

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

PAUL CARDOZA, Appellant

and

**U.S. POSTAL SERVICE, MAIN POST OFFICE,
Fresno, CA, Employer**

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**Docket No. 04-2220
Issued: March 11, 2005**

Appearances:
Steven F. Brown, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On September 10, 2004 appellant, through his attorney, filed a timely appeal from the March 17, 2004 merit decision of the Office of Workers' Compensation Programs, terminating his compensation benefits effective that date on the grounds that he no longer had any residuals or disability causally related to his April 22, 2003 employment injuries. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this termination case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation benefits effective March 17, 2004 on the grounds that he no longer had any residuals or disability causally related to his April 22, 2003 employment injuries.

FACTUAL HISTORY

On April 22, 2003 appellant, then a 46-year-old mail handler, filed a traumatic injury claim alleging that on that date he hurt both feet when a gate fell on them while he was loading a

truck. He stopped work on April 29, 2003. In a May 29, 2003 letter, the Office accepted appellant's claim for a fractured left toe and low back strain.

The Office received medical records regarding appellant's ongoing symptoms of his left toe and back conditions and his disability for work. Appellant filed a claim for compensation (Form CA-7) for the period June 7 through August 21, 2003 together with medical records from Dr. Tony C. Fernandez, his treating internist, which indicated that he was totally disabled for work.

By letter dated September 11, 2003, the Office referred appellant together with a statement of accepted facts, medical records and a list of questions to be addressed to Dr. Gholam Bahman Ha'Eri, a Board-certified orthopedic surgeon, for a second opinion medical examination.

Appellant filed CA-7 forms for the periods August 22 through September 18, 2003 and September 20 through December 11, 2003. He submitted medical records from Dr. Fernandez revealing that he was totally disabled for work during the above periods.

Dr. Ha'Eri submitted a December 1, 2003 medical report in which he noted that appellant was evaluated in his office on October 18, 2003. He stated that, prior to the examination, "I had the opportunity to review [appellant's] medical records, statement of accepted facts and the questions posed by the [Office] claims examiner." Dr. Ha'Eri provided a history of appellant's job duties and April 22, 2003 employment injuries. He also provided a history of a work-related lower back injury that appellant sustained on February 8, 1997 and reported residual back pain due to this injury. Dr. Ha'Eri noted appellant's medical treatment and social background. He reported his findings on physical examination regarding appellant's lower extremities and back. Dr. Ha'Eri reviewed prior x-ray findings and medical records from Dr. James Mansfield,¹ Dr. Fernandez, a treating physician and Dr. Mariela Resendes, a Board-certified radiologist. Dr. Ha'Eri diagnosed a fracture of the great left toe and temporary aggravation of a preexisting lumbar strain.

In response to questions posed by the Office, Dr. Ha'Eri responded that appellant's fracture of the left great toe was established by an April 22, 2003 x-ray and his temporary aggravation of a preexisting lumbar strain was based on his subjective complaint. He stated that appellant's left great toe fracture was directly caused by the April 22, 2003 employment injury and that the lumbar strain was temporarily aggravated by this injury. Dr. Ha'Eri opined that appellant had no residuals of the temporarily aggravated lumbar strain and that his lower back had returned to preinjury level. He further opined that there were no objective factors of disability regarding appellant's fractured toe as the x-rays showed a well-healed fracture and there was only a subjective factor of slight left great toe pain. Dr. Ha'Eri stated that there was no preexisting disability prior to the April 22, 2003 employment injuries as appellant was performing his regular duties as a mail handler. He also stated that appellant's prognosis was good with respect to his April 22, 2003 employment injuries and that no further medical treatment was necessary. Dr. Ha'Eri indicated that temporary aggravation of appellant's lumbar strain had ceased and that he did not require any medical attention for his left fractured toe

¹ The Board notes that the professional qualifications of Dr. Mansfield cannot be determined from the record.

because x-rays revealed that it was healed. He also indicated that appellant was temporarily totally disabled beginning April 22, 2003 until his disability ceased on August 22, 2003 when Dr. Fernandez released him to full-duty work. He concluded that appellant had no physical limitations because he had no work-related disability and his employment-related conditions had resolved. Dr. Fernandez further concluded that appellant had residuals in the form of slight left great toe pain which were subjective as no objective abnormal findings supported his continued subjective complaints.

In a work capacity evaluation dated October 18, 2003, Dr. Ha'Eri indicated that appellant could work eight hours a day with no physical limitations. He also indicated that, in addition to the accepted employment injuries, appellant suffered from depression.

Appellant filed a Form CA-7 for the period December 12, 2003 through January 2, 2004 and medical records from Dr. Fernandez indicating that he was totally disabled for work.

