

**United States Department of Labor
Employees' Compensation Appeals Board**

JAMES L. SULLIVAN, III, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Miami, FL, Employer**

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**Docket No. 04-1575
Issued: December 28, 2004**

Appearances:
Stanley M. Roseberg, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On June 2, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated July 24, 2003, finding that he had no residuals of his May 4, 1970 employment injury after January 27, 2001. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant had residuals of his May 4, 1970 employment injury after January 27, 2001.

FACTUAL HISTORY

On May 8, 1970 appellant, then a 35-year-old mail handler, filed a traumatic injury claim alleging that he sustained a back injury while attempting to turn a dolly around as he was lifting a battery at work on May 4, 1970. The Office accepted that he sustained a back strain and discogenic lumbar disease. Appellant intermittently stopped work or worked in part-time positions for the employing establishment and received compensation for partial and total

disability.¹ In August 1989, he began working in a part-time position as a mail processing equipment mechanic.²

Appellant received treatment over an extended period from Dr. Lloyd A. Moriber, an attending Board-certified orthopedic surgeon. In numerous reports, dated in mid 2000, he detailed treatment of appellant's back condition. During this period, appellant participated in a physical therapy program. In a report dated June 7, 2000, Dr. Moriber stated that appellant had significant left paralumbar spasm and that he was unable to completely extend his back. In reports dated June 14 and 28, 2000, he noted that appellant experienced significant improvement in his back condition after therapy treatments. In a report dated August 2, 2000, Dr. Moriber stated that appellant was much improved with therapy although he still had pain in his neck and back.

In July 2000, the Office referred appellant to Dr. Georges Boutin, a Board-certified orthopedic surgeon, for an examination and opinion regarding whether he continued to have residuals of his May 4, 1970 employment injury.

In a report dated August 9, 2000, Dr. Boutin detailed appellant's factual history and reported the findings of the examination conducted on that date. He noted that appellant reported pain in the neck, shoulder, back and extremities and indicated that he exhibited surprisingly good range of motion upon flexion, extension and rotation. Dr. Boutin stated that the findings of x-ray testing revealed a small spur at L4 with no significant loss of intervertebral space and mild degenerative changes of the thoracic spine. He indicated that there were no significant objective findings to corroborate the persistence of symptoms related to the accepted employment injury.³ Dr. Boutin noted that physical therapy three times a week was not indicated and stated:

“In reviewing the x-rays of the lumbar spine, there are very few signs of degenerative arthritis and these signs would certainly be comparable with the patient's age. However, I feel in all fairness an MRI [magnetic resonance imaging] [scan] of the lumbar spine is indicated to compare with previous examination. We will schedule this accordingly and finalize the report accompanied by the OWCP-5c form at a later date.”

¹ On July 25, 1993 appellant was deleted from the periodic disability compensation rolls because he elected to receive the Office of Personnel Management (OPM) retirement benefits; he continued to receive medical benefits compensation from the Office. He later elected to receive Office disability compensation and medical benefits over OPM benefits.

² In several decisions, the Office rescinded its acceptance of appellant's claim for total disability due to his May 4, 1970 employment injury for the period June 21 to November 2, 1990 and determined that he was entitled to only partial disability compensation after November 2, 1990. By decision dated June 12, 1995, the Board reversed these Office decisions and directed the Office to pay appropriate compensation. Docket No. 93-2415 (issued June 12, 1995).

³ Dr. Boutin provided a diagnosis of “lumbar sprain” but it does not appear that he felt this was a current diagnosis.

The results of an MRI scan of appellant's lumbar spine, obtained on August 21, 2000 revealed mild bulging at L3-4 and minimal bulging at L5-S1 without focal disc herniation, stenosis of the spinal canal, lateral recess or neural foramina. In an undated report received by the Office on September 20, 2000, Dr. Boutin reported the findings of the August 21, 2000 MRI scan and stated that appellant did not have any residuals of his May 4, 1970 employment injury. In an OWCP-5c form dated September 11, 2000, he noted that appellant could work eight hours per day without restrictions.

