

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of WILLIAM T. ROBINSON and U.S. POSTAL SERVICE,  
POST OFFICE, Savannah, GA

*Docket No. 03-253; Submitted on the Record;  
Issued October 3, 2003*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,  
A. PETER KANJORSKI

The issue is whether appellant established that he sustained a recurrence of disability on February 11, 2000 causally related to his accepted work injury.

On March 1, 1994 appellant, then a 41-year-old rural carrier, filed a notice of traumatic injury alleging that, on January 29, 1994, he hurt his back when he picked up a parcel in the performance of duty. The Office of Workers' Compensation Programs accepted the claim for a lumbar strain. Appellant underwent a partial hemilaminectomy at L4-5 performed by Dr. Ben N. Estes, a Board-certified neurosurgeon, on March 4, 1994. He returned to his regular duties effective January 1995. Appellant stopped working on November 23, 1996. On December 2, 1996 he filed a notice of occupational disease, alleging a recurrent herniated disc, which was also accepted by the Office. Appellant underwent a repeat partial laminectomy at L4-5 on February 12, 1997. He received compensation for total disability from November 23, 1996 until August 11, 1998, when he returned to part-time duty in a modified position as a distribution clerk for four hours per day.

In order to ascertain appellant's capacity for work, the Office referred appellant for a second opinion evaluation with Dr. Gary Loveless, a Board-certified orthopedic surgeon. In a report dated November 2, 1999, Dr. Loveless noted that appellant had objective findings of neuritis and positive straight leg raising on physical examination with marked lumbar limitation of motion. He opined that appellant should continue with his part-time work restrictions and recommended that he be seen by a pain management specialist. Dr. Loveless noted that it remained a possibility that, with an intensive work hardening program, appellant could return to full-time work but felt that this was unlikely, given that appellant was convinced that he could not perform the work.

Appellant stopped work again and filed a claim alleging a recurrence of disability beginning February 11, 2000. In letters dated February 17 and March 30, 2000, the Office advised appellant that the medical evidence in the case file was insufficient to establish his claim for compensation based on a recurrence of disability. He was told to submit a reasoned medical

report addressing his disability for work on or after February 11, 2000. In the meanwhile, appellant was approved for pain management and began receiving epidural injections under the direction of Dr. Russell L. Stephens, a Board-certified anesthesiologist.

The record indicates that after appellant stopped work he sought treatment with Dr. James Mobley because Dr. Estes was out on medical leave. In a treatment note dated March 8, 2000, Dr. Mobley stated that appellant complained of back pain radiating to his legs. Physical findings were reported and appellant was prescribed a pain patch. Dr. Mobley indicated that appellant would be seen in one month. By report dated May 30, 2000, Dr. Estes indicated that appellant had been seen on May 26, 2000. He wrote, "I do not think [appellant] is able to work as of today and I am not sure he will be able to work after the steroids." Dr. Estes noted his agreement with Dr. Stephens long-term pain management plan, and on July 25, 2000, reported that steroid injections were not helping appellant's bilateral leg pain. He stated his doubt whether appellant would be able to return to gainful employment.

In an August 22, 2000 letter, the Office referred appellant for a second opinion evaluation with Dr. Frederick Mathew Laun, a Board-certified orthopedic surgeon. In his report dated September 6, 2000, Dr. Laun stated that appellant's ongoing back pain was due to his surgical procedures and was recognized as secondary to his work-related back condition. He opined that appellant should maintain light duty but felt that he was capable of working eight hours per day.

In a decision dated October 17, 2000, the Office denied compensation on the grounds that the medical evidence was insufficient to establish a worsening of appellant's medical condition such that he was disabled for work on or after February 11, 2000 as a result of his accepted work injury. Appellant subsequently requested an oral hearing, contesting the Office decision.

On November 2, 2000 the employing establishment offered appellant a position as a full-time modified distribution clerk with the same physical requirements he had been previously working under prior to February 10, 2000.

Appellant accepted the job and returned to work on December 27, 2000. He stopped work again on January 5, 2001, complaining of increased back pain and leg numbness. On February 6, 2001 appellant filed a claim for a recurrence of disability beginning January 5, 2001. In a March 5, 2001 letter, the Office advised appellant that he needed to submit a medical opinion explaining how his disability on or after January 5, 2001 was causally related to his work injury of January 29, 1994.

On October 31, 2000 appellant requested a hearing that was held on May 31, 2001. In a decision dated October 5, 2001, an Office hearing representative vacated the Office's October 17, 2000 decision, finding that there was an unresolved conflict in the medical record. Thus, the case was remanded for further medical development as to whether or not appellant established a recurrence of disability on or after February 11, 2000.

