

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ROBERT D. McKENNA and U.S. POSTAL SERVICE,  
POST OFFICE, Petaluma, CA

*Docket No. 01-666; Submitted on the Record;  
Issued April 15, 2002*

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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 on and after July 13, 1994 causally related to his accepted back condition of an aggravation of preexisting spondylolisthesis.

On December 16, 1992 appellant, then a 49-year-old postal dispatcher, filed an occupational disease claim asserting that his back condition was a result of his employment activities. The Office of Workers' Compensation Programs accepted his claim for an aggravation of preexisting spondylolisthesis. Appellant eventually returned to work in a modified job as a distribution clerk and continued to work in that capacity. In July 1994, the employing establishment formally offered appellant a modified job as a distribution clerk,<sup>1</sup> which appellant accepted. Appellant retired from the employing establishment effective July 13, 1994 on disability retirement.

Appellant filed a claim for recurrence of disability beginning July 13, 1994. He asserted that he was unable to continue his limited-duty position due to the aggravation of his condition from sitting an extended period of time. Appellant subsequently filed, on November 25, 1994, a claim for wage loss during the period July 13 to November 30, 1994. By decision dated January 5, 2000, the Office denied appellant's recurrence claim and request for compensation on the grounds that the weight of the medical evidence did not establish that the disability claimed

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<sup>1</sup> The record contains two job offers for a distribution clerk. The job offer dated July 7, 1994 appears to be less restrictive in terms of limitations of what appellant can do while the July 9, 1994 job offer contains greater limitations. However, there is no specific information marking or identifying which particular restrictions go with each job offer. Although the file notes that appellant refused to sign the job offer on July 8, 1994, it is unclear from the record as to which job offer appellant accepted under protest on July 12, 1994. The Board notes that the Office utilized what it called the July 7, 1994 job offer with the more restrictive limitations in developing this claim.

from work is causally related to the accepted injury.<sup>2</sup> In a decision dated October 10, 2000 and finalized October 17, 2000, an Office hearing representative affirmed the prior decision.

The Board finds that appellant has not sustained a recurrence of total disability on or after July 13, 1994 causally related to his accepted employment injury.

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee 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 to show that he or she 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 job requirements.<sup>3</sup>

In this case, Dr. David Wren, appellant's attending Board-certified orthopedic surgeon, opined in a report dated February 19, 1999 that appellant's work-related injury never resolved and that his ongoing symptoms represent a permanent aggravation of his preexisting L5-S1 spondylolisthesis and spondylosis. Dr. Wren also opined that appellant sustained a lumbar or lumbosacral strain as part of the work injury, which is subject to flare-ups. Spinal stabilization and fusion was the ultimate recommended treatment for appellant's condition. Dr. Wren advised that appellant could do light-duty work with restrictions.

The Office referred appellant, along with a statement of accepted facts and medical records to, Dr. John Lavorgna, a Board-certified orthopedic surgeon, for examination. In a report dated June 7, 1999, Dr. Lavorgna opined that appellant's work injury was a temporary aggravation of the preexisting L5-S1 spondylolisthesis, which would have ceased within one to two years following appellant's leaving of work. He opined that appellant's ongoing symptoms were due to the natural progression of the underlying disease and that surgery was not recommended as appellant's prognosis was for a stable situation. Dr. Lavorgna further reviewed the July 7, 1994 job description and opined that appellant could perform those work activities if he is free to sit, stand and walk at will and had a 15-pound limitation on lifting, bending, stooping, pushing and pulling. In a supplemental report of June 28, 1999, he opined that appellant would have been able to work at his light-duty job since July 7, 1994, in the modified position he held from July 7 to 12, 1994, had he not chosen to voluntarily retire on July 13, 1994. Dr. Lavorgna also advised that, once appellant's work-related aggravation ceased, one to two years following appellant's retirement, appellant would have reverted back to the normal progression course of degenerative disc disease and the pathogenesis of spondylolysis and spondylolisthesis.

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<sup>2</sup> The Office further recommended that appellant's entitlement to further benefits be terminated as the weight of the medical evidence did not establish that he continued to experience residuals or require medical treatment causally related to the accepted work-related condition.

<sup>3</sup> *Albert C. Brown*, 52 ECAB \_\_\_\_ (Docket No. 98-2320, issued November 29, 2000); *Barry C. Peterson*, 52 ECAB \_\_\_\_ (Docket No. 98-2547, issued October 16, 2000).

The Office properly found that a conflict in the medical evidence existed between Drs. Wren and Lavorgna over the issue of whether appellant's light-duty work caused a temporary or permanent aggravation of the preexisting spondylolisthesis and whether additional medical treatment in terms of surgery was indicated. Section 8123(a) of the Federal Employees' Compensation Act provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.<sup>4</sup> When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.<sup>5</sup>

In a report dated December 9, 1999, Dr. Howard Sturtz, a Board-certified orthopedic surgeon selected as an impartial medical specialist, provided a history and results on examination. Dr. Sturtz stated in pertinent part:

"The patient does not continue to suffer any residuals of his work injury, which was accepted as an aggravation of his spondylolisthesis. The reason for this opinion is that he has never demonstrated any positive objective physical findings in any examination which would support such a contention.