Dr. Moriber continued to produce brief reports detailing appellant's condition. In a report dated September 13, 2000, he indicated that appellant's treatment was "not holding him" and he prescribed medication for his pain. In a report dated October 25, 2000, Dr. Moriber noted that appellant was doing well with his therapy. In a report dated November 15, 2000, he stated that his condition had significantly improved and his therapy would be discontinued. He recommended that appellant continue with medication and home exercises.⁴

By decision dated January 4, 2001, the Office terminated appellant's compensation effective January 27, 2001, on the grounds that he had no residuals of his May 4, 1970 employment injury after that date. The Office determined that the weight of the medical evidence rested with the opinion of Dr. Boutin.

In January 2001, appellant requested a hearing before an Office hearing representative.⁵ He submitted additional medical evidence, including a January 17, 2001 report in which Dr. Moriber indicated that his symptoms had significantly worsened and included lumbar spasms, pain and limitation of motion. The findings of an MRI scan obtained on April 26, 2001 contained an impression of foraminal disc herniation at L2-3 and L3-4, mild posterior bulging at L4-5 and partial sacralization at L5. Appellant also submitted a report of an MRI scan obtained on May 18, 2001 which showed similar findings. In a letter dated October 3, 2001, Dr. Moriber stated that appellant's back condition was directly related to his March 21, 1966 and May 4, 1970 employment injuries.⁶

On November 28, 2001 a hearing was held before an Office hearing representative and, by decision dated and finalized February 21, 2002, the hearing representative affirmed the Office's January 4, 2001 decision.

Appellant appealed his case to the Board and, by order dated April 24, 2003, the Board remanded the case to the Office for proper assemblage of the case record and a *de novo* decision

⁴ In a report dated November 29, 2000, Dr. Moriber indicated that appellant still reported considerable pain.

⁵ Appellant filed an appeal with the Board shortly after he requested a hearing before an Office hearing representative. By order dated June 5, 2001, the Board dismissed the appeal as the Office and Board may not have concurrent jurisdiction on an identical issue in a claim. Docket No. 01-824 (issued June 5, 2001).

⁶ Dr. Moriber inadvertently listed the date of injury as March 12, 1966 rather than the correct date of March 21, 1966.

to preserve his appeal rights.⁷ The Board noted that the February 21, 2002 decision of the Office hearing representative was missing from the record.

On July 24, 2003 the Office hearing representative used a new decision.

LEGAL PRECEDENT

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.⁸ The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁹ After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, he must establish by the weight of the reliable, probative and substantial evidence that he had an employment-related disability which continued after termination of compensation benefits.¹⁰

ANALYSIS

The Board finds that the Office properly terminated appellant's compensation effective January 27, 2001, by determining the weight of the medical evidence regarding his continuing employment-related residuals was represented by the thorough, well-rationalized opinion of Dr. Boutin, the Board-certified orthopedic surgeon, who served as an Office referral physician. The opinion of Dr. Boutin established that appellant had no residuals of his May 4, 1970 employment injury after January 27, 2001.

In his report dated August 9, 2000, Dr. Boutin detailed appellant's factual history and reported the findings on examination and diagnostic testing. He indicated that appellant had good range of back motion and posited that the limited degenerative changes of his lumbar spine were due to his age rather than the May 4, 1970 employment injury, back strain and discogenic lumbar disease. Dr. Boutin concluded that there were no significant objective findings to corroborate the persistence of symptoms related to the accepted employment condition.¹¹ He noted that "in all fairness" it would be prudent to obtain an MRI scan and after obtaining such testing on August 21, 2000 he produced a supplemental report. In this undated report received by the Office on September 20, 2000, Dr. Boutin reported the findings of the August 21, 2000 MRI scan and stated that appellant did not have any residuals of his May 4, 1970 employment

⁷ Docket No. 02-1001 (issued April 24, 2003). By order dated September 26, 2002, the Board dismissed an appeal that duplicated Docket No. 02-1001. Docket No. 02-1155 (issued September 26, 2002).

⁸ *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

⁹ *Id.*

¹⁰ *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

¹¹ Dr. Boutin also indicated that appellant did not have any residuals of his March 21, 1966 employment injury, a back strain. He provided a diagnosis of "lumbar sprain," but it does not appear that he felt this was a current diagnosis.

injury.¹² In a form report dated September 11, 2000, he stated that appellant could work eight hours per day without restrictions.

