

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of OSCAR ANDERSON and U.S. POSTAL SERVICE,  
POST OFFICE, Oakland, CA

*Docket No. 02-235; Submitted on the Record;  
Issued October 10, 2002*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits on the grounds that he had no residuals of his accepted employment injury.

Appellant, a 33-year-old letter sorter machine clerk, filed a notice of traumatic injury on September 24, 1987 alleging that on September 22, 1987 he injured his head and neck when an elevator door closed on him. Appellant stopped work on October 22, 1987. The Office accepted appellant's claim for cervical strain and head injury on January 20, 1988. The Office entered appellant on the periodic rolls on March 28, 1988. He underwent surgery on March 23, 1993. The Office expanded appellant's claim to include herniated disc at C5-6. By decision dated August 21, 2000, the Office terminated appellant's compensation benefits finding that he had no disability or medical residuals causally related to his accepted employment injury. Appellant requested an oral hearing.

On September 22, 1988 appellant filed a second claim alleging that he developed carpal tunnel syndrome due to factors of his federal employment. By decision dated March 27, 1989, the Office denied this claim. Appellant requested an oral hearing in a letter postmarked April 24, 1989.

The Office held appellant's oral hearing on both the issues of termination and carpal tunnel syndrome on May 23, 2001. By decision dated August 15, 2001, the hearing representative affirmed the August 21, 2000 termination decision and reversed the March 27, 1989 decision, finding that appellant developed carpal tunnel syndrome of the right hand as a result of his employment duties.<sup>1</sup> The hearing representative remanded appellant's claim for wage-loss compensation due to his accepted carpal tunnel syndrome.

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<sup>1</sup> As there is no adverse decision before the Board regarding the issue of carpal tunnel syndrome, the Board will not address this issue on appeal. 20 C.F.R. § 501.2(c).

The Board finds the Office failed to meet its burden of proof to terminate appellant's compensation benefits.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.<sup>2</sup> After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.<sup>3</sup> Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.<sup>4</sup> To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition, which require further medical treatment.<sup>5</sup>

Appellant's attending physician, Dr. Allan Halden, a Board-certified orthopedic surgeon, submitted a report dated March 17, 1999 and stated that appellant was totally disabled due to near constant cervical pain with headache. Dr. Halden stated on November 23, 1999 that appellant was totally disabled due to cervical pain and right carpal tunnel syndrome. He referred appellant to Dr. James St. John, a Board-certified neurosurgeon, for surgical consideration. Dr. St. John diagnosed chronic craniocervical pain following cervical disc herniation at C5-6 and anterior cervical discectomy and fusion.

The Office referred appellant for a second opinion evaluation with Dr. Ernest A. Bates, a neurosurgeon, who noted appellant's history of injury and reviewed his medical records in his July 28, 1999 report. He stated that appellant had full range of motion of his cervical spine and that he reported tenderness with no spasm. Dr. Bates diagnosed postcervical spine surgery with chronic degenerative disc disease and attributed appellant's neck complaints to residuals of his surgically-treated herniated disc. He did not indicate that appellant could return to his date-of-injury position.

The Office also referred appellant to Dr. John Lavorgna, a Board-certified orthopedic surgeon, who provided a history of injury and performed a physical examination on April 27, 1999. He diagnosed degenerative disc disease and failed fusion at C5-6. Dr. Lavorgna concluded that appellant had no work restrictions, required no treatment and that he had no work-related conditions. He opined that appellant's accepted herniated disc and resultant surgery were not causally related to his employment injury, but instead the result of his preexisting degenerative disc disease.

Section 8123(a) of the Federal Employees' Compensation Act,<sup>6</sup> provides, "If there is disagreement between the physician making the examination for the United States and the

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<sup>2</sup> *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

<sup>3</sup> *Id.*

<sup>4</sup> *Furman G. Peake*, 41 ECAB 361, 364 (1990).

<sup>5</sup> *Id.*

<sup>6</sup> 5 U.S.C. §§ 8101-8193, 8123(a).

physician of the employee, the Secretary shall appoint a third physician who shall make an examination.” There was a conflict between appellant’s attending physicians, Drs. Halden and St. John, who opined that he was totally disabled and Drs. Bates and Lavorgna, the Office physicians, who found that appellant was capable of returning to work. The Office properly referred him to Dr. John R. Lang, a Board-certified orthopedic surgeon, to resolve the conflict of medical opinion evidence.

