



After initially denying the claim, the Office advised appellant on February 9, 1998 that it accepted cervical and lumbosacral muscle strains. In a September 22, 1998 report, Dr. Carl L. Cannon, a Board-certified orthopedic surgeon, stated that a magnetic resonance imaging (MRI) scan of appellant's cervical spine showed a disc herniation with stenosis at C5-6, that a lumbar MRI scan was negative and that appellant had muscular contraction headaches. In a January 10, 2000 report, Dr. Patricia Beaver, a Board-certified orthopedic surgeon to whom the Office referred appellant for a second opinion, concluded that appellant's herniated cervical disc was related to her employment, and that her lumbar strain had resolved.

On May 24, 2000 the Office authorized a C5-6 anterior cervical discectomy and fusion for appellant's herniated disc. This surgery was performed on July 5, 2000 by Dr. Norman J. Torres, a neurosurgeon. Dr. R. Craig Saunders, a Board-certified orthopedic surgeon, set forth work tolerance limitations on May 24, 2001, based on a functional capacity evaluation done on April 19, 2001. On June 5, 2001 the employing establishment offered appellant a limited-duty position of rural carrier relief with lifting under 45 pounds, and duties of checking accuracy of change of address information, delivering express mail, and maintaining time records. Appellant returned to work on August 13, 2001 and the Office terminated her compensation. On August 26, 2002 the employing establishment offered and appellant accepted the same limited-duty position of rural carrier relief, with restrictions increased to no repetitive lifting over 15 pounds, driving less than 5 hours per day, 2 days off together each week, and a 15-minute break every 2 hours. On August 15, 2003 the Office advised appellant that it had not accepted a psychiatric condition, headaches, carpal tunnel syndrome or underlying degenerative conditions.

On August 15, 2003 the employing establishment issued appellant a notice of removal effective September 19, 2003 for unsatisfactory attendance. The notice listed 22 dates from April 28 through June 16, 2003 on which she had unscheduled absences, and noted that she was issued a letter of warning for attendance on December 30, 2002 and a 14-day suspension on March 14, 2003 for attendance. In an August 25, 2003 letter, appellant requested that her case be reopened, stating, "I have spent many days off in excruciating pain from my neck and back waking up with headaches from this and aching and hurting all over. I have been late for work many times and had to leave early many times from the pain." On September 2, 2003 appellant filed a claim for a recurrence of disability related to her September 1997 employment injury. The employing establishment reported that appellant was placed on 30 days of administrative leave from August 15, 2003 until her removal on September 19, 2003.

In a July 29, 2003 report, Dr. David Suchowiecky, a psychiatrist, diagnosed a pain disorder associated with psychological and general medical conditions. In a September 30, 2003 report, Dr. Cannon stated that appellant was seen with multiple orthopedic complaints related to her September 1997 injury, and noted that she complained of worsening cervical spine pain with bilateral upper extremity radiculopathy and worsening lumbar spine symptoms with bilateral lower extremity radiculopathy, with numbness and tingling from her buttocks to feet at times.

On October 27, 2003 the Office advised appellant of the evidence needed to establish her claim for a recurrence of disability beginning the date of her termination, namely proof that she was totally disabled due to an accepted work-related condition. Appellant submitted a November 11, 2003 report from Dr. Torres stating that she did quite well after her July 2000

surgery, but felt that she injured her lower back after she returned to work, with her symptoms beginning in January 2003 when she was required to lift stacks of magazines off the top shelf. Appellant complained of increasing low back pain with radiation into her thighs and legs to her feet, but denied problems with numbness and tingling. Dr. Torres recommended an updated lumbar MRI scan.

By decision dated December 2, 2003, the Office found that the medical evidence did not establish that she was totally disabled due to her cervical and lumbosacral strains, and that she had not established that her claimed recurrence disability beginning September 2, 2003 was due to her accepted injury.

In a December 5, 2003 report, Dr. Mark D. Barhorst, a Board-certified anesthesiologist, diagnosed low back pain, lumbar radiculitis and cervicgia. The Office authorized a lumbar MRI scan, which was done on January 26, 2004. Dr. Terri Omessi, a Board-certified diagnostic radiologist, stated that it showed, at L4-5, mildly stenosed central spinal canal and neural foramina due to hypertrophied facets and mild annular disc bulging but no focal nerve impingement; at L5-S1, neural foramina mildly stenosed by hypertrophied facets, snug but adequate for exiting L5 nerve roots; and no focal disc herniation, cord or nerve impingement. In an April 20, 2004 report, Dr. Torres stated that, based on the MRI scan findings and appellant's continued complaint of back pain radiating down both lower extremities, he recommended an L3-4 and L4-5 hemilaminectomy, medial facetectomy and foraminotomy. Dr. Torres stated that appellant had complained of low back pain with associated throbbing headaches since he first saw her on December 10, 1999, and he opined that her complaint of back pain was related to her September 1997 work injury.