The Office subsequently referred appellant, along with a copy of the medical record and a statement of accepted facts, to Dr. Robert T. Greenfield, a Board-certified orthopedic surgeon for an impartial medical evaluation. In a report dated December 26, 2001, Dr. Greenfield reviewed magnetic resonance imaging (MRI) scan reports and recorded physical findings. He noted that

some of appellant's subjective complaints were consistent with the objective findings, while some were not. He opined that appellant's complaints of upper extremity paresthesias and neck discomfort were not consistent with a lumbar disc herniation and could be attributable to cervical disc disease. Dr. Greenfield reviewed the physical demands of appellant's job as a modified distribution clerk, finding appellant capable of working six hours per day in that position. He stated, "In my opinion, [appellant] was capable of continuing his light-duty part-time position when he stopped working on February 10, 2000. This point has been based on [appellant's] subjective presentation as opposed to any objective evidence that would result in this period of disability. There is no objective evidence that, during this time, the injury-related condition worsened." Dr. Greenfield indicated that appellant's work restrictions were due to his accepted work injuries. He recommended that appellant undertake an exercise program and prescribed anti-inflammatory medication as opposed to narcotic analgesics. The prognosis was noted as being poor until such time as appellant became an active participant in his recovery.

In a February 20, 2002 decision, the Office determined that appellant's work duties did not result in a recurrence of disability for work on or after February 10, 2000; therefore, the Office denied compensation. However, the Office advised appellant by letter dated March 14, 2002, that his claim was accepted for recurrence of disability beginning January 5, 2001, based on the opinion of the impartial medical specialist. The Office notified appellant that, since Dr. Greenfield found him capable of working six hours per day, he would receive a new job offer from the employing establishment based on his work capabilities.

Appellant subsequently submitted a March 26, 2002 office note from Dr. Estes, wherein the physician opined that appellant needed additional fusion surgery for treatment of his chronic low back and bilateral leg pain. He opined that appellant was at maximum medical improvement until he had surgery and was no longer able to hold down a job of any sort due to his chronic pain syndrome.

On March 26, 2002 the employing establishment offered appellant a job as a part-time modified distribution clerk working six hours per day within the work restrictions provided by Dr. Greenfield. Appellant rejected the position on April 8, 2002.

Appellant filed a reconsideration request on May 31, 2002 and submitted the following evidence: (1) a May 2, 2002 letter from Dr. Estes estimating appellant's chance of getting back to gainful employment as 40 percent; (2) a copy of appellant's surgical discharge summary for the 1997 partial hemilaminectomy; (3) an April 12, 2002 report from Dr. Wayne D. Beveridge, a Board-certified neurologist, who recommended that appellant undergo a surgical fusion to relieve his moderate degree of ongoing nerve pain; (4) a May 3, 2000 report from Dr. Stephens detailing appellant's treatment plan and advising Dr. Estes that appellant would undergo two additional epidural steroid injections; and (5) an attending physician's report dated January 29, 2001 signed by Dr. Estes, wherein the physician diagnosed a recurrent herniated disc that he attributed to appellant's prior work injury of January 29, 1994.

The record before the Office at the time of appellant's reconsideration request also included office notes dated January 29 and July 9, 2002 from Dr. Estes, reporting that there had been no change in appellant's symptoms. Dr. Estes noted that appellant did not wish to undergo any further back surgery to correct his recurrent herniated disc at L4-5.

In a decision dated July 30, 2002, the Office denied modification of its prior decision.

The Board finds that appellant has not met his burden of proof to establish that he sustained a recurrence of disability on February 11, 2000.

Where 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>1</sup>

Section 8123(a) of the Federal Employees' Compensation Act provides that, 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>2</sup> 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>3</sup>

In this case, although appellant alleges that he sustained a recurrence of disability for work due to his accepted herniated disc condition beginning February 11, 2000, he did not submit any reasoned medical opinion evidence to show either a change in the nature and extent of work injury or a change in the nature and extent of his modified light-duty position such that he was unable to work on February 11, 2000.

In accordance with section 8123(a), the Office sent appellant for an impartial medical evaluation with Dr. Greenfield, who provided a well-reasoned opinion, based on an accurate medical and factual history, that appellant did not sustain a recurrence of disability on or after February 10, 2000 causally related to his accepted work injury. Dr. Greenfield reviewed the MRI scan findings and still felt that appellant was capable of working the four-hour per day light-duty job he had been assigned on February 11, 2000. Because Dr. Greenfield's opinion is sufficiently well rationalized and based on a proper factual and medical background, the Board finds that it must be given special weight.<sup>4</sup>

The Board also notes that appellant's evidence on reconsideration does not dispel from the weight properly assigned Dr. Greenfield's opinion. The report from Dr. Beveridge does not address the issue of the February 11, 2000 recurrence of disability. Additional reports from Dr. Estes, including his January 29, 2002 report, are repetitive of his prior opinion which created

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<sup>1</sup> *Mary A. Wright*, 48 ECAB 240 (1996); *Terry R. Hedman*, 38 ECAB 222 (1986).

<sup>2</sup> *See* 5 U.S.C. § 8123(a); *Wen Ling Chang*, 48 ECAB 272 (1997).

<sup>3</sup> *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001).

<sup>4</sup> *Id.*

the conflict and therefore cannot serve to create a new conflict.<sup>5</sup> Because Dr. Greenfield, as the impartial medical specialist, provided a reasoned opinion establish that appellant did not sustain a recurrence of disability on February 11, 2000, the Office properly denied compensation.

The decision of the Office of Workers' Compensation Programs dated July 30, 2002 is hereby affirmed.

Dated, Washington, DC  
October 3, 2003

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>5</sup> See *Barbara J. Warren*, 51 ECAB 413 (2000).