

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

EDWARD J. KALSKY, Appellant

and

**U.S. POSTAL SERVICE, COLESVILLE
POST OFFICE, Colesville, PA, Employer**

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**Docket No. 04-1853
Issued: January 21, 2005**

Appearances:
Jeffrey P. Zeelander, 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
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On July 16, 2004 appellant, through his attorney, filed a timely appeal of a July 13, 2004 merit decision of the Office of Workers' Compensation Programs' hearing representative which affirmed, as modified, a September 2, 2003 decision terminating his compensation benefits on the grounds that he no longer had any residuals causally related to his July 12, 2002 lumbar strain. The hearing representative also found that appellant failed to establish that his herniated disc and resultant surgery and degenerative disc disease were sustained while in the performance of duty on July 12, 2002. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation effective August 25, 2003 on the grounds that he no longer had any residuals causally related to his July 12, 2002 employment-related lumbar strain; and (2) whether appellant has established that his herniated disc and resultant surgery and degenerative disc disease were sustained while in the performance of duty.

FACTUAL HISTORY

On July 12, 2002 appellant, then a 51-year-old letter carrier, filed a traumatic injury claim alleging that he hurt his lower back on that date when he picked up a package weighing almost 60 pounds and walked about five feet. The Office accepted appellant's claim for a lumbar strain and authorized him to undergo a magnetic resonance imaging (MRI) scan.

A September 14, 2002 MRI scan report from Dr. Arleen J. Goldbacher, a radiologist, revealed moderate degenerative changes. In a medical report of the same date, Dr. Howard C. Hutt, a Board-certified radiologist, reviewed the MRI scan and found that appellant had moderate disc desiccation at L4-5 without disc space narrowing and prominent facet hypertrophy with severe stenosis and a shallow road herniation extending laterally into the right L4-5 neural foramen which would well impinge the right L4 nerve root. Dr. Hutt found a shallow herniation at L2-3 with mild impingement of the thecal sac to the left of the midline but, without stenosis and the neural foramen appeared to be normal. Further, he found a shallow broad disc bulge at L3-4 with facet hypertrophy in a canal that was at the lower limits of normal in size and a mild central disc bulge at L5-S1.

On December 2, 2002 Dr. Lewis S. Sharps, an attending Board-certified orthopedic surgeon, requested authorization to perform a discogram on the right at L4-5 and a possible percutaneous discectomy on December 5, 2002.

On December 4, 2002 the Office requested that an Office medical adviser determine whether appellant sustained a herniated disc on July 12, 2002 and whether surgery was necessary. The Office medical adviser responded that surgery was not warranted as the MRI scan revealed that appellant had multilevel degenerative disc disease with several bulges and herniations, but his medical records indicated a normal neurological examination and, thus, surgery was not an emergency. The Office medical adviser recommended a second opinion medical evaluation on the issue of whether the July 12, 2002 employment injury caused the current need for surgery.

Appellant underwent back surgery on December 5, 2002. In a letter dated December 10, 2002, the Office requested that he submit a copy of the operative report regarding his surgery.

By letter dated December 27, 2002, the Office denied authorization for appellant's back surgery. The Office advised appellant that a second opinion medical examination would be scheduled to resolve the issue of whether the July 12, 2002 employment injury resulted in the need for surgery when it received and reviewed the operative report. The Office received Dr. Sharps' December 5, 2002 operative report revealing that appellant had a herniated disc on the right at L4-5.

By letter dated February 4, 2003, the Office referred appellant together with medical records, a statement of accepted facts and questions, to Dr. Anthony W. Salem, a Board-certified orthopedic surgeon, for a second opinion medical examination. Dr. Salem submitted a March 6, 2003 medical report, which provided a history of appellant's accepted employment injury and medical treatment, his findings on physical examination and a review of appellant's medical records. He opined that appellant's herniated disc and subsequent surgery were not caused by

