

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

R.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Pittsburgh, PA, Employer**

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**Docket No. 06-1432
Issued: December 1, 2006**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 8, 2006 appellant filed a timely appeal from the May 10, 2006 merit decision of the Office of Workers' Compensation Programs, which terminated his compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the termination issue. The Board also has jurisdiction to review the Office's May 31, 2006 nonmerit decision denying appellant's request for reconsideration.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation; and (2) whether the Office properly denied his request for reconsideration.

FACTUAL HISTORY

On October 25, 1991 appellant, then a 39-year-old part-time flexible city carrier, injured his neck and low back in the performance of duty when he stepped off a porch and onto a concrete block, which rocked, causing him to jerk backward as he was carrying about 30 pounds.

The Office accepted his claim for low back and cervical strain and later expanded its acceptance to include chronic low back strain and aggravation of degenerative disc disease of the lumbar spine. Appellant received compensation for wage loss on the periodic rolls.

Dr. David Gammon, appellant's attending internist, reported on August 5, 2004: "[Appellant] has been my patient since May 14, 2004. He has progressive degenerative disc disease with dis[c] protrusion and nerve impingement. He can expect to never improve. [Appellant] has chronic pain and requires chronic medication. I recommend that he not carry mail as it may worsen his condition." In later duty status reports, Dr. Gammon diagnosed chronic back pain and indicated that appellant could return to limited duty. The employing establishment had no work available for appellant as a clerk.

On April 12, 2005 Dr. Glenn L. Scott, an orthopedic surgeon and Office referral physician, examined appellant and reported that "findings have been stable on repeat examinations done in 1999 and 2002." Dr. Scott diagnosed degenerative lumbar disc disease and chronic back pain syndrome with significant psycho-physiologic component. He concluded:

"At this point, I have little to offer him from an orthopedic standpoint that I feel is going to significantly improve his situation. I am in agreement with previous examiners that surgical intervention is not in his best interest and would have a low probability of success. Likewise, I do not feel that significant improvement would be made with a physical therapy or reconditioning program and doubt that a functional capacity evaluation would add much meaningful information. I do feel that he should be reevaluated by the urologist regarding his hematuria and also clarification be obtained from a family doctor as to etiology of his 10[-]mile driving restriction. He could probably function in a sedentary[-]type office situation but with the amount of medications that he is taking and his altered sensorium, I would be quite concerned about his ability to drive safely."

The Office referred appellant to Dr. Surendrapal Singh Mac, an orthopedic surgeon, for reevaluation and a second opinion. On August 8, 2005 Dr. Mac related appellant's history and findings on examination. He diagnosed cervical strain, resolved; lumbar strain, resolved; degenerative arthritis and degenerative disc disease, lumbar spine and chronic pain syndrome. In addition to reporting that appellant's work-related cervical and lumbar strains had resolved, Dr. Mac stated: "In my opinion, aggravation of the degeneration and degenerative disc disease has resolved. In my opinion, his aggravation was temporary and his symptoms are related to degenerative arthritis and degenerative disc disease at this time." He added that appellant was not disabled for work strictly based on his work injury, "since in my opinion his cervical lumbar strain and temporary aggravation has resolved." Addressing residuals of the work injury, Dr. Mac reported: "As stated before, his aggravation from work[-]related injury has resolved. The aggravation which he had from work injury more likely than not has caused increase in the arthritis and degenerative disc disease in addition to natural progression and condition has stabilized." Dr. Mac stated that appellant could perform a modified-duty job and could drive more than 10 miles "strictly based on his work-related injury, which in my opinion has resolved."

The Office found a conflict in medical opinion between Dr. Gammon and Dr. Mac. To resolve the conflict, the Office referred appellant, together with the case record and a statement of accepted facts, to Dr. Thomas G. Fleischer, a Board-certified orthopedic surgeon.

On October 26, 2005 Dr. Fleischer noted appellant's history and findings on examination. He diagnosed resolved cervical and lumbar strain and mild to moderate degenerative changes at L4-5 and L5-S1. Dr. Fleischer reported: "I think this patient did sustain a strain to his cervical and lumbar spine that has long since resolved. I do not think that the injury caused his disc bulges or mild degenerative changes at L4-L5 and L5-S1. These are not uncommon findings on MR[I] [magnetic resonance imaging scan] examination." Dr. Fleischer added: "As far as aggravation is concerned, I think his minor injury could have aggravated his preexisting disc disease but he has no objective findings of ongoing significant dysfunction. His aggravation should have long since resolved. I do not think that his injury worsened or accelerated his degenerative disc disease." Dr. Fleischer reported that appellant's subjective complaints were inconsistent with objective findings both by physical examination, radiographic examination and MRI scan report findings. He stated that he did not detect any residuals of the work injury and he released appellant to operate a motor vehicle to and from work "if he is off of his sedatives and narcotics which I feel he should be off." Dr. Fleischer completed a duty status report indicating that appellant was capable of performing his usual job with no limitations if he was off his sedative and narcotics.

The Office asked Dr. Fleischer to state unequivocally whether the accepted conditions had resolved and to support his answer with objective medical reasoning. In an addendum report dated December 9, 2005, Dr. Fleischer stated:

"H: This is