In a January 13, 2004 letter, the Office issued a notice of proposed termination of appellant's compensation benefits based on Dr. Ha'Eri's December 1, 2003 medical report. The Office provided 30 days in which appellant could respond to this notice.

Appellant filed a Form CA-7 for the period January 3 through February 11, 2004 and submitted Dr. Fernandez's medical records finding that he was totally disabled. The Office received a February 3, 2004 report from Dr. Robert G. Salazar, a Board-certified anesthesiologist, in which he provided a history of appellant's April 22, 2003 employment injuries and medical treatment and his current complaints. He reported his findings on physical and x-ray examination and noted that he reviewed Dr. Fernandez's April 23, 2003 report. Dr. Salazar diagnosed displacement of the lumbar disc without myelopathy, lumbosacral radiculitis and severe muscle spasms in the back. He opined that appellant's severe muscle spasms and radicular pain in both lower extremities resulted from his April 22, 2003 employment injuries. He stated that a magnetic resonance imaging (MRI) scan confirmed potential impingement of the L5 root on the right side. He expressed concern about the unresponsiveness of appellant's muscle spasms to prior treatment and recommended a particular treatment plan. He stated that pain management could not be pursued until appellant's muscle spasms were appropriately addressed. Regarding appellant's disability status, Dr. Salazar stated "[a]s per [appellant's] primary treating physician."

A February 11, 2004 medical report from Dr. Fernandez provided a history of appellant's April 22, 2003 employment injuries and his medical treatment and social background. He noted his findings on physical examination and reviewed radiologic test results. He diagnosed a left toe fracture, disc herniation at L3-4 and L4-5, moderate spinal stenosis at L3-5, degenerative disc disease and left knee strain. Dr. Fernandez stated that appellant subjectively continued to have throbbing pain and difficulty flexing and extending the left toe almost nine months after the date of injury. He further stated that this was accompanied by aggravation of his preexisting low back pain and swelling and pain in his left knee which was aggravated by prolonged walking. Dr. Fernandez opined that appellant was not disabled with respect to his left toe injury because repeat x-rays of the toe revealed no fracture or dislocation. Regarding appellant's low back pain, Dr. Fernandez noted that he continued to experience pain and spasms. He stated that an MRI scan revealed degenerative disc disease, disc herniation along L3 to L5, moderate spinal stenosis

at L3-5 with possible impingement on the right fifth nerve root. Dr. Fernandez opined that there was a worsening of appellant's previous disc condition and that this was "more likely than not" a new and further disability of his low back injury. He stated that appellant would require further neurosurgical evaluation for this problem and a continuing course of anti-spasmodic and anti-inflammatory medications. Dr. Fernandez concluded that appellant was temporarily totally disabled. With respect to appellant's left knee, he noted that appellant recently complained about left knee pain. Dr. Fernandez opined that "this more likely than not" is precipitated by his gait alteration wherein which he developed a knee strain. He further opined that this "is probably due" to the low back condition. Dr. Fernandez noted that this would require a course of anti-inflammatory medications and, thus, appellant was temporarily totally disabled due to this injury.

A January 19, 2004 MRI scan report from Dr. Matthew M. Iwamoto, a Board-certified radiologist, regarding appellant's left knee revealed small knee effusion, mild thinning of the articular cartilage over the medial femoral condyle with no evidence of a meniscal tear or ligamentous injury and attenuation of the anterior cruciate ligament that may be secondary to previous trauma and he recommended clinical correlation.

The Office received Dr. Fernandez's February 6, 2004 duty status report which revealed that appellant suffered from pain in his left toe, lower back and left knee. Dr. Fernandez stated that appellant should be off work. In a disability certificate of the same date, Dr. Fernandez reiterated that appellant should be off work.

By decision dated February 24, 2004, the Office finalized its proposed termination of appellant's compensation benefits effective that date. The Office found that the evidence submitted by appellant was insufficient to establish that he had any residuals or disability caused by his April 22, 2003 employment injuries and accorded greater weight to Dr. Ha'Eri's December 1, 2003 report.

In a letter dated February 26, 2004, appellant's attorney advised the Office that it failed to consider Dr. Fernandez's February 11, 2004 report in its February 24, 2004 decision. Counsel requested that the Office address this oversight and immediately reinstate appellant's compensation benefits.

By letter dated March 17, 2004, the Office advised appellant's attorney that Dr. Fernandez's February 11, 2004 medical report had not been reviewed prior to the issuance of the February 24, 2004 decision. The Office further advised counsel that, upon review of this report, it did not require additional medical development as he had contended. The Office stated that a new decision would be issued which addressed Dr. Fernandez's report.

