a recurrence of disability causally related to his August 17, 1998 employment injury.

On August 20, 1998 appellant, then a 61-year-old custodian, filed a traumatic injury claim alleging that on August 17, 1998 he injured his back when he was helping a fellow employee pick up a heavy collection box. The Office of Workers' Compensation Programs accepted his claim for lumbar sprain and related medical expenses. Appellant worked limited duty and returned to full duty on September 17, 1998.

On October 7, 1998 appellant filed a claim for a recurrence (Form CA-2a) claiming that his persistent lower back pain was caused by his August 17, 1998 injury. In support of his claim, he submitted medical reports from Dr. Rodney G. Gordon, who treated appellant on September 25, 1998, the date appellant listed as the date of his recurrence and stated:

“[Appellant] had an MRI [magnetic resonance imaging] scan which shows very significant stenosis at L4-5. This is secondary to bulging of the disc at the L4-5 level and arthritis of the facet joints and hypertrophy of the ligament flavum. The stenosis is quite severe. He also has a [G]rade I spondylolisthesis of L4 on L5.”

He further stated: “He denies that this condition did preexist to the work injury on the 17th of August 1998, but the work injury on the 17th of August has been a significant exacerbating feature of this preexisting condition and this is the thing that has caused the necessity for surgery at this date.”

In a letter dated October 27, 1998, Dr. Gordon again recommended that appellant undergo lumbar decompression at L4-5 with fusion.

Appellant eventually underwent surgery on December 8, 1998 and returned to work in June 1999, with restrictions on lifting over 30 pounds.

By letter dated January 21, 1999, the Office referred appellant's medical records and a statement of accepted facts to the Office medical adviser, requesting that he determine whether the medical evidence was sufficient to support appellant's alleged exacerbation and whether the December 1998 surgery was injury related. The Office medical adviser responded on January 25, 1999, stating: "No." He continued: "The findings on MRI [scan] and especially on the operation report are degenerative taking much longer than three to four months to develop no herniated discs were found. The surgery was to correct the underlying condition."

"The accepted lumbar strain of August 17, 1998 resolved by September 17, 1998.... Restrictions due to the underlying [degenerative joint disease] and surgery are not the result of the August 17, 1998 injury."

By decision dated February 2, 1999, the Office denied appellant's claim since the evidence failed to demonstrate that the claimed recurrence was causally related to the accepted employment injury.

By letter dated February 25, 1999, appellant requested an oral hearing which was held on September 29, 1999.

In support of his claim, appellant submitted a report from Dr. Gordon dated March 3, 1999, in which he opined:

"It is my opinion that [appellant] had some preexisting narrowing of his spinal canal at the time of his injury to his back in August 1998. However, this narrowing of the spinal canal was asymptomatic or minimally symptomatic, and the patient was able to perform his regular work activities. The incident which occurred 2 weeks prior to being seen and which involved him lifting a large slab weighing 200 to 400 pounds significantly worsened in a permanent fashion the underlying narrowing of the spinal canal. It is my opinion that the patient had additional disc bulging after this incident occurred which narrowed his spinal canal beyond the critical limits needed for nerve functioning. This caused acute sciatic type problem and an S1 radiculopathy on the right side. This incident could be likened to the straw which broke the camel's back and as such was the main incident which lead to the necessity for the surgical intervention which occurred on December 8, 1998. Without the lifting incident, it is possible that [appellant] may have been able to work for several more years with his preexisting spinal stenosis."

Appellant submitted an additional report from Dr. Gordon dated June 13, 1999. Dr. Gordon again indicated:

"It is my opinion that the spinal stenosis did preexist the work injury in August 1998 but the work injury when he was trying to lift a large concrete slab did significantly exacerbated his underlying problem causing it to become symptomatic and these symptoms had not resolved. Thus, it is my opinion that the work injury made surgery necessary at a much earlier date than otherwise would have been necessary."

He further indicated that appellant's period of total disability was from August 31, 1998 to April 5, 1999.

By decision dated February 3, 2000, the hearing representative remanded the case finding that appellant had submitted sufficient evidence to warrant further development by the Office.

By letter dated February 16, 2000, the Office requested that appellant submit medical records related to his preexisting back condition.

Appellant submitted a MRI report dated September 4, 1998, taken approximately one month before appellant filed the recurrence.¹ The MRI report found degenerative disc disease at levels L4-5, L5-S1 and L3-4.

By letter dated March 7, 2000, the Office referred appellant to Dr. Subrata Barua, a Board-certified orthopedic surgeon, for a second opinion examination, to determine whether appellant's condition was causally related to his accepted employment injury. Appellant was instructed to bring all pertinent x-rays, MRI or computerized tomography scans to the examination.

