

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of WAYNE A. DECK and DEPARTMENT OF THE NAVY,  
DEFENSE PRINTING SERVICE, Orlando, FL

*Docket No. 00-2512; Submitted on the Record;  
Issued September 13, 2001*

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DECISION and ORDER

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

The issue is whether appellant sustained a recurrence of disability in May 1997 causally related to his accepted work injury of March 30, 1996.

In this case, the Office of Workers' Compensation Programs accepted that appellant, then a 33-year-old printer, sustained a lumbar subluxation on March 30, 1996. Appellant was paid appropriate compensation for all relevant time periods of total and partial disability. He returned to full, regular duty on August 26, 1996.

In an undated letter, which the Office received March 31, 1997, appellant requested that his claim be reopened. After not receiving a response to its request for a detailed medical report, the Office denied the claim for a recurrence by decision dated May 30, 1997. The Office found that the evidence failed to establish that the claimed recurrence was causally related to the original work injury.

Appellant, through his attorney, requested a hearing and submitted additional medical evidence. By decision dated September 10, 1998, the Office hearing representative found that the case was not in posture for a decision due to a conflict in the medical evidence between appellant's treating physicians, Dr. Mark Anderson and Dr. Roberto Mixco, and the Office referral physician, Dr. Stephen R. Goll. The evidence reflected that appellant was diagnosed with a lumbar strain and degenerative disc disease and the dispute arose as to whether appellant could return to his regular duty work without restrictions. Accordingly, the May 30, 1997 decision was set aside and the case remanded for further proceedings. The Office hearing representative stated that, on remand, the Office should first refer appellant's x-rays to a radiologist for an opinion on whether the x-rays and medical evidence of record showed that a subluxation pursuant to the Office's definition currently existed. The hearing representative further stated that appellant, together with the case record and a statement of accepted facts, should then be referred to a Board-certified surgeon for a well-rationalized opinion, based on a complete and accurate factual and medical background, regarding the causal relationship

between appellant's current condition and the accepted employment injury of lumbar subluxation.

By letter dated October 13, 1998, the Office requested a copy of appellant's x-rays of May 15, 1996 from Dr. Mark T. Anderson, appellant's chiropractor. By decision dated January 28, 1999, the Office, having not received the x-rays, denied appellant's claim for compensation for recurrence of disability as being causally related to the accepted work lumbar subluxation.

By letter dated June 17, 1999, appellant requested reconsideration through his attorney and submitted additional medical evidence.

On August 18, 1999 the Office determined that a conflict in the medical evidence existed and ordered that a referee examination be conducted. The Office found that the nature of the conflict in medical evidence was the "extent of any remaining condition causally related to the work injury." Dr. Joseph E. Rojas, a Board-certified orthopedic surgeon, was selected to resolve the conflict in medical evidence. However, due to a conflict in interest, Dr. Rojas canceled the scheduled appointment as the same attorney represented both appellant and Dr. Rojas.

Appellant was then referred to Dr. Shekhar S. Desai, a Board-certified orthopedist, for a referee examination. In a November 5, 1999 report, Dr. Desai reported a history of appellant's original work injury to his lower back on May 13, 1996 and noted the subsequent medical treatment appellant had undergone. He noted that appellant was initially cleared to go back to light duty and subsequently returned to regular work. Dr. Desai also described a work injury of September 1999 where appellant bent down to move some paper and, upon straightening up, felt severe agonizing pain. After setting forth the results of his physical examination, Dr. Desai diagnosed a work-related injury with discogenic low back pain and responded to the Office's inquiries. He stated that appellant did not have any neurological deficit. The only objective findings were restricted range of motion on flexion and lateral bending. There were no subjective complaints, which did not correspond to the objective findings of restricted range of motion. Based on the recent lumbosacral spine x-rays completed in his office, Dr. Desai opined that he did not see any evidence of subluxation and stated that the established diagnosis was discogenic low back pain. He noted that appellant reported that his original back pain was attributed to his work-related injury in May 1996. Following this work-related injury, appellant stated that he has recurrent and ongoing intermittent back pain and periodic exacerbations and remissions. Based on the history provided by appellant, Dr. Desai opined that it would be medically reasonable to conclude that appellant's discogenic low back pain was attributed to his work-related injury. He further opined that regarding appellant's offset duplicating press operator responsibilities, appellant could do a light-duty job which did not involve lifting more than 20 pounds repetitively and not lifting, at any time, more than 50 pounds. Dr. Desai stated that a functional capacity would need to be performed for a more detailed listing of appellant's work restrictions. He also noted that an assessment of maximum medical improvement could not be evaluated until a trial of epidural steroid injections were completed.