his accepted work injury. Dr. Salem stated that appellant had multiple levels of significant bulging discs, apophyseal hypertrophy and degenerative instability. He further stated that appellant may have strained his back and created some discomfort and complaints at the time of his injury but he was certainly not disabled by this incident. Dr. Salem indicated that appellant's multiple levels of disc disease were not related to his work injury and he did not sustain an acute disc herniation on July 12, 2002 as a result of this injury. He related that the surgery was questionably necessary and that appellant's decision to retire was not related to the employment injury. Dr. Salem stated that appellant had a significant preexisting nonindustrial disability while working before the July 12, 2002 employment injury and the surgery was performed to give appellant a reason to quit working. He noted appellant did not have any residuals of his work injury at that time based on a normal neurological examination, full motion of his spine, good strength and no atrophy. He stated that appellant's prognosis was fair and recommended that appellant stay away from drinking and smoking, lose weight, strengthen his abdominal muscles, stretch and condition himself. He concluded that appellant was not disabled as a result of the July 12, 2002 employment injury.

By letter dated March 13, 2003, the Office advised Dr. Sharps that his request for reimbursement for the December 5, 2002 surgery was denied.

In an April 7, 2003 supplemental report, Dr. Salem stated that appellant's employment-related lumbar strain should have resolved within one to two months after the incident. He assumed that the underlying degenerative disease was the reason Dr. Sharps proceeded with surgery. Dr. Salem concluded that appellant's employment injury ceased within two months of the incident and, thus, he was able to return to work as he had been working prior to the July 12, 2002 employment injury with the same back that he had after the incident. He further concluded that the July 12, 2002 employment injury did not cause appellant to be disabled or require surgery.

On April 11, 2003 appellant also filed a claim for an occupational disease alleging that on July 12, 2002 he realized that his central disc bulge/herniation at L4-5 with mild degenerative changes at L2-3 and L3-4 was caused by factors of his federal employment.¹

In a May 12, 2003 letter, the Office issued a notice of proposed termination of appellant's compensation based on Dr. Salem's March 6 and April 7, 2003 reports. The Office provided 30 days in which appellant could respond.

In a May 5, 2003 report, Dr. Sharps provided a history of treatment of appellant's back condition and the employment injury. Dr. Sharps opined that appellant sustained a direct injury to the lumbar spine region with resultant disc herniation at L4-5 secondary to his July 12, 2002 employment injury. He opined that appellant's injury prevented him from performing full-duty work and required modified duty thereafter. He indicated that the accepted employment injury directly necessitated a discogram and a percutaneous discectomy, which was performed on December 5, 2002. Dr. Sharps concluded that appellant responded excellently following his

¹ This claim was adjudicated under claim No. 03-2017759 and denied by decision dated December 10, 2003. No appeal was made from this decision and it is not before the Board on the present appeal.

back surgery and could return to modified duty as a letter carrier with certain physical restrictions as of April 2003.

The Office found a conflict in medical opinions between Dr. Sharp and Dr. Salem regarding the issue of whether the July 12, 2002 employment injury resulted in a herniated disc, which required surgery and whether appellant had any residuals of his accepted employment injury. It referred appellant, together with medical records, a statement of accepted facts and specific questions, to Dr. William H. Spellman, a Board-certified orthopedic surgeon, for an impartial medical evaluation.

In a July 3, 2003 report, Dr. Spellman provided a history of appellant's July 12, 2002 employment injury and medical treatment. On physical examination, he noted appellant's 25-year smoking history wherein he stopped smoking in 1991 after smoking 2 to 3 packs of cigarettes per day for the last 8 years. Dr. Spellman further noted:

“On inspection, the back is without scoliosis, abnormal lordosis, or list. There are barely perceptible scars from his percutaneous procedure. On bony and soft tissue palpation of the entire back, there is no tenderness or muscle spasm. The soft tissues are smooth, without areas of induration or trigger points. There is full painless range of motion of the lumbar spine. There is full painless range of motion of the hips. In the sitting position, straightleg raising is negative when sustained at 90 degrees symmetrically. In the supine position, the hamstrings become symmetrically tight at 75 degrees. Deep tendon reflexes are 2+ symmetrically in the lower extremities. Motor strength is grossly full in the lower extremities.”