In a decision dated March 17, 2004, the Office terminated appellant's compensation benefits effective that date. The Office found that the evidence submitted by appellant including Dr. Fernandez's February 11, 2004 report was insufficient to establish that he had any residuals

or disability causally related to his April 22, 2003 employment injuries. The Office again accorded greater weight to Dr. Ha'Eri's December 1, 2003 medical report.²

LEGAL PRECEDENT

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.³ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁴ If the Office, however, meets its burden of proof and properly terminates compensation, the burden for reinstating compensation benefits properly shifts to appellant.⁵

ANALYSIS

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits. To determine the extent and degree of any employment-related disability or residuals, the Office referred appellant to Dr. Ha'Eri for a second opinion examination. In a December 1, 2003 medical report, Dr. Ha'Eri provided an accurate factual and medical background. He conducted a thorough medical examination and reviewed appellant's medical records. Dr. Ha'Eri diagnosed a fractured great left toe and temporary aggravation of a preexisting lumbar strain. He opined that appellant had no residuals of his temporarily aggravated lumbar strain and that his lower back had returned to preinjury level. Dr. Ha'Eri further opined that there were no objective factors of disability regarding appellant's fractured toe as x-rays showed a well-healed fracture and there was only a subjective factor of slight left great toe pain. He stated that appellant's prognosis was good with respect to his April 22, 2003 employment injuries and that no further medical treatment was necessary. Dr. Ha'Eri found that appellant was temporarily totally disabled commencing April 22, 2003 until his disability ceased on August 22, 2003 when Dr. Fernandez released him to full-duty work. Dr. Ha'Eri concluded that appellant had no physical limitations because he had no work-related disability and his employment-related conditions had resolved. Although he concluded that appellant had residuals in the form of slight left great toe pain, he stated that these residuals were subjective because there were no objective abnormal findings to support appellant's continued subjective complaints.

² Following the issuance of the Office's March 17, 2004 decision, the Office received additional medical evidence. The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). Appellant can submit this evidence to the Office and request reconsideration under 5 U.S.C. § 8128 and 20 C.F.R. § 10.606.

³ *Jason C. Armstrong*, 40 ECAB 907 (1989).

⁴ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁵ *See Virginia Davis-Banks*, 44 ECAB 389 (1993); *Joseph M. Campbell*, 34 ECAB 1389 (1983).

The Board finds that Dr. Ha'Eri's opinion is entitled to greater weight in finding that appellant no longer has any residuals or disability due to his April 22, 2003 employment injuries as it is sufficiently rationalized and based on a proper factual and medical background.

On appeal appellant, through his attorney, contends that Dr. Ha'Eri's medical report does not constitute the weight of the medical evidence in establishing that he no longer has any residuals or disability due to his April 22, 2003 employment injuries. Counsel argues that his report is based on an incomplete and inaccurate medical history because he only reviewed five medical reports and he did not review certain medical reports from Dr. Fernandez, Dr. William J. Vlymen, a Board-certified radiologist, and Dr. Eugene L. Gilpin, a Board-certified radiologist. In addition, counsel contends that Dr. Ha'Eri cannot conclude that appellant has no residual disability since his lower back returned to a preinjury level when he did not review any medical records relating the period prior to his April 22, 2003 employment injuries. Counsel further argues that Dr. Ha'Eri incorrectly stated that appellant was released to full-duty work on August 22, 2003 by Dr. Fernandez as he did not mention that he had reviewed any report from Dr. Fernandez after August 8, 2003.

Although Dr. Ha'Eri, in his December 1, 2003 medical report, notes specific medical reports he reviewed, he states that prior to appellant's examination "I had to the opportunity to review [appellant's] medical records, statement of accepted facts and the questions posed by the [Office] claims examiner." Further, the record reveals that the Office sent appellant's medical records to Dr. Ha'Eri at the time of the referral. In addition, the record contains a copy of Dr. Fernandez's report in which he released appellant to full-duty work on August 22, 2003. Thus, based on the above, the Board finds that the evidence of record bears out that the Office sent all of appellant's medical records to Dr. Ha'Eri in accordance with its procedures,⁶ and that the doctor reviewed all of appellant's medical records.

Regarding Dr. Ha'Eri's finding that appellant has no residual disability due to his April 22, 2003 temporary aggravation of the lumbar strain and that he had returned to preinjury level, Dr. Ha'Eri expressed knowledge about a back injury sustained by appellant prior to the April 22, 2003 employment injuries. He provided a history that appellant sustained a work-related lower back injury on February 8, 1997 and he reported residual low back pain due to this injury. Further, he found no preexisting disability prior to the April 22, 2003 employment injuries as appellant was performing his regular duties as a mail handler. Based on the foregoing, the Board finds that counsel's arguments are without merit.

