

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

LARRY MARCUM, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Columbus, OH, Employer**

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**Docket No. 04-1528
Issued: November 15, 2004**

Appearances:
Larry Marcum, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On May 24, 2004 appellant filed a timely appeal from the October 8, 2003 merit decision of the Office of Workers' Compensation Programs, which terminated his compensation benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this decision, together with the Office's April 29, 2004 decision denying modification.

ISSUE

The issue is whether the Office properly terminated appellant's compensation benefits.

FACTUAL HISTORY

On May 19, 2002 appellant, then a 41-year-old distribution clerk, filed a claim alleging that his lumbosacral sprain and strain was a result of his federal employment. The Office accepted his claim for the condition of lumbosacral sprain/strain and paid compensation.

On June 4, 2003 appellant's physician, Dr. Charles J. Kistler, Jr., a specialist in family medicine, reported that he had treated appellant's low back injury for a significant period of time:

"He has had significant problems with his lumbar sprain with radicular symptoms and he has been refractory to analgesic, muscle relaxant, and nonsteroidal anti-inflammatories. It appears that the strain has not resolved because the patient has developed dis[c] dehydration and anterior disc bulge at L4-L5 and dis[c] degenerations."

The Office sought a second opinion. On July 17, 2003 Dr. E. Gregory Fisher, a Board-certified orthopedic surgeon, reported no objective evidence to show that the work-related condition of lumbosacral strain was still active:

"The symptoms he is presently having over the low back is due to the degenerative disc disease and degenerative arthritis over the lumbar area noted on x-rays and MRI [magnetic resonance imaging]. He does not exhibit any muscle spasm or muscle guarding about the low back area. He strictly has restriction in range of motion of the back due to stiffness and pain over the back area. He does not show any objective signs or symptoms of the strain lumbosacral from the accident of May 7, 2002."

Dr. Fisher reported that appellant was unable to perform his date-of-injury job but that his restrictions were due to chronic pain and restricted back motion due to obesity, degenerative disc disease and arthritis over the lumbar area "and not due to the allowed condition in this claim of a lumbosacral strain."

On September 3, 2003 the Office issued a notice of proposed termination of compensation and medical benefits. The Office found that Dr. Fisher's opinion represented the weight of the medical evidence and established that residuals of the accepted employment injury had ceased.

On September 19, 2003 Dr. Kistler advised the Office that he disagreed with Dr. Fisher's conclusion and medical rationale:

"I am submitting this narrative report at the request of [appellant] to correct some of the wrongfully interpreted findings of the claims examiner and Dr. E. Gregory Fisher who evaluated [appellant].

"I have previously sent correspondence noting that [appellant] remains unable to work his current job at the U.S. Postal Service because of residuals from his May 7, 2002 sprain injury to his low back.... Accepting the allowed condition in the claim, Dr. Fisher notes that he has physical restrictions with flexion/extension and rotation in his lumbar spine on his physical examination.

"However, in your discussion of evidence, you state that Dr. Fisher opined there were no objective findings of work[-]related lumbosacral sprain that the symptoms were from nonwork[-]related degenerative dis[c] disease and

degenerative arthritis. The degenerative arthritis and degenerative dis[c] disease do not give restricted range of motion but muscle spasm and restriction does. I have found muscle spasm and muscle guarding repeatedly with [appellant] and even Dr. Fisher states that he has discomfort and pain when palpating his low back area. He also notes that [appellant] has chronic pain and decreased range of motion and again, these were wrongly interpreted, as degenerative conditions do not cause restricted range of motion. The interpretation that extreme obesity is contributing to chronic pain is nothing about the muscle spasm related to the lumbar sprain and restricted motion regarding the lumbar sprain. Dr. Fisher, as you stated, gave restrictions based on obesity due to degenerative dis[c] disease and arthritis that are not allowances in this claim and not on [appellant's] lumbosacral strain.

“He totally misinterpreted that the functional capacity evaluation stating that the patient could work eight hours a day with restrictions....

“In my medical report, it was stated that I did not support my opinion with objective findings or medical reasoning. I have repeatedly issued the ranges of motion, documented the muscle spasm, palpatory findings on his examinations and have stated that he does, in fact, have work[-]related strain. Again, I was misinterpreted, I did comment that [appellant] can perform sedentary work eight hours a day....

“In reference to his medication was [sic] not for the fact that for the muscle spasm he needed muscle relaxants and pain medicine and this often times made him weak and tired. I repeatedly have stated that [appellant's] objective symptoms in his lumbar strain are still active and that the dis[c] dehydration and bulging dis[c] and dis[c] degeneration are affecting his recovery. I do not disagree with the [functional capacity evaluation], which states that he can work 2.6 hours a day and Dr. Fisher misinterpreted this.

“Thus, it is my medical opinion, based on reasonable medical certainty and probability documented by functional capacity evaluation and physical evaluation, that [appellant] still remains unable to return to his job at the post office that he was doing prior to this injury.”

In a decision dated October 8, 2003, the Office terminated appellant's compensation benefits effective that date. The Office found that Dr. Kistler's September 16, 2003 report had little probative value. The Office could find no recent report or note from Dr. Kistler noting any muscle spasms or guarding. Progress notes from May 21 and July 30, 2003, the Office observed, indicated low back complaints but had unreadable objective findings.

In a decision dated April 29, 2004, the Office reviewed the merits of appellant's claim and denied modification of its prior decision.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.¹ 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.²

ANALYSIS

The Office terminated appellant's compensation benefits based on the opinion given by Dr. Fisher, the Office referral physician, who found no objective evidence that appellant's work-related lumbosacral strain was still active. Appellant's symptoms and restrictions, he reasoned, were due to obesity, degenerative disc disease and arthritis over the lumbar area, not to the accepted lumbosacral strain. Dr. Kistler, appellant's attending physician, explicitly disagreed. He reported that appellant continued to suffer disabling residuals of his work-related lumbosacral sprain/strain. Dr. Kistler noted that objective symptoms of lumbar strain were still active. He took issue with Dr. Fisher's interpretation of findings, pointing out that degenerative arthritis and degenerative disc disease do not cause restricted range of motion.

The Board finds a clear conflict in medical opinion between appellant's physician and the Office referral physician. Dr. Kistler's May 21 and July 30, 2003 treatment notes do show positive objective findings on examination of the low back both before and after Dr. Fisher's July 17, 2003 examination. Although the findings are difficult to read, they buttress Dr. Kistler's contention that he repeatedly reported positive findings on examination. Further, Dr. Kistler's opinion is sufficiently well reasoned that any deficiency that can be attributed to his specialty in family medicine, as compared to Dr. Fisher's specialty in orthopedic surgery, is not dispositive. The conflict stands.

The Office did not meet its burden of proof to justify the termination of appellant's compensation benefits because a conflict in medical opinion existed when the Office issued its October 8, 2003 final decision. As this conflict remains unresolved, the Board will reverse the Office's October 8, 2003 decision terminating benefits and the April 29, 2004 decision denying modification.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to justify the termination appellant's compensation benefits. A conflict in medical opinion exists between appellant's physician and the Office referral physician on whether appellant continues to suffer disabling residuals of her accepted lumbosacral sprain/strain.

¹ *Harold S. McGough*, 36 ECAB 332 (1984).

² *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

ORDER

IT IS HEREBY ORDERED THAT the April 29, 2004 and October 8, 2003 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: November 15, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member