* * *

“The discogram performed as part of the percutaneous discectomy nucleoplasty on December 5, 2002 does not show an annular disruption at L4-5. It would be extremely unusual for a person in this age group with a long history of smoking to have an MRI [scan] that did not show changes at least as advanced as those demonstrated on this patient's September 14, 2002 study. If the disc protrusion demonstrated on that MRI [scan] was a herniation caused by the trauma of July 12, 2002, there would have been a tear of the annulus posteriorly. This was not present.

“It is my opinion that the changes demonstrated on the MRI [scan] were present prior to the July 12, 2002 event.

“The injury [appellant] sustained on July 12, 2002 was a lumbar strain and sprain (ICD-9-CM-724.2). He did not sustain a disc herniation. This incident did not necessitate the surgery performed on December 5, 2002.

“[Appellant] has fully recovered from the events of July 12, 2002. He may return to work without restriction. It should be appreciated, however, that men in his age group and of his profile are at increased risk of back injury when doing heavy work. This risk is independent of the events of July 12, 2002.”

By decision dated September 2, 2003, the Office finalized its proposed termination of appellant's compensation effective August 25, 2003. The Office accorded special weight to Dr. Spellman's report in finding that appellant no longer had any residuals causally related to the July 12, 2002 employment injury.

After the Office's September 2, 2003 decision, the Office received a September 5, 2003 report from Dr. Sharps who reiterated his May 5, 2003 conclusion regarding the causal relationship between appellant's back condition, surgery and July 12, 2002 employment injury.

On September 18, 2003 appellant requested an oral hearing before an Office hearing representative.

On January 8, 2003 Dr. Sharps stated that appellant was doing well after his back surgery and that his July 12, 2002 employment injury resulted in the need for the surgery. The Office also received appellant's laboratory test results. The December 5, 2002 preoperative report provided a history of appellant's employment injury, findings on physical examination and a discussion with appellant regarding the risks and complications associated with the surgery.

By decision dated July 13, 2004, the Office hearing representative found that Dr. Spellman's medical opinion that appellant no longer had any residuals causally related to his July 12, 2002 employment injury was entitled to the special weight accorded an impartial medical specialist. He also found Dr. Spellman's medical opinion sufficient to establish that appellant's July 12, 2002 employment injury did not cause or contribute to his degenerative disc disease, herniated disc at L4-5 or the need for back surgery. The hearing representative affirmed as modified the Office's September 2, 2003 decision.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.² The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.³ If the Office, however, meets its burden of proof and properly terminates compensation, the burden for reinstating compensation benefits properly shifts to appellant.⁴

Section 8123 of the Federal Employees' Compensation Act provides that if there is a disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician to resolve the conflict.⁵ When a case is

² *Jason C. Armstrong*, 40 ECAB 907 (1989).

³ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁴ *See Virginia Davis-Banks*, 44 ECAB 389 (1993); *Joseph M. Campbell*, 34 ECAB 1389 (1983).

⁵ 5 U.S.C. § 8123; *see Robert D. Reynolds*, 49 ECAB 561 (1998).

referred to an impartial medical specialist for the purpose of resolving a conflict of medical evidence, the opinion of such specialist, if sufficiently well rationalized and based on a proper medical background, must be given special weight.⁶

ANALYSIS -- ISSUE 1

The Office properly determined that a conflict arose in the medical opinion evidence as to whether appellant had any continuing residuals of his July 12, 2002 employment-related lumbar strain and whether he sustained a herniated disc that required surgery and degenerative disc disease causally related to his accepted employment injury. Dr. Sharps, a treating physician, opined that appellant had residuals of his accepted employment injury and that his herniated disc, which required surgery and degenerative disc disease were causally related to the accepted employment injury. Dr. Salem, an Office referral physician, opined that appellant did not have any residuals of his July 12, 2002 lumbar strain and that his herniated disc and degenerative disc disease which necessitated surgery, were not causally related to the accepted employment injury.