In a report dated April 20, 2000, Dr. Lang noted appellant’s history of injury, reviewed the medical record and performed a physical examination.<sup>7</sup> He noted that clinical examination of the cervical spine showed only limitation of rotation to the right, a voluntary test and that Spurling’s test was unremarkable. Dr. Lang further found radicular complaints positive only for localized paracervical discomfort. He diagnosed cervical degenerative disc syndrome, status post arthrodesis/discectomy with probable nonunion and right carpal tunnel syndrome. Dr. Lang stated that postoperatively appellant continued to complain of discomfort compatible with ongoing cervical degenerative disc disease and the residual from the operative intervention. Dr. Lang stated that he agreed with Drs. Lavorgna, Bates and Aubrey A. Swartz that there was ample time for healing in the year following the incident and that surgery as performed five years later was for the developing/evolving condition of chronic cervical degenerative disc disease. Dr. Lang opined that appellant could perform his date-of-injury position despite his subjective complaints except for the condition of carpal tunnel syndrome. He stated that appellant did not require further treatment for his cervical condition.<sup>8</sup>

In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.<sup>9</sup> Dr. Lang stated that he believed that appellant could perform his date-of-injury position without restrictions due to his 1987 employment injury. However, the Board finds that this report is not sufficiently rationalized

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<sup>7</sup> The Board notes that appellant’s attorney alleged at the oral hearing that it was inappropriate to allow Dr. Lang to review an edited video surveillance tape made as part of an investigative report by the employing establishment in reaching his findings. The Board has allowed physicians to review videotapes in evaluating an appellant’s actual physical abilities. *Kathleen McKinnon*, Docket No. 00-2797 (issued April 26, 2002); *Armengol Beltram*, Docket No. 00-878 (issued February 25, 2002); *James E. Hudson*, Docket No. 01-858 (issued February 13, 2002); *George Zupko*, Docket No. 00-1107 (issued December 14, 2001). Appellant has not submitted evidence that the videotape improperly represents his activities such that it was inappropriate for Dr. Lang to rely upon it in reaching his decision.

<sup>8</sup> Appellant’s attorney alleged that it was inappropriate for the Office to refer appellant for additional medical opinions following the initial impartial medical examination in 1997 by Dr. John M. Knight, a Board-certified orthopedic surgeon, who diagnosed degenerative disc disease and postconcussive syndrome. He opined that appellant’s conditions were due to his 1987 employment injury and recommended additional medical treatment including possible refusion of C5-6. In 1999 the Office continued to develop the medical evidence to determine if the employing establishment had offered appellant a suitable work position under section 8106(c) of the Act. 5 U.S.C. §§ 8101-8193, 8106(c). The Board has found that, in order to determine if a position is suitable, the Office must base the decision on contemporaneous medical evidence. *Martha A. McConnell*, 50 ECAB 129, 131-32 (1998). Therefore, it was appropriate for the Office to insure that the medical opinion evidence was current prior to issuing a decision.

<sup>9</sup> *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

regarding the issue of any restrictions and residuals of appellant's cervical spine surgeries to be accorded special weight.

Dr. Lang indicated that he did not believe that appellant's cervical disc herniation was due to his employment injury. He stated that there was "ample time for healing in the year following the incident and that surgery as performed five years later was for the developing/evolving condition of chronic cervical degenerative disc disease." Dr. Lang, therefore, concluded that appellant's surgeries were due to his degenerative disc disease and not to his accepted 1987 employment injury despite the fact that the cervical herniation and resultant surgeries were accepted as employment related by the Office. He noted that degenerative disc disease was not an accepted condition and stated, "Postoperatively, the patient has continued to complain of level of cervical/paracervical and trapezial discomfort compatible with ongoing cervical degenerative disc disease and the residuals from the operative intervention." Dr. Lang noted that the surgeries were not successful, resulting in a "probable nonunion."

Dr. Lang concluded that appellant did not require further treatment for his cervical degenerative disc disease. He further noted that while appellant alleged subjective complaints, which appellant felt prevented him from performing his date-of-injury position, Dr. Lang felt that appellant could perform the modified position without concern and that the factual evidence submitted indicated that appellant could perhaps perform his date-of-injury position despite his subjective complaints.

As the Office authorized the surgeries for herniated cervical disc at C5-6, which according to Dr. Lang, resulted in a probable nonunion of the spine at that location as well as unidentified residuals, any condition or disability that appellant has as a result of the surgeries is employment related. It is not clear from Dr. Lang's report that he considered appellant's "probable nonunion" of the cervical spine and "residuals from the operative intervention" as accepted conditions and that he considered these conditions and any resultant disability in determining whether appellant was capable of returning to his date-of-injury position with no restrictions and in finding that he had no residuals from his 1987 employment injury.

As Dr. Lang did not provide medical reasoning addressing his conclusion of a lack of residuals and explaining why appellant did not need further treatment given the diagnosis of a probable nonunion of the cervical spine and the finding of residuals compatible with the operative intervention in his report, the Board finds that this report is insufficient to meet the Office's burden of proof to terminate appellant's compensation benefits. The August 15, 2001 decision of the hearing representative must be reversed regarding the termination of appellant's compensation benefits due to his August 1987 employment injury.

The August 15, 1997 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC  
October 10, 2002

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member