The Board has carefully reviewed the opinion of Dr. Boutin and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. His opinion is based on a proper factual and medical history in that he had the benefit of an accurate and up-to-date statement of accepted facts, provided a thorough factual and medical history and accurately summarized the relevant medical evidence.¹³ Dr. Boutin provided medical rationale for his opinion by explaining that appellant's limited objective findings on examination and diagnostic testing showed that his May 4, 1970 employment injury had resolved. He explained that the limited findings of x-rays and MRI scans of the lumbar spine supported this conclusion. Dr. Boutin accounted for appellant's continuing back problems by noting that these were due to the natural progression of his degenerative disc disease rather than an employment-related condition.

Appellant submitted reports of Dr. Moriber, an attending Board-certified orthopedic surgeon, which were produced around the time of Dr. Boutin's evaluation. The reports variously indicated that his back symptoms had either worsened or improved.¹⁴ These reports, however, are of limited probative value on the relevant issue of the present case in that they do not contain an opinion on causal relationship.¹⁵ Dr. Moriber did not provide any indication that appellant had residuals of an employment-related condition.

After the Office's January 4, 2001 decision terminating appellant's compensation effective January 27, 2001, he submitted additional medical evidence which he felt showed that he was entitled to compensation after January 27, 2001, due to residuals of his May 4, 1970 employment injury. Given that the Board has found that the Office properly relied on the opinion of the Office referral physician, Dr. Boutin, in terminating appellant's compensation effective January 27, 2001, the burden shifts to appellant to establish that he is entitled to compensation after that date. The Board has reviewed the additional evidence submitted by appellant and notes that it is not of sufficient probative value to establish that he had residuals of his May 4, 1970 employment injury after January 27, 2001.

Appellant submitted a January 17, 2001 report, in which Dr. Moriber indicated that his symptoms had significantly worsened and included lumbar spasms, pain and limitation of

¹² The record contains a copy of the findings which reveals mild bulging at L3-4 and minimal bulging at L5-S1 without focal disc herniation, stenosis of the spinal canal, lateral recess or neural foramina.

¹³ See *Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

¹⁴ For example, in a report dated June 7, 2000, Dr. Moriber stated that appellant had significant left paralumbar spasm and that he was unable to completely extend his back. In a report dated August 2, 2000, he noted that appellant was much improved with therapy, although he still had pain in his neck and back. In a report dated November 15, 2000, he stated that appellant's condition had significantly improved and his therapy would be discontinued.

¹⁵ See *Charles H. Tomaszewski*, 39 ECAB 461, 467-68 (1988) (finding that medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

motion. He also submitted the findings of an MRI scan obtained in April 26 and May 18, 2001 which suggested that appellant had bulging or herniated lumbar discs. However, these reports contained no opinion that the reported findings were due to an employment-related condition. In a letter dated October 3, 2001, Dr. Moriber stated that appellant's back condition was directly related to his March 21, 1966 and May 4, 1970 employment injuries. This report, however, is of limited probative value on the relevant issue of the present case in that Dr. Moriber did not provide any medical rationale in support of his conclusion on causal relationship.¹⁶ He did not provide any description of the employment injuries or explain how that could have produced residuals for such an extended period. For these reasons, the Office properly determined, in its July 24, 2003 decision, that appellant did not have residuals of his May 4, 1970 employment injury after January 27, 2001.¹⁷

CONCLUSION

The Board finds that appellant did not have residuals of his May 4, 1970 employment injury after January 27, 2001.

¹⁶ See *Leon Harris Ford*, 31 ECAB 514, 518 (1980) (finding that a medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship which is unsupported by medical rationale).

¹⁷ On appeal appellant argued that the Office should not have produced its July 24, 2003 decision after the Board issued its April 24, 2003 order. However, the Board notes that the Office acted appropriately in response to the Board's order.

ORDER

IT IS HEREBY ORDERED THAT the July 24, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 28, 2004
Washington, DC

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member