The Board finds that the July 3, 2003 medical report of Dr. Spellman, an impartial medical examiner, was sufficient to terminate appellant's compensation. Dr. Spellman provided an accurate factual and medical background. He conducted a thorough medical examination and a detailed review of appellant's medical records. Dr. Spellman noted normal findings on physical examination and opined that appellant sustained only a lumbar strain on July 12, 2002. He explained that the September 14, 2002 MRI scan did not demonstrate a herniated disc at L4-5 caused by the accepted employment injury or required surgery on December 5, 2002. Dr. Spellman concluded that appellant had fully recovered from the accepted employment injury and that he could return to work with no restriction.

The Board finds that Dr. Spellman's July 3, 2003 opinion is entitled to special weight as the impartial medical specialist and establishes that appellant no longer has any residuals of his July 12, 2002 lumbar strain. Dr. Spellman's report is sufficiently well rationalized and based upon a proper factual background and as the impartial medical examiner his report is entitled to special weight.

After the Office's September 2, 2003 decision terminating appellant's compensation, the Office received additional medical evidence. Given that the Board has found that the Office properly relied on the opinion of Dr. Spellman in terminating appellant's compensation effective August 25, 2003, the burden shifts to appellant to establish that he is entitled to compensation after that date.

Dr. Sharps reiterated his opinion that appellant continued to have residuals of his July 12, 2002 employment injury and that his herniated disc and resultant surgery and degenerative disc disease were causally related to the accepted employment injury. The Board has held that reports from a treating physician who was on one side of a medical conflict that has been resolved are generally insufficient to overcome the special weight of the referee medical

⁶ See *Sherry Hunt*, 49 ECAB 467 (1998); *Wiley Richey*, 49 ECAB 166 (1997).

examiner's opinion.⁷ As Dr. Sharps was part of the original conflict, his reports are not sufficient to overcome the special weight accorded Dr. Spellman, the impartial medical examiner. Appellant has not submitted additional probative medical opinion evidence establishing that he had continuing residuals causally related to his accepted July 12, 2002 employment injury.

LEGAL PRECEDENT -- ISSUE 2

To determine whether an employee has sustained a traumatic injury the employee must submit sufficient evidence, generally in the form of medical evidence, to establish that the employment incident caused a personal injury.⁸ The medical evidence required to establish a causal relationship is rationalized medical opinion evidence.⁹ Rationalized medical opinion evidence is medical evidence, which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹⁰

ANALYSIS -- ISSUE 2

Appellant has alleged that his herniated disc, which required surgery on December 5, 2002, and degenerative disc disease resulted from the July 12, 2002 injury. The Office accepted that appellant sustained a lumbar strain. In a July 14, 2002 decision, the Office hearing representative accorded special weight to Dr. Spellman's July 3, 2003 opinion as an impartial medical examiner in finding that appellant's herniated disc, degenerative disc disease and the need for surgery were not caused by the accepted employment injury. Dr. Spellman opined that appellant did not sustain a herniated disc on July 12, 2002, based on the September 14, 2002 MRI scan, and that surgery on December 5, 2002 was not necessitated by the accepted employment injury. He explained that the changes shown on the MRI scan were present prior to appellant's July 12, 2002 lumbar strain.

Dr. Spellman's opinion is sufficiently well rationalized and based upon a proper factual background. The Board finds that it is entitled to special weight and establishes that appellant's herniated disc degenerative disc disease and the need for surgery were not caused by the July 12, 2002 employment injury.

⁷ See *Harrison Combs, Jr.*, 45 ECAB 716, 728 (1994); *Virginia Davis-Banks*, *supra* note 4; *Dorothy Sidwell*, 41 ECAB 857, 874 (1990)

⁸ *Id.*

⁹ *Michael E. Smith*, 50 ECAB 313 (1999).

¹⁰ *Gary J. Watling*, 52 ECAB 278 (2001); *Shirley A. Temple*, 48 ECAB 404 (1997).

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation effective August 25, 2002 on the grounds that he no longer had any residuals causally related to his July 12, 2002 employment injury. The Board further finds that appellant has failed to establish that his herniated disc; degenerative disc disease and surgery were due to the accepted injury.

ORDER

IT IS HEREBY ORDERED THAT the July 13, 2004 and September 2, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 21, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member