By letter dated January 7, 2000, the Office wrote Dr. Desai to request clarification of his report. In a letter of January 24, 2000, Dr. Desai stated that, regarding the September 1999 injury, appellant told him that, while at work, he was bending over to clear a jam out of a copy

machine and developed severe agonizing pain. He was not lifting any object. Regarding the diagnosis, Dr. Desai stated that appellant continues to have pain. His magnetic resonance imaging (MRI) scan did not reveal any frank herniations. Based on that, Dr. Desai stated that he has given a diagnosis of a discogenic low back pain. He stated that he did not think that appellant required any further work up as the epidural steroids did not help appellant. Dr. Desai further stated that it was very difficult to speculate as to why appellant's injury still persists. He noted that, although appellant appears to be in discomfort, he is neurologically intact. Dr. Desai stated that he could not speculate how long it would take for appellant's symptoms to resolve. He related that, in the interim period, it was his understanding that Dr. Lombardo has cleared appellant for light duty, part time, 4 hours per day, not to lift more than 10 pounds and to do absolutely no kneeling, bending, twisting, pulling or crouching.

The Office advised that, in its letter of January 7, 2000, it had requested that Dr. Desai provide a diagnosis based on injury-related pathology, as his diagnosis of "discogenic low back pain" appeared to be symptom based. The Office reported that Dr. Desai's response of January 24, 2000 failed to furnish the requested diagnosis. Accordingly, the Office referred appellant, for the third time, to another referee examination as the issue of appellant's injury-related diagnosis remained unresolved.

In a medical report dated April 7, 2000, Dr. Nitin Hate, a Board-certified orthopedic surgeon, related the history of injury, noted that an MRI scan in April 1996 revealed bulging intervertebral disc at L4-5, and related that appellant's treating orthopedic surgeon, Dr. Lombardo, declared appellant at maximum medical improvement and advised appellant not to work more than four hours a day. Dr. Hate related that appellant's job involves operating high copy machines and lifting heavy boxes, though he is on light duty. Examination revealed tenderness over the right sacroiliac joint and the range of motion was restricted in the thoracolumbar region. In reviewing the medical records, Dr. Hate specifically noted the November 5, 1999 report of Dr. Desai; a February 25, 1999 note from Dr. Mixco, indicating a lifting restriction of 15 pounds; a July 26, 1999 MRI reading from Dr. Mixco; and a March 30, 1996 report from Orlando Orthopedic Clinic which indicated a diagnosis of lumbar sprain and degenerative disc disease with 0 percent permanent impairment. Dr. Hate stated that the physical examination including neurological system and skeletal examination was essentially within normal limits. The only positive finding was tenderness in the right sacroiliac joint and restrictive range of motion in the thoracolumbar spine. He noted that a fresh x-ray of the lumbosacral joint and an MRI scan may be helpful. It was noted that the previous MRI scan showed early degenerative disc disease not uncommon at appellant's age. Dr. Hate opined that he could not say with reasonable degree of medical probability that these changes related to appellant's work-related accident. He further opined that appellant's ability to work was restricted mainly due to pain in the lumbosacral region. In the absence of definite positive findings on physical examination, Dr. Hate stated that he did not have a definite diagnosis. He stated that appellant might have difficulty in repetitive bending, stooping and lifting over 15 pounds.

In a noted dated April 17, 2000, the district medical director advised that Dr. Hate's report of April 7, 2000 did not fully address the questions sent by the claims examiner. In a letter dated April 18, 2000, the claims examiner advised that a copy of the questions were being

provided. He further noted that, as no separate radiology report was generated with regard to radiology or x-ray reports, Dr. Hate was authorized to obtain new x-rays or an MRI scan in order to answer the questions.

In a letter dated April 19, 2000, Dr. Hate stated that the objective findings on examination were noted on the previous report. The subjective complaints were suggestive of radiculopathy consistent with degenerative disc disease. The physical examination including neurological system was unremarkable except for tenderness over right sacroiliac joint and restricted range of motion in the thoracolumbar region. Dr. Hate advised that he would recommend radiological examination of this joint. MRI reports supplied in the medical records indicated the diagnosis of degenerative disc disease. There are no findings suggestive of subluxation. Dr. Hate stated that he could not say with a reasonable degree of medical probability that the MRI findings were related to the work injury. Dr. Hate opined that, as appellant was currently on light duty, he should be able to continue with it. Physical therapy along with pain medication was suggested.

By decision dated May 3, 2000, the Office, after performing a merit review, denied appellant's reconsideration request on the grounds that the evidence of record was insufficient to warrant modification of the prior decision. The Office attributed special weight to the reports of Dr. Hate.

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 disability for which he claims compensation is causally related to the accepted injury.<sup>1</sup> 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.<sup>2</sup>

The Board finds that the case is not in posture for a decision, due to an unresolved conflict in the medical opinion evidence.

Section 8123(a) of the Federal Employee's Compensation Act<sup>3</sup> provides in part: "If there is 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."<sup>4</sup> The Office properly found a conflict in medical opinion evidence existed as to whether appellant had any remaining condition causally related to the accepted work condition of lumbar subluxation. Appellant was first referred to Dr. Rojas, who cancelled the appointment due to a conflict of interest as the same attorney represented both appellant and Dr. Rojas. Thus,

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<sup>1</sup> *John E. Blount*, 30 ECAB 1374 (1974).

<sup>2</sup> *Frances B. Evans*, 32 ECAB 60 (1980).

