

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICK T. BARTOLI and U.S. POSTAL SERVICE,
POST OFFICE, El Toro, CA

*Docket No. 00-2131; Submitted on the Record;
Issued September 5, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's claim for a recurrence of partial disability beginning November 1997; and (2) whether the Office properly terminated appellant's compensation effective February 4, 1999.

On June 28, 1996 appellant, then a 49-year-old letter carrier, filed a claim for an injury to his low back sustained on June 27, 1996 by lifting a tray of mail. On July 8, 1996 appellant filed a claim for an occupational disease for a herniated disc at L5 that he attributed to an "ongoing injury that occurred the last part of Dec[ember] 1995" and to the June 27, 1996 employment injury.

The Office accepted that appellant sustained a herniated disc at L5-S1, and that on June 27, 1996 he sustained an aggravation of this herniated disc. The Office determined that appellant was entitled to buy back leave he used between December 28, 1995 and June 27, 1996, which appellant did, thereafter receiving compensation for his intermittent absences during this period. The Office also determined that appellant was entitled to continuation of pay due to his June 27, 1996 injury until he returned to limited duty on July 6, 1996. Appellant returned to his regular, full-time duties as a letter carrier on September 5, 1996.

The employing establishment reported that appellant stopped working eight hours per day in September 1997. On June 21, 1998 appellant entered a pain management program, authorized by the Office. The Office paid appellant compensation for temporary total disability while he was enrolled in this program and not working. Appellant returned to limited duty on July 30, 1998, working four to five hours per day.

By letter dated September 4, 1998, the Office advised appellant that it had received his Form CA-8 claiming four hours of leave without pay (LWOP) before and after he went into the authorized pain clinic. The Office stated that, in order to receive compensation for not working full time, he had to file a claim for and establish that he suffered a recurrence of disability, by showing that his limited-duty job changed or that his medical condition worsened.

On January 4, 1999 the Office issued a notice of proposed termination of compensation, on the basis that the weight of the medical evidence established that he no longer suffered from disabling residuals of his accepted work injuries. By decision dated February 4, 1999, the Office terminated appellant's compensation on the basis that the weight of the medical evidence established that he had no residuals of his June 27, 1996 employment injury.

By letter dated February 9, 1999, appellant requested reconsideration, and submitted additional medical evidence. By decision dated March 30, 1999, the Office found that the additional evidence was not sufficient to warrant modification of its February 4, 1999 decision. The Office also found that appellant had not submitted sufficient evidence to establish a recurrence of partial disability in November 1997.

By letter dated February 22, 2000, appellant requested reconsideration and submitted additional medical evidence. By decision dated April 4, 2000, the Office found that the additional medical evidence was not sufficient to warrant modification of its prior decisions.

The Board finds that the case is not in posture for a decision on the issue of whether appellant sustained a recurrence of partial disability beginning November 1997.

Despite the Office's statement in its September 4, 1998 letter that it had appellant's Form CA-8 claiming compensation for four hours of LWOP before and after his participation in a pain management program, the case record does not contain this form. The Board is therefore unable to ascertain the period for which appellant is claiming compensation. The case record also does not show whether appellant was performing his regular duties as a letter carrier or limited duty at the time he reduced the number of hours per day he was working and does not show exactly when he began working fewer than eight hours per day. In light of the deficiencies in the evidence and given the employing establishment's statement that appellant stopped working eight hours a day in September 1997, the Board is unable to ascertain whether the Office properly determined that appellant did not sustain a recurrence of partial disability beginning November 1997. The case will be remanded to the Office for it to obtain evidence of appellant's work duties and hours worked between his return to his regular duties on September 5, 1996 and the beginning of November 1997. The Office should also obtain a copy of appellant's claim form that indicates what period of compensation he is claiming prior to June 1998.¹ The Office should then issue a *de novo* decision on appellant's entitlement to compensation for partial disability covering the periods before and after appellant's participation in the pain management program.

The Board further finds that the Office did not meet its burden of proof to terminate appellant's compensation on February 4, 1999, as there is an unresolved conflict of medical opinion.

¹ The case record contains an account of appellant's work hours beginning November 1997, and of his claim forms for the period after his discharge from the pain management program and his return to work on July 30, 1998.

