

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MICHAEL KOZUBOSKI and U.S. POSTAL SERVICE,  
POST OFFICE, Hauppauge, NY

*Docket No. 99-1570; Submitted on the Record;  
Issued May 18, 2001*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether appellant has met his burden of proof in establishing that he sustained a recurrence of disability commencing March 31, 1997 causally related to the January 16, 1996 employment injury.

The Office of Workers' Compensation Programs accepted that on January 16, 1996 appellant, then a 44-year-old letter carrier, sustained a lumbosacral sprain when he slipped on ice while going down stairs. Preexisting conditions, which the Office did not accept as being related in any manner to the January 16, 1996 employment injury were spina bifida occulata at L5 with left spondylolysis and a degenerative L5-S1 disc. Appellant experienced intermittent periods of disability after the January 16, 1996 employment injury and eventually returned to limited duty of four hours per day on January 30, 1997. He was placed on the periodic rolls for the remaining four hours. Appellant stopped work on March 31, 1997 and has not worked since.

On May 7, 1997 appellant filed a claim for a recurrence of disability, Form CA-2a, alleging that he stopped work on March 31, 1997 as his back condition had worsened to the point where he was unable to work. Appellant stated that he was progressing in a positive direction with the chiropractic therapy, but once the therapy was discontinued he was back on his medication and unable to work within a couple of weeks. He asserted that his therapy was stopped prematurely and that his back condition gradually regressed to the point of total disability.

Appellant submitted evidence to support his claim including medical progress reports of Dr. Robert J. Lippe, a Board-certified orthopedic surgeon, dated January 22, February 27, March 5 and April 3, 1997. In his January 22, 1997 report, Dr. Lippe noted his examination findings and released him to light-duty part-time work with no lifting as of January 27, 1997. In his February 27, 1997 report, Dr. Lippe stated that overall there had been little change in appellant's condition. He noted that appellant had been working a limited part-time schedule and had been able to tolerate this. An examination was performed and recommendations

regarding continued stretching and strengthening routine and chiropractic treatments were given. In his March 5, 1997 report, Dr. Lippe stated that appellant was suffering from a flare-up with back pain especially off to the left side radiating into the buttock. The pain was quite severe, limiting his ability to sit or stand more than a few minutes at a time. It was noted that the prescribed pain medication and muscle relaxor were being used three times a day now as opposed to one time a day when the pain was less. Dr. Lippe recommended that appellant stay out of work and chiropractic treatments continue. Appellant was diagnosed with LS strain, degenerative disc, lumbar radiculopathy and spondylosis. He was advised to return to light duty on March 10, 1997.<sup>1</sup> In an April 3, 1997 report, Dr. Lippe stated that appellant's back had been quite painful with inability to sit, stand or walk. It was noted that he had not been able to work with the chiropractor due to coverage problems. The chiropractor rendered appellant totally disabled after performing an examination. Authorization was requested for lower extremity electromyogram (EMG) and a spine surgeon consultation.<sup>2</sup>

By letter dated May 14, 1997, the Office requested additional information from appellant including evidence of a change in the nature and extent of his injury-related condition or of his light-duty requirements.

Medical progress reports from Dr. Lippe continued to be submitted opining that appellant was temporarily totally disabled and requesting reauthorization for chiropractic treatment.

By decision dated July 11, 1997, the Office denied the recurrence claim, stating that appellant had failed to supply sufficient evidence supportive of either a change in the nature and extent of his injury-related condition or of his light-duty requirements.

Appellant requested an oral hearing, which was held before an Office hearing representative on January 14, 1997. At the hearing, he described the history of his January 16, 1996 employment injury and stated that his limited-duty job requirements never changed and the Office's withdrawal of authorization for his ongoing chiropractic care resulted in the exacerbation of his condition and total disability.

Appellant also submitted additional medical evidence. A July 15, 1997 EMG showed low back derangement, spondylolisthesis with left L5-S1 radiculopathy. Medical progress notes from Dr. Lippe continued to diagnose lumbosacral sprain, lumbar radiculopathy and spondylolysis with degenerative disc disease along with requests for reauthorization of chiropractic treatment. In a May 30, 1997 report, Dr. Lippe stated that, since appellant's chiropractic treatment was stopped, his condition has worsened. Appellant's pain has been more severe. His mobility was limited. He was having difficulty sitting, standing or walking for more than a few minutes at a time. Dr. Lippe stated that he took appellant off work as of March 30, 1997 due to the exacerbation of his symptoms. Diagnosis remained lumbosacral sprain with left lumbar radiculopathy. He stated that appellant functioned much better with chiropractic treatments and opined that, if he was able to return to the treatments, he may be able to return to

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<sup>1</sup> Appellant stated that he was off work from March 3 through 9, 1997 due to cellulitis of the left Achilles tendon. Sick leave was taken for this time. Achilles cellulitis is not an accepted condition in this case.