<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> 5 U.S.C. § 8123(a).

the Office properly referred appellant to a second impartial medical specialist, Dr. Desai, for a referee examination. It is noted that, although the Office subsequently referred appellant to a third impartial medical specialist and relied upon that opinion in denying the recurrence claim, the Board finds that the report of Dr. Hate, the third impartial medical specialist, must be excluded from the record.

It was improper for the Office to refer the case to Dr. Hate as a third impartial medical specialist when Dr. Desai, the second impartial medical specialist, provided a report and a supplemental report as requested by the Office and supported his conclusion with rationale.<sup>5</sup> In his November 5, 1999 report, Dr. Desai opined that appellant had no evidence of subluxation and provided a diagnosis of discogenic low back pain. He stated that appellant had objective findings of restricted range of motion on flexion and lateral bending and noted that the subjective complaints were consistent with the objective findings of restrictive range of motion. In its January 7, 2000 letter requesting clarification, the Office specifically asked Dr. Desai to clarify three points. First, the Office first wanted to know the history appellant provided regarding the injury of September 1999. Dr. Desai emphasized that appellant was not lifting any object, but was bending over the copier when he developed severe agonizing pain. Secondly, the Office noted that, as appellant's established diagnosis was discogenic low back pain, which appeared to be a symptom based diagnosis, it requested a clinical diagnosis based on appellant's injury related pathology. Dr. Desai related that, as appellant continued to have pain and the MRI scan did not reveal any disc herniations, he was given a diagnosis of discogenic low back pain. Lastly, the Office inquired as to why appellant's residuals were continuing and when they were expected to resolve. Dr. Desai stated that he could not speculate how long it would take for appellant's symptoms to resolve, but related that appellant's treating physician released appellant to light-duty part-time work with restrictions. Accordingly, in his supplemental report of January 24, 2000, Dr. Desai addressed each of the Office's questions with sufficient explanation.

The Board has stated that, when a physician's statements regarding an employee's ability to work consist only of a repetition of the employee's complaints that he or she hurt too much to work, without objective signs of disability being shown, the physician has not presented a medical opinion on this issue or a basis for payment of compensation.<sup>6</sup> However, in the present case, Dr. Desai stated that appellant had objective signs of disability, namely restricted range of motion, which he attributed to discogenic low back pain.<sup>7</sup> While there must be a proven basis for

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<sup>5</sup> See *Queenie Anderson*, 37 ECAB 661 (1986).

<sup>6</sup> *John L. Clark*, 32 ECAB 1618 (1981).

<sup>7</sup> The Board notes that DORLAND'S ILLUSTRATED *Medical Dictionary* (25<sup>th</sup> ed. 1974), page 452, defines "discogenic" as a condition "caused by derangement of an intervertebral dis[c]."

the pain, pain due to an employment-related condition can be the basis for payment of compensation for disability under the Act.<sup>8</sup> Also, worsening of symptoms, including pain, can be an appropriate basis for payment of compensation for disability.<sup>9</sup> The opinion of Dr. Desai, a Board-certified orthopedic surgeon and the impartial medical specialist, was favorable to appellant as his diagnosis of discogenic low back pain was supported by objective findings of restrictive range of motion and he concluded that such discogenic pain was work related. The Office's referral to a third impartial medical specialist gives the appearance of impropriety that the Office was shopping around to secure a medical opinion that would justify the denial of appellant's recurrence claim.<sup>10</sup> Therefore, the Board finds that the Office improperly referred appellant to a third impartial medical specialist and, thus, the reports of Dr. Hate are excluded from the record.

It is noted that, in the supplemental report of January 24, 2000, Dr. Desai stated that appellant's treating physician, Dr. Lombardo cleared appellant for light duty, part time, 4 hours per day with lifting restrictions of 10 pounds with no kneeling, bending, twisting, pulling or crouching. In his earlier report of November 5, 1999, Dr. Desai opined that appellant could perform a light-duty job which did not involve lifting more than 20 pounds repetitively and never more than 50 pounds. As the type of restrictions and hours appellant can work appears to be at odds, the Office should request a clarification opinion from Dr. Desai.

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<sup>8</sup> See *Sylvia Lucas (Richard Lucas)*, 32 ECAB 1582 (1981) (The Board found that the evidence established that the employee's symptom of angina pectoris was related to factors of his employment and that the employee was entitled to compensation for the period of disability due to the angina pectoris.)

<sup>9</sup> See *Thomas N. Martinez*, 41 ECAB 1006 (1990) (The Board stated: "Even if ... only appellant's symptoms were aggravated by his employment, appellant is entitled to compensation, as it was the symptom of heel pain which necessitated treatment and use of sick leave)."

<sup>10</sup> *Lynda J. Olson*, 52 ECAB \_\_\_\_ (Docket No. 00-2085, issued July 11, 2001); *Carlton Owens*, 36 ECAB 608, 616 (1985).

The May 3, 2000 decision of the Office of Workers' Compensation Programs is hereby set aside and remanded to the Office for action consistent with this decision of the Board.

Dated, Washington, DC  
September 13, 2001

David S. Gerson  
Member

Willie T.C. Thomas  
Member

A. Peter Kanjorski  
Alternate Member