

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

RALPH BAKER, Appellant

and

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

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**Docket No. 04-1650
Issued: February 3, 2005**

Appearances:
Alan Shapiro, Esq., for the appellant,
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On June 17, 2004, appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated May 26, 2004, which affirmed a prior decision that terminated her compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue on appeal is whether the Office properly terminated appellant's compensation benefits effective August 13, 2003.

FACTUAL HISTORY

On June 17, 1996 appellant, then a 46-year-old letter carrier, filed a traumatic injury claim alleging that on June 17, 1996 he sustained an injury to his back when he turned and stepped to leave a mailbox. The Office accepted appellant's claim for lumbosacral

sprain/strain.¹ The Office also accepted that appellant sustained recurrences of total disability on March 3 and October 15, 1998. Appellant resigned from the employing establishment on September 6, 1999.²

In a report dated January 28, 2000, Dr. Robert F. McLain, a Board-certified orthopedic surgeon and one of appellant's treating physicians, noted symptoms consistent with discogenic back pain and referred appellant for x-rays and a magnetic resonance image (MRI) scan. A January 28, 2000 x-ray of the lumbar-spine revealed that no instability was identified during flexion and extension and there was no evidence of disc space narrowing.³

An August 18, 2000 lumbar MRI scan read by Dr. Michael Modic, a Board-certified diagnostic radiologist, revealed degenerative bulging at L5-S1 and L4-5. He also noted that the lumbar vertebral bodies demonstrated normal anatomic alignment and marrow signal intensity.

In a report of September 15, 2000, Dr. McLain stated: "I do not have a surgical procedure that is likely to help him." Dr. McLain referred appellant to Dr. Nagy Mikhail, a Board-certified in anatomic pathology and clinical pathology, for further treatment. In a January 18, 2001 report, Dr. Mikhail submitted results of a lumbar discogram⁴ and requested authorization for an intradiscal electrothermal annuloplasty (IDET) procedure at L4-5 as the discogram showed a symptomatic disc at L4-5.

On February 21, 2001 Dr. Nabil F. Angley, an Office medical adviser, determined that appellant had a work-related diagnosis of "sprain to the lumbar spine aggravating a degenerative disc disease at L4-5." Dr. Angley determined that the IDET procedure was appropriate and should be authorized. The Office authorized the IDET on February 23, 2001 which appellant underwent on April 2, 2001. The Office expanded the claim on February 23, 2001 to include the condition of aggravation of degenerative disc disease at L4-5.

On January 24, 2002 the Office referred appellant to Dr. Bernard N. Stulberg, a Board-certified orthopedic surgeon, for a second opinion examination. In a February 25, 2002 report, Dr. Stulberg indicated that appellant's injury had not fully resolved and advised that "these residuals are most likely permanent and relate primarily to guarding and paravertebral muscle spasm and intermittent mechanical back pain which can be limiting. He does not have evidence for neurologic compromise." Dr. Stulberg concluded that appellant had permanent

¹ X-rays of the lumbar spine dated June 17, 1996, which were read by Dr. George L. Gravel, a physician of unknown specialty, were normal. A December 5, 1996 lumbar MRI scan read by Dr. Douglas S. Arnson, a Board-certified diagnostic radiologist, revealed minimal bulging discs at L3-4, L4-5 and L5-S1.

² Appellant returned to work on light duty effective June 18, 1996 and to full duty on June 25, 1996. Appellant's symptoms worsened on July 31, 1996 and he was placed on various restrictions and was on and off light duty since June 17, 1998. In a May 11, 1999 letter, the employing establishment advised that appellant was on extended administrative leave, unrelated to his employment and had not worked since November 3, 1998.

³ The physician's specialty is unclear.

⁴ The Office authorized a discogram on November 14, 2000.

residuals of the 1996 injury; however, he advised that appellant was capable of working full time with restrictions.

On March 13, 2002 appellant was paid compensation for disability from February 24 to March 23, 2002.

By letters dated April 22 and 30 and May 19, 2003, the Office referred appellant for a second opinion examination with Dr. Oscar F. Sterle, a Board-certified orthopedic surgeon. In a May 30, 2003 report, Dr. Sterle noted appellant's history of injury and treatment. On examination the doctor noted findings including limited lumbosacral extension; seated and supine straight-leg raising was negative at 80 degrees. The doctor opined that the conditions of lumbosacral sprain and aggravation of degenerative lumbar disc disease had reached a treatment plateau with no residual and the degenerative process of the lumbar spine would continue with progression of restricted function and mobility to appellant's lower back. Dr. Sterle noted that appellant no longer had "residuals associated with the accepted work[-]related injury." He stated that the "condition of aggravation of appellant's preexisting degenerative lumbar disc disease will continue in the foreseeable future in spite of the conservative medical treatment." Further, he opined that the "the work[-]related condition of aggravation of degenerative lumbar disc disease is temporary in nature" and "[t]he continued symptoms and objective findings represent a natural deteriorative process and may wax and wane as time progresses." Dr. Sterle concluded that appellant was not capable of returning to work as a letter carrier. He explained that while the conditions of lumbosacral sprain and aggravation of degenerative lumbar disc disease had plateaued with no residual, the degenerative process of the lumbar spine would continue with progression of restricted function and mobility to appellant's lower back. He subsequently advised that appellant could return to work with permanent restrictions.⁵