<sup>2</sup> Authorization for a lower extremity EMG was granted on June 18, 1997.

some sort of gainful employment. In a September 4, 1997 report, Dr. Lippe again opined that appellant was totally disabled. He reiterated that appellant functioned much better with chiropractic treatment and stated that, without any chiropractic treatment, appellant had retrogressed. In an office visit note of January 28, 1998, Dr. Lippe noted that he was examining appellant for follow-up of his lumbosacral sprain, lumbar radiculopathy and spondylolysis. He further noted that appellant had been doing chiropractic treatments one time per week and was noticing improvement. An examination was performed and lumbosacral sprain, lumbar radiculopathy and spondylolysis were diagnosed. Dr. Lippe opined that appellant was not yet capable of returning to the rigors of his work duties. Renewals for pain and muscle relaxant muscles were given. Dr. Lippe reiterated his earlier opinion that working light duty part time in combination with termination of chiropractic treatment caused an exacerbation of appellant's condition.

In a January 14, 1998 report, Dr. Denise Logan, a chiropractor, noted that appellant had been treated for symptoms related to a work-related lower back injury in January 1996. She stated that, while under treatment, appellant showed progressive improvement and was able to return to work. When appellant discontinued care, because his insurance no longer covered such care, appellant's condition got progressively worse to the point where appellant found that he was unable to work. Dr. Logan stated that appellant has been totally disabled since March 31, 1997. She noted that appellant had been under continuous care with an orthopedist, has worked on home care, water exercises, etc. Dr. Logan reported that appellant returned to the office on October 27, 1997 after compensation was reauthorized, progressive improvement was noted and appellant was scheduled to return to work on a part-time light-duty basis in February 1998. In a January 26, 1998 letter, Dr. Logan stated that appellant still requires care for his employment injury. She stated that, when appellant was working part-time and was unable to receive treatment, his back condition exacerbated.

By decision dated March 26, 1998, the Office hearing representative affirmed the Office's prior decision.<sup>3</sup>

In a cover letter dated March 1, 1999, appellant's attorney requested reconsideration. A brief was submitted advancing arguments, which pertained to the proper law the Office was to apply in the adjudication of recurrence claims. Appellant's attorney further argued that the Office should have accepted additional medical conditions.

Medical evidence was also submitted. Progress reports from Dr. Lippe continued to diagnose lumbosacral sprain, degenerative disc disease, spondyloschisis and lumbar radiculopathy and opine that appellant was totally disabled. An October 23, 1997 report noted that appellant had been approved for two times a week chiropractic treatments. Progress reports thereafter noted an improvement in appellant's condition since he has been working with the chiropractor with intermittent periods of disability. In a July 16, 1998 report, Dr. Lippe noted appellant's progress since March 18, 1996 to June 25, 1998. Impression remained lumbosacral sprain, left lumbar radiculopathy, spondylolysis and degenerative disc disease. He opined that

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<sup>3</sup> The Board notes that although the Office hearing representative stated it affirmed the district Office's decision dated March 11, 1995 this is a typographical error and should be July 11, 1997.

appellant's overall prognosis was poor. Dr. Lippe stated that appellant would likely suffer permanent pain in his lower back which limits his ability to sit, stand and walk for more than a few minutes at a time. Dr. Lippe stated that there was a high likelihood of spinal fusion surgery but stated that there would be no guarantee that this would completely resolve his symptoms. He again stated that appellant had been helped by weekly chiropractic treatments as it made him somewhat more functional. Without such treatments, Dr. Lippe stated that his pain was quite exacerbated. He further opined that there was a causal relationship between the accident on January 16, 1996 and the injuries sustained.