Dr. Barua examined appellant and his medical records and submitted a report dated March 26, 2000, in which he discussed appellant's medical history and diagnosed appellant with "post decompression lumbar laminectomy and residual lower back pain." He opined:

"His condition is preexisting and did not accelerate from any work injury from the lifting heavy slab of cement. This patient has had back symptoms prior to the lifting injury of August 17, 1998. The patient's back symptoms in my opinion is due to the preexisting back condition. The present condition which requires him to restricted weight lifting is due to the preexisting condition of severe degenerative joint disease of the lumbar spine and also degenerative disc disease between L5-S1."

In an addendum report dated March 30, 2000, Dr. Barua attempted to clarify his diagnosis. He stated:

"[Appellant] sustained lumbar strain initially from a lifting episode at work. This has aggravated his preexisting condition of lower back pain and leg pain which he complained prior to the incident. This lifting injury did not aggravate or accelerate or precipitated the preexisting condition of severe spinal stenosis, which the patient had for many years. This preexisting condition of spinal stenosis would have eventually required decompression surgery sometime later in his lifetime. The condition of spinal stenosis that was detected a month after the lifting episode was quite severe and did not accelerate because of lifting episode. The present complaint of back symptom is thus not a work-related injury."

¹ Appellant also submitted duplicative evidence already contained in the record.

By decision dated June 8, 2000, the Office denied appellant's claim since the evidence of record was insufficient to establish that the claimed recurrence was causally related to the accepted employment injury.

The Board has reviewed the entire case record on appeal and finds that this case is not in posture for decision because of a conflict in medical evidence and requires further development by the Office.

Where appellant claims a recurrence of disability due to an accepted employment-related injury, he has the burden of establishing by the weight of the substantial, reliable and probative evidence that the subsequent disabilities for which he claims compensation are causally related to the accepted injury.² This burden includes the necessity of furnishing evidence from a qualified physician who, on the basis of a complete and accurate factual and medical history, concludes that the condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.³

In this case, appellant's attending physician, Dr. Gordon, opined that appellant's stenosis at L4-5 as indicated on the September 4, 1998 MRI scan, was a preexisting condition, but was exacerbated by the August 17, 1998 incident, thus leading to the requirement of surgery on December 8, 1998. In his March 3, 1999 report, he stated that this was "the straw that broke the camel's back" and as such was the main incident which led to the necessity of the surgery. Dr. Gordon stated that without the lifting incident, it was possible that appellant would have been able to work several more years with his preexisting condition.

However, the Office medical adviser and the second opinion physician, Dr. Barua, both opined that the need for work restrictions and surgical intervention were not the result of the August 17, 1998 incident, but were due to degenerative changes. He opined that appellant's preexisting lower back and leg pain was exacerbated by the August 17, 1998 incident resulting in lumbar strain, but that this was only a temporary condition. The Office medical adviser opined that the lumbar strain should have resolved by September 17, 1998. Dr. Barua opined that appellant's current condition of spinal stenosis was a preexisting condition that was not exacerbated by the lifting episode and did not lead to the need for surgical intervention. He stated that the spinal stenosis would have eventually required decompression surgery sometime later in appellant's lifetime.

Section 8123 of the Federal Employees' Compensation Act⁴ provides that if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician to resolve the conflict.⁵ The Board has interpreted the statute to require more than a simple disagreement between two physicians. To

² *Jose Hernandez*, 47 ECAB 288 (1996).

³ *Id.*

⁴ 5 U.S.C. §§ 8101-8193; 5 U.S.C. § 8123(a); 20 C.F.R. § 10.321.

⁵ *Shirley L. Steib*, 46 ECAB 309, 316 (1994).

constitute a true conflict of medical opinion, the opposing physicians' reports must be of virtually equal weight and rationale.⁶

In this case, the Board finds a conflict created by the opinion of Dr. Gordon, who found that appellant's preexisting condition was aggravated by the August 17, 1998 incident and led to the necessity of surgical intervention, and the Office medical adviser and Dr. Barua, who found that appellant's condition was purely degenerative and was not exacerbated by the lifting incident.

On remand, the Office should refer appellant, the case record, and the statement of accepted facts to an appropriate medical specialist for an impartial medical evaluation pursuant to section 8123(a).⁷ After such development of the case record as the Office deems necessary, a *de novo* decision shall be issued.

The June 8 and February 3, 2000 decisions of the Office of Workers' Compensation Programs are hereby set aside and the case is remanded for further proceedings consistent with this opinion.

Dated, Washington, DC
July 5, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

⁶ *Adrienne L. Wintrip*, 38 ECAB 373, 379 (1987).

⁷ *See* 20 C.F.R. § 10.321; *Debra S. Judkins*, 41 ECAB 616, 620 (1990).