On May 11, 2004 an Office medical adviser reviewed the medical evidence and concluded that it did not support the recommended surgery. On May 26, 2004 the Office referred appellant and the case record to Dr. Bernard Albina, a Board-certified orthopedic surgeon, for a second opinion on the proposed surgery. In a June 23, 2004 report, Dr. Albina stated that examination showed normal ankle and knee jerks and equal girths of the calves, and that x-rays showed minimal degenerative changes at L4-5. Dr. Albina concluded:

“The diagnosed conditions do not warrant the proposed surgical intervention. These procedures are within the realm of accepted medical practice in a situation where [there is] severe spinal stenosis both noted clinically and radiologically and [appellant] does not have clinical or radiologically findings of any severe spinal or foraminal stenosis. Patient has mild degenerative changes compatible with her age in the lumbar spine and there is no foraminal encroachment neither radiologically nor clinically. Consequently a procedure as proposed is not necessary in her clinical condition.”

By decision dated July 21, 2004, the Office denied authorization for surgery on appellant's lumbar spine.

### **LEGAL PRECEDENT -- ISSUE 1**

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>1</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant has not established that she sustained a recurrence of total disability beginning September 19, 2003.<sup>2</sup> Until that date, she was performing limited duty as a result of her September 1997 employment injury. The medical evidence contemporaneous to the time of her termination, which consists of the July 29, 2003 report from Dr. Suchowiecky, the September 30, 2003 report from Dr. Cannon, and the November 11, 2003 report from Dr. Torres, do not state that appellant was disabled for her limited-duty position. The evidence does not establish that appellant's condition changed so that she could no longer perform her limited-duty position as of September 19, 2003.

Appellant's limited duty was terminated by the employing establishment.<sup>3</sup> However, when an employee's limited duty is terminated for cause, that employee is not entitled to compensation for a recurrence of disability.<sup>4</sup> Appellant's employment was terminated for unscheduled absences. Although she contended that her absences were due to pain related to her accepted conditions, there is no medical evidence to support this contention.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8103 of the Federal Employees' Compensation Act<sup>5</sup> provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed or recommended by a qualified physician, which the Office considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation. In interpreting this section of the Act, the Board has recognized that the Office has broad discretion in approving services provided under the Act. The Office has the general objective of ensuring that an employee recovers from his

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<sup>1</sup> *Terry R. Hedman*, 38 ECAB 222 (1986).

<sup>2</sup> Although the Office's December 2, 2003 decision denied appellant's claim for a recurrence of disability beginning September 2, 2003, the date she filed that claim, the evidence shows she was on administrative leave and therefore did not lose any pay until September 19, 2003.

<sup>3</sup> *Jackie B. Wilson*, 39 ECAB 915 (1988).

<sup>4</sup> *See Albert C. Brown*, 52 ECAB 152 (2000).

<sup>5</sup> 5 U.S.C. § 8103.

injury to the fullest extent possible in the shortest amount of time. The Office therefore has broad administrative discretion in choosing means to achieve this goal. The only limitation on the Office's authority is that of reasonableness.<sup>6</sup> Section 10.310 of Title 20 of the Code of Federal Regulations provides, in relevant part: "(a) The employee is entitled to receive all medical services, appliances or supplies which a qualified physician prescribes or recommends and which [the Office] considers necessary to treat the work-related injury."

### **ANALYSIS -- ISSUE 2**

The Board finds that the Office did not abuse its discretion by refusing to authorize the lumbar spine surgery recommended by Dr. Torres. An Office medical adviser concluded that the record did not support the performance of this surgery. The Office referred appellant to Dr. Albina, a Board-certified orthopedic surgeon, who gave a rationalized medical opinion of why the proposed surgery was not warranted, explaining that such surgery was within the realm of accepted medical practice where there is severe spinal stenosis, but that clinically and on x-rays appellant had no findings of severe spinal or foraminal stenosis. This conclusion is consistent with the lumbar MRI scan done on January 26, 2004, as interpreted by Dr. Omessi, the Board-certified diagnostic radiologist who conducted this test.

### **CONCLUSION**

The Board finds that appellant has not established that she sustained a recurrence of disability beginning September 19, 2003 related to her September 1997 employment injury; and that the Office did not abuse its discretion when it refused to authorize surgery to appellant's lumbar spine.

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<sup>6</sup> *David Spearman*, 49 ECAB 445 (1998); *Francis H. Smith*, 46 ECAB 392 (1995).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 21, 2004 and December 2, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 1, 2005  
Washington, DC

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member