In an April 30, 1998 medical report, Dr. William A. Healy, Jr., an orthopedic surgeon for the employing establishment, noted the history and medical progress of the employment injury, performed a physical examination and took an x-ray of the lumbar spine. He noted that appellant did perform weight lifting at one time. Dr. Healy opined that appellant most likely has ligamentous injury to the sacroiliac joint, whether it be from the work-related fall or from his prior weight lifting experiences. He stated that it appears that the sacroiliac joint becomes subluxed at times resulting in acute pain to his back which is relieved by the chiropractor flexing the hip and internally rotating that hip joint to reduce the subluxation and give temporary relief. Regarding the pain in the midline in the back, Dr. Healy opined that this pain was secondary to the degenerative disc disease, degenerative arthritis and the spondylolisthesis at L5-S1. He stated that this condition was not likely to improve with time or any form of treatment. Dr. Healy further opined that appellant could work with limited capacity in terms of lifting and bending. Based on the history of the work-related injury, he opined that the work injury had aggravated preexisting problems within appellant's lumbar spine, as noted in the x-ray findings. Dr. Healy further opined that, if in fact appellant does have subluxation of the left sacroiliac joint, he does not require chiropractic treatment to perform the maneuver of flexing the knee on the hip and internally rotating the hip.

In a July 28, 1998 report, Dr. Logan noted the history of injury and medical treatment. She stated that x-rays taken at Island Orthopedic showed spina bifida occulata at L5 with left spondylolysis and degenerative L5-S1 disc space. A magnetic resonance imaging (MRI) taken on March 22, 1996 showed mild spondylolisthesis of L5 on S1, degenerative bulge at L5-S1 disc with degenerative changes of facet joints and narrowing of the right neural foramen, spina bifida occulata at S1. Initial diagnosis was lumbosacral sprain/strain complicated by disc bulge, discogenic spondylosis (subluxation L5) and spondylolysis of L5. Based on the history as given by appellant along with the examination findings and test results, Dr. Logan opined that appellant's present condition was causally related to the injury on January 16, 1996. She stated that, before appellant returned to work on a limited basis on January 30, 1997, he had several exacerbations at times with no apparent precipitating factors. At other times, housecleaning, vacuuming, sitting for long periods of time, driving for two hours, or drop of the barometric pressure would aggravate the lower back causing a return of positive orthopedic signs and symptoms. Dr. Logan stated that, upon appellant's return to work, his condition deteriorated. His symptoms increased and he increased his medications. Temporary improvement would be experienced with chiropractic treatment. Dr. Logan indicated that appellant stopped working March 31, 1997 due to the progressive worsening of his condition. She indicated that there was no subsequent injury to the area and she felt that the total disability at this time was related to the initial injury of January 16, 1996. There were no intervening injuries. Appellant never fully

recovered from the original injury, but tried to return to work in a lesser functional capacity. There were continuous signs and symptoms that got worse once he returned to work. Dr. Logan further indicated that, once chiropractic care was no longer covered, a subsequent EMG performed indicated that he had a left L5-S1 radiculopathy, which was consistent with his symptoms. She indicated that appellant was again seen in October 1997 and that the examination findings were similar to those in December 1996 and March 1997 with diminish in straight leg raise and slight weakness in the left extensor hallucis. Dr. Logan stated that it was apparent at this time that appellant has permanent residual signs and symptoms that are related to the injury of January 16, 1996. The relatively unchanged examinations throughout the last year and a half do indicate that the condition has reached a plateau. Appellant has found that without treatment in a period of two to three weeks the condition generally worsens. Dr. Logan indicated that there has been an increase in subjective symptoms as well as in objective findings. She stated that, without treatment, the condition gets worse and, therefore, she feels that supportive care at this time is indicated.

In a January 25, 1999 report, Dr. Lippe noted that appellant had been authorized for a repeat MRI of the lumbosacral spine and for spine surgical evaluation. He opined that appellant's recurrences of total disability, March 31, 1997, were causally related to his prior injury he sustained at work on January 16, 1996. Dr. Lippe reiterated his opinion that appellant was able to function in a limited capacity when he was receiving regular chiropractic treatments and, once the chiropractic treatments stopped, appellant's symptoms magnified to the point where he was unable to perform any of his work duties. In a February 3, 1999 report, Dr. Lippe noted that the repeat MRI showed Grade 1 L5 on S1 spondylolisthesis with advanced degenerative disc intervening. The sagittal views show some degree of spinal stenosis secondary to the deformity. He continued to opine that appellant was totally disabled. In a February 19, 1999 report, Dr. Lippe reiterated his earlier opinions regarding the causal relation of appellant's recurrence of total disability on March 31, 1997 to the discontinuance of chiropractic treatment.