On July 2, 2003 the Office issued a notice of proposed termination of compensation for wage loss and medical benefits, advising appellant that the weight of medical evidence showed that his work-related conditions had resolved. The Office noted that the weight of medical evidence rested with the opinion of Dr. Sterle. The Office explained that Dr. Stulberg's opinion was not sufficient to carry the weight of the medical evidence because his report did not contain a history of injury and the doctor's opinion was equivocal with respect to whether appellant had permanent residuals related to accepted conditions. The Office also noted that Dr. Stulberg did not express any opinion with respect to whether the residuals were related to the accepted conditions of lumbar sprain and aggravation of lumbar degenerative disc disease. Appellant was advised that he could submit additional medical evidence within 30 days.

In a July 9, 2003 response, appellant indicated that he disagreed with the proposal to terminate his compensation benefits and alleged that he continued to suffer from his employment injury. He also submitted office notes dated March 5, 2003, from Dr. William A. Mourad, Board-certified in internal medicine, diagnosing various conditions including hypertension, depression, heart disease, diverticulitis, shoulder arthritis and drug/alcohol dependencies.

⁵ The permanent restrictions included no more than 2 hours of sitting, walking or standing, no lifting over 25 pounds and no climbing.

By decision dated August 13, 2003, the Office terminated appellant's compensation benefits effective August 13, 2003.

By letter dated August 20, 2003, appellant through his representative, requested a hearing, which was held on April 20, 2004.⁶

By decision dated May 26, 2004, the Office hearing representative affirmed the August 13, 2003 decision.

LEGAL PRECEDENT

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.⁷ Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.⁸

ANALYSIS

The Office met its burden of proof to terminate appellant's compensation based on Dr. Sterle's opinion. Dr. Sterle conducted a thorough examination, noted appellant's history of injury and treatment and concluded that residuals of the employment injury had ceased. He provided rationale⁹ for his conclusion, explaining that the accepted conditions of lumbosacral sprain and aggravation of degenerative lumbar disc disease had reached a treatment plateau with no continuing residuals attributable to the employment injury. Dr. Sterle further noted that the degenerative process of the lumbar spine would continue and progress such that appellant would have restricted function and mobility to his lower back. Further, he differentiated between appellant's degenerative condition, which he advised would continue in the foreseeable future in spite of the conservative medical treatment and the work-related condition of aggravation of degenerative lumbar disc disease, which was temporary in nature, noting that the continued symptoms and objective findings were representative of the deteriorative process and would vary with time. Dr. Sterle indicated that appellant's inability to return to work as a letter carrier was due to his degenerative condition and not to a continuation of the accepted conditions. He opined that appellant could return to work with restrictions due to his preexisting condition. The

⁶ During the hearing appellant's representative alleged that the Office should have asked Dr. Stulberg for clarification rather than referring appellant to a new second opinion examination. He also alleged that Dr. Sterle's report was equivocal because the doctor stated that the allowed condition of aggravation of lumbar disc disease would continue in the future. In addition, he alleged that Dr. Sterle incorrectly referred to a definition of temporary aggravation.

⁷ *Curtis Hall*, 45 ECAB 316 (1994).

⁸ *Jason C. Armstrong*, 40 ECAB 907 (1989).

⁹ See *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

Board finds that the Office properly found that Dr. Sterle's opinion was a sufficient basis on which to terminate compensation.

Appellant did not submit any other medical evidence which addressed whether appellant continued to have residuals of his accepted employment injury.

The Board notes that appellant's representative alleged that the Office should have sought clarification from the first physician, Dr. Stulberg, instead of sending appellant to Dr. Sterle. However, the Office's regulation provide that an injured employee "must submit to examination by a qualified physician as often and at such times and places as the [Office] considers reasonably necessary."¹⁰ The determination of the need for an examination, the type of examination, the choice of locale and the choice of medical examiners, are matters within the province and discretion of the Office, with the only limitation on this authority of reasonableness.¹¹ In this case, the Office properly exercised its discretion to arrange for a second opinion examination with Dr. Sterle. As noted above, Dr. Sterle emphasized that the employment injury had resolved and that the only factors precluding appellant's return to work as a letter carrier were his preexisting conditions. Further, he prescribed restrictions, which could be utilized to return. Accordingly, the Office met its burden of proof to justify termination of benefits.

CONCLUSION

The Board finds that the Office met its burden of proof in terminating appellant's benefits effective August 13, 2003.

¹⁰ 20 C.F.R. § 10.320.

¹¹ *James C. Talbert*, 42 ECAB 974 (1991).

ORDER

IT IS HEREBY ORDERED THAT the May 26, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 3, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member