Counsel argues that Dr. Ha'Eri failed to provide any medical rationale to support his conclusions. However, Dr. Ha'Eri provided an accurate medical and factual background and reviewed appellant's medical reports and x-ray results, he thoroughly examined appellant and provided his clinical findings, including some subjective findings of pain in the left great toe. Therefore, the Board finds that Dr. Ha'Eri's opinion is sufficiently rationalized and counsel's argument is without merit.

⁶ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.3c (December 1994).

Subsequent to Dr. Ha'Eri's December 1, 2003 report and the Office's January 13, 2004 notice of proposed termination, appellant submitted medical records from Dr. Fernandez which indicated that he was totally disabled. None of these records, however, explain whether or how appellant's disability for work was caused by the April 22, 2003 employment injuries. Therefore, they are insufficient to outweigh the probative value of Dr. Ha'Eri's second opinion medical report which specifically concluded that appellant had no objective residuals or disability causally related to his accepted employment injuries.

Dr. Salazar's February 3, 2004 medical report which revealed that appellant's severe muscle spasms and radicular pain in both lower extremities were caused by his April 22, 2003 employment injuries and indicated that his disability status was "per [appellant's] primary treating physician" is insufficient to outweigh Dr. Ha'Eri's opinion. Dr. Salazar referenced the disability finding of appellant's treating physician. He did not provide any rationale explaining whether or how appellant's continuing residuals and disability for work were caused by the April 22, 2003 employment injuries.

In a February 11, 2004 medical report, Dr. Fernandez provided a diagnosis of left toe fracture, disc herniation at L3-4 and L4-5, moderate spinal stenosis at L3-5, degenerative disc disease and left knee strain. He opined that appellant's continuing back symptoms were a worsening of his previous disc condition and that this was "more likely than not" a new and further disability of his low back injury. Regarding appellant's recent complaints of left knee pain, he opined that this "more likely than not" was precipitated by his gait alteration wherein he developed a knee strain. He further opined that this "is probably due" to the low back condition. Dr. Fernandez concluded that appellant was temporarily totally disabled. While the medical opinion of a physician supporting causal relationship does not have to reduce the cause or etiology of a disease or condition to an absolute certainty, neither can such opinion be speculative or equivocal. The opinion of a physician supporting causal relationship must be one of reasonable medical certainty that the condition for which compensation is claimed is causally related to federal employment and such relationship must be supported with affirmative evidence, explained by medical rationale and be based upon a complete and accurate medical and factual background of the claimant.⁷ The Board finds that Dr. Fernandez's opinion is speculative and fails to provide an explanation of how appellant's current back and left knee conditions were caused by the April 22, 2003 employment injuries. Further, the Board notes that the Office has not accepted appellant's claim for a left knee condition.

Dr. Fernandez's February 6, 2004 duty status report which reveals that appellant experienced pain in his left toe, lower back and left knee and that he should be off work neither provides a specific diagnosis nor any rationale explaining how or why appellant's residuals and disability for work were causally related to his April 22, 2003 employment injuries. Similarly, Dr. Fernandez's February 6, 2004 disability certificate indicating that appellant should to be off work did not provide a specific diagnosis and did not address whether or how appellant's total disability was caused by the accepted employment injuries.⁸

⁷ *Calvin E. King*, 51 ECAB 394 (2000); *Linda Thompson*, 51 ECAB 694 (2000).

⁸ *Daniel Deparini*, 44 ECAB 657, 659 (1993).

Dr. Iwamoto's MRI scan report regarding appellant's left knee revealed small knee effusion, mild thinning of the articular cartilage over the medial femoral condyle with no evidence of a meniscal tear or ligamentous injury and attenuation of the anterior cruciate ligament that may be secondary to previous trauma. He does not address whether any of appellant's conditions are caused by the April 22, 2003 employment injuries. Further, as previously discussed, the Board has not accepted appellant's claim for a left knee condition.

The Board finds that as none of the medical evidence from Dr. Fernandez, Dr. Salazar and Dr. Iwamoto provided a rationalized medical opinion, their reports and disability certificate are insufficient to create a conflict with Dr. Ha'Eri's December 1, 2003 opinion that appellant no longer has any residuals or disability causally related to his accepted employment injuries. Accordingly, as appellant has not submitted additional probative medical opinion evidence establishing that he had continuing residuals or disability causally related to his accepted April 22, 2003 employment injuries, he has not met his burden of proof.

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation benefits effective March 17, 2004 on the grounds that he no longer had any residuals or disability causally related to his April 22, 2003 employment injuries.

ORDER

IT IS HEREBY ORDERED THAT the March 17, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 11, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member