In a February 19, 1999 report, Dr. Laurence E. Mermelstein, a Board-certified orthopedic surgeon, noted the history of injury, performed a physical examination finding that neurologically there were no focal motor deficits in the lower extremities, flexes were intact and symmetric at the knees and ankles and there were no sensory deficits. The MRI of January 27, 1999 showed a Grade I spondylolisthesis of L5-S1, significant facet joint arthritis, more right sided than left sided; significant degeneration of the L5-S1 disc space with narrowing and aggressive degenerative changes. X-rays revealed an old pars defect with no significant motion of the interspace. L5-S1 spondylolisthesis, advanced degenerative disc disease were diagnosed. Dr. Mermelstein stated that appellant was disabled from his work injury. He opined that appellant's recent exacerbation of pain was due to his original injury. His present injuries were causally related to this accident in 1996 and opined that appellant was totally disabled. Dr. Mermelstein further stated that appellant requires surgical reconstruction of his lumbosacral junction.

By decision dated March 23, 1999, the Office denied appellant's request for modification.

The Board finds that the issue of whether appellant has established that his recurrence of disability commencing March 31, 1997 was causally related to the January 16, 1996 employment injury is not in posture for decision.

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he can perform the 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 show that he 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 requirements.<sup>4</sup>

In the present case, appellant did not show that the nature and extent of his light-duty requirements changed and he has not presented any rationalized medical evidence showing that his injury-related condition changed. In this case, the Office accepted that appellant sustained a lumbosacral strain on January 16, 1996 and that all other conditions concerning appellant's back were preexisting and not causally related to the work injury. Dr. Lippe's reports and progress notes continue to diagnose LS strain, degenerative disc, lumbar radiculopathy and spondylosis. Although he addressed treatment of appellant's back pain and provided statements that appellant's condition was exacerbated when chiropractic care was discontinued and that appellant's recurrences of total disability were causally related to the work injury of January 16, 1997, Dr. Lippe does not provide a rationalized medical opinion explaining how this medically occurred. In his May 30, 1997 report, he stated that he took appellant off work as of March 30, 1997 due to the exacerbation of his symptoms, but does not explain how or why appellant's symptoms became exacerbated other than stating that appellant functioned much better with chiropractic treatments. In his January 28, 1998 report, Dr. Lippe stated that working light duty in combination with termination of chiropractic treatment caused an exacerbation of appellant's symptoms, but again, does not provide a medical explanation as to how and why this occurred. In his reports of February 1999, Dr. Lippe noted that the February 1999 MRI showed Grade 1 L5 on S1 spondylolisthesis with advanced degenerative disc and again related appellant's recurrence of total disability to the discontinuance of chiropractic treatment. Again Dr. Lippe does not provide a rationalized medical opinion explaining how this medically occurred. Further, an exacerbation or aggravation of January 16, 1996 employment injury would constitute a new injury, not a recurrence of disability. A recurrence of disability is defined as a spontaneous material change in the employment-related condition without an intervening injury.<sup>5</sup> Dr. Lippe's report, therefore, is not sufficient to establish a recurrence of disability. His opinion is also insufficiently detailed and lacking in medical rationale to establish that appellant established an aggravation of the January 16, 1996 employment injury or a new injury as a result of the return to light-duty work and subsequent stoppage of chiropractic treatment.<sup>6</sup>

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<sup>4</sup> *Carlos A. Marrero*, 50 ECAB \_\_\_\_ (Docket No. 96-2186, issued October 19, 1998).

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(b)(1) (January 1995).

<sup>6</sup> *See Diane Williams*, 47 ECAB 613, 616 (1996).