In a report dated December 16, 1998, Dr. Thomas Dorsey, a Board-certified orthopedic surgeon to whom the Office referred appellant for a second opinion evaluation, concluded:

“I do not see any objective findings in the lumbar spine which are legitimately medically related to the events in the statement of accepted facts. The patient shows no evidence of nerve root involvement. He shows evidence of a 4 mm [millimeter] disc protrusion at L4-5. Such a disc protrusion is commonly seen in [magnetic resonance imaging scans] MRIs of the lumbar spine of individuals who have no back pain whatsoever. At most, in my opinion, the patient would have had a lumbar musculoligamentous sprain/strain. The known history of resolution of lumbar musculoligamentous sprain/strain is that of complete resolution within 30 days. There is no evidence of any other condition occurring. The patient has no ongoing diagnosis at this time with regard to the lumbar spine resulting from the events listed in the statement of accepted facts. The patient has no complaints of leg pain. He has no evidence of sensory loss or motor strength loss in any dermatomal pattern.”

Dr. Dorsey also stated that he saw “no evidence of aggravation, precipitation or acceleration of any condition,” that appellant’s objective findings did not support any subjective complaints, and that there was “no evidence of material damage to the lumbar spine resulting from the events as listed in the statement of accepted facts. Dr. Dorsey concluded that appellant had at most, some mild disc degeneration on a nonwork-related basis, that “these degenerative changes were the natural result of the aging process,” and that appellant could work eight hours per day and needed no further treatment.

In a report dated December 15, 1998, Dr. Robert Moore, a Board-certified neurologist to whom the Office referred appellant for a second opinion evaluation, diagnosed biomechanical low back pain with disc protrusion, and stated that examination showed “no evidence of neurological dysfunction.” Dr. Moore also stated that appellant’s subjective complaints were out of proportion to his objective findings, that he would require ongoing medical care, and that “functional limitations are present essentially on an orthopedic basis and I do not believe that the patient has additional functional limitations on a neurologic basis related to any type of active radiculopathy.”

Appellant’s attending physicians continue to support ongoing employment-related partial disability. In a report dated October 27, 1998, Dr. Calvin J. Okey, an osteopath, diagnosed “lumbar disc herniation at L4-S1,” and stated that appellant was temporarily partially disabled from June 27, 1996 until June 21, 1998, and again from July 28 through October 22, 1998 when he became permanent and stationary. Beginning with a report dated February 2, 1998, Dr. Okey has consistently and repeatedly stated that appellant is unable to work eight hours per day. In a report dated December 15, 1998, Dr. Okey explained his opinion that appellant could work only four hours per day:

“I have reached this conclusion after considering the patient’s subjective complaints when working beyond four hours daily, as well as several prior attempts to increase his work hours beyond this point. I am also taking into consideration the objective findings which include magnetic resonance imaging,

dated November 30, 1997, which showed a mild bulging disc at the L4,5 level. The results of a discogram performed at Mission Hospital on March 27, 1998 showed incompetent discs at L4,5 and L5, S1 with posterior annular fissuring with extension of contrast into the central ventral epidural space.”

In a report dated May 26, 1998, Dr. Vance O. Gardner, a Board-certified orthopedic surgeon, diagnosed internal disc disruption at L4-5 with a prior herniated disc at L5-S1, and stated that appellant had two alternatives: permanent work restrictions including working only four hours per day, or surgery. In a report dated January 19, 1999, Dr. Gardner stated that he considered the diminished range of back motion he found on examination an objective finding. Dr. Gardner then stated:

“In addition, the patient had discography performed on L4-5 and L5-S1 demonstrating posterior annular fissuring with contrast leakage into the central ventral epidural space indicating positive lumbar discography at L4-5 and L5-S1. These were thought to be typical of his pain especially at the L4-5 level.

“In my opinion, this discogram demonstrates that the patient does have internal disc disruption and the objective nature is very specific as these discograms are videotaped. The patient does not know the injections being performed and therefore, in my opinion, this is very objective evidence that the patient does have significant disability and this is causatively related to his work injuries.”

Section 8123 of the Act² provides that, if there is a 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. In this case the Office did not meet its burden of proof as it did not resolve the conflict of medical evidence.

² 5 U.S.C. § 8123.

The decision of the Office of Workers' Compensation Programs dated April 4, 2000 is reversed with regard to the Office's termination of compensation effective February 4, 1999. With regard to appellant's claim for partial disability, the Office's April 4, 2000 decision is set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Dated, Washington, DC
September 5, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member