"It is my opinion that the aggravation that occurred as a result of his work activities was temporary. In other words, his preexisting condition was not worsened in any way due to these activities. I believe that such aggravation probably ceased within six months of his leaving employment.

"He does have preexisting spondylolisthesis which might have been symptomatic or become symptomatic on its own through its natural progression.

"As to the prognosis, I believe it is favorable.... I do not believe there has been any progression of his spondylolisthesis which has remained stable since first detected in 1992.

"Finally, the job description of July 7, 1994, is that of a modified distribution clerk with duties of answering the [tele]phone, processing paperwork, filling inquiries by telephone or by mail, filing and spending two hours per week waiting on customers. It notes that the job involves alternate sitting and standing as needed, no bending or stooping, no climbing or kneeling and no lifting. It is my opinion that this patient has been continually capable of performing these activities since the date of that job offer. This opinion is based upon the history obtained, examination carried out and my thorough review of the records."

Dr. Sturtz provided a reasoned medical opinion, based on a complete background, that although appellant's preexisting condition of spondylolisthesis was temporarily aggravated by his work activities, appellant was capable of performing the job description duties of July 7,

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<sup>4</sup> *Robert W. Blaine*, 42 ECAB 474 (1991); 5 U.S.C. § 8123(a).

<sup>5</sup> *William C. Bush*, 40 ECAB 1064 (1989).

1994 prior to his retirement on July 13, 1994. It is well established that when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.<sup>6</sup> The Board finds that Dr. Sturtz's opinion is entitled to special weight and represents the weight of the evidence in this case.

In support of his claim for compensation beginning July 13, 1994, the date of his retirement, appellant submitted medical reports dated July 13 and September 8, 1994 from Dr. L.B. O'Brian, Chief, Occupational Medicine of The Permanente Medical Group, Inc., a supervisor's statement dated April 19, 1994, agency certification of reassignment and accommodation efforts in connection with disability retirement under the Civil Service Retirement System dated July 26, 1994 and a notice of personnel action effective January 13, 1995. In his July 13, 1994 report, Dr. O'Brian wrote that appellant should be placed on permanent and total disability from any postal service occupation. In his subsequent report of September 8, 1994, Dr. O'Brian stated that appellant had repeat x-rays of the lumbosacral spine on August 26, 1994 that were compared to prior films of November 19, 1993 by the chief of the radiology department. "His opinion was that there has been significant interval progression of the degenerative changes of the facet joints, especially to the right side of the lumbosacral junction. There has also been a one- to two-mm [millimeter] increase of the spondylolisthesis at the lumbosacral junction during the interval." He then quotes Dr. Gordon Manashil's report noting a one- to two-mm increase in slippage of the spondylolisthesis at the lumbosacral junction and increasing degenerative change and moderate severe change noted at the facet joints, more prominently on the right than the left." Dr. O'Brian indicated that those findings indicate progressive disease. Although he supported appellant's claim for disability retirement, he did not explain how appellant's original employment injury of December 16, 1992 caused the deterioration of appellant's condition to the point where he was unable to work. Dr. O'Brian's reports, therefore, did not address the central point of appellant's claim, that his recurrence of disability, effective the date of his retirement, was causally related to the employment injury. The reports of Dr. O'Brian have limited probative value and are insufficient to show that appellant's condition, due to the employment injury, had changed to the point that he was no longer able to perform the light-duty position offered July 7, 1994. Although Dr. Wren's February 19, 1999 report provided some support that appellant was disabled in 1994 by a combination of aggravation and exacerbation of his preexisting condition by his postal activities, as previously discussed, this report was sufficient to create a conflict with the Office's second opinion physician with regards to whether the aggravation was temporary or permanent and the opinion of the impartial medical specialist, Dr. Sturtz carries the weight of the medical opinion evidence in regard to that issue.

The additional reports submitted do not actually state that appellant was removed from his light-duty position due to a material worsening of his partially disabled condition or due to a change in his light-duty requirements. Instead these reports merely suggested that appellant was eligible for disability retirement, which was his choice. These reports, therefore, do not support appellant's recurrence claim.

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<sup>6</sup> *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

Although appellant asserts that the employing establishment withdrew its offer of light/limited duty as of July 13, 1994, there is no indication in the record to substantiate such assertion. Moreover, the factual evidence shows that the Office developed the recurrence claim based upon the July 7, 1994 job offer and the more restrictive limitations, which Dr. Sturtz indicated that appellant could perform even though appellant's preexisting condition of spondylolisthesis was temporarily aggravated by his work activities at the time. Therefore, the Board finds that appellant has failed to meet his burden of proof.

The October 17, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
April 15, 2002

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member