Section 8101(2) of the Federal Employees' Compensation Act provides that the term "physician" includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist...."<sup>7</sup> Therefore, a chiropractor cannot be considered a physician under the Act unless it is established that there is a subluxation as demonstrated by x-ray evidence.<sup>8</sup> In her July 28, 1999 report, Dr. Logan related what the x-rays taken at Island Orthopedic showed along with the findings of the March 22, 1996 MRI. She then stated that "initial diagnosis" was lumbosacral sprain/strain complicated by disc bulge, discogenic spondylosis (subluxation L5) and spondylolysis of L5 and opined that appellant's present condition was causally related to the injury on January 16, 1996. Assuming that the "initial diagnosis" is Dr. Logan's, based upon a review of the x-ray evidence from Island Orthopedic, then she can be considered a physician under the Act even though the x-ray evidence was not her own. Although Dr. Logan noted in her reports that appellant experienced temporary improvement with chiropractic treatment and upon appellant's return to work his condition deteriorated as denoted by increased symptoms and increased medication, her opinion that appellant's March 31, 1997 recurrence is causally related to the January 16, 1996 work injury is not sufficiently rationalized to establish that appellant sustained a recurrence of disability. Moreover, Dr. Logan's opinion that appellant has permanent residual signs and symptoms that are related to the injury of January 16, 1996 appears to be based upon appellant's condition without chiropractic treatment and is also not sufficiently rationalized to establish that appellant sustained a new employment injury or an aggravation of a preexisting injury. Dr. Logan's opinion, therefore, is insufficient to establish appellant's recurrence claim.

In his February 19, 1999 report, Dr. Mermelstein opined that appellant's recent exacerbation of pain was due to the January 16, 1996 work injury. However, it is unclear from his report whether he is aware of appellant's preexisting back conditions. The February 19, 1999 report of Dr. Mermelstein is of diminished probative value because it is based on an inaccurate history<sup>9</sup> and also lacks medical rationale explaining the basis of his opinion on causal relationship and does not address the issue of a recurrence of disability. Dr. Mermelstein does not address the March 31, 1999 recurrence. Moreover, he did not provide an opinion, demonstrating a knowledge of appellant's preexisting back problems, which explained the medical reasons why his current condition was caused or aggravated by employment factors instead of being solely the result of his preexisting condition. As previously stated, an exacerbation or aggravation of the January 16, 1996 work injury would constitute a new injury, not a recurrence of disability. The Office noted, in its addendum to the Notice of Decision of March 23, 1999, that a new medical issue was being developed. Although appellant's attorney argued that additional medical conditions should originally have been accepted, the Board notes that the issue is irrelevant in adjudicating a recurrence claim. Moreover, as medical treatment was never denied for appellant's additional medical conditions, this is not an issue in this case.

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<sup>7</sup> 5 U.S.C. § 8101(2); *see also Linda Holbrook*, 38 ECAB 229 (1986).

<sup>8</sup> *See Kathryn Haggerty*, 45 ECAB 383 (1994).

<sup>9</sup> *See Vernon R. Stewart*, 5 ECAB 276, 280 (1953) (where the Board held that medical opinions based on histories that do not adequately reflect the basic facts are of little probative value in establishing a claim).

Although the Board notes that the medical opinion evidence of record is insufficient to establish appellant's recurrence claim, they do provide some support to his claim. Dr. Lippe, who was of the opinion that appellant became totally disabled after his physical therapy was discontinued, specifically noted that the pain was quite severe, limiting appellant's ability to sit or stand for more than a few minutes and that pain medication and muscle relaxer use increased to three times a day as opposed to one time a day prior to the discontinuation of physical therapy by a chiropractor. Dr. Logan, the treating chiropractor, also noted continuous signs and symptoms that got worse once appellant returned to work and that, when chiropractic care was no longer covered, an EMG indicated a left LS-51 radiculopathy, which was consistent with his symptoms. He further noted that appellant's condition generally worsened without treatment in a period of two to three weeks and that a temporary improvement would be experienced with chiropractic treatment. These opinions thus raise an uncontroverted inference of causal relationship between appellant's condition and the compensable employment factors and are sufficient to require further development of the case by the Office.<sup>10</sup>

On remand, the Office should further develop the medical evidence by referring appellant and a statement of accepted facts to an appropriate Board-certified specialist for a rationalized medical opinion with specific questions as to whether residuals of appellant's employment injuries, the limited duties he was performing and the withdrawal of physical therapy prevented him from continuing to perform his limited-duty position.

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<sup>10</sup> See *John J. Carlone*, 41 ECAB 354 (1989).

The decision of the Office of Workers' Compensation Programs dated March 23, 1999 is hereby set aside and the case is remanded to the Office for proceedings consistent with this opinion.

Dated, Washington, DC  
May 18, 2001

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Willie T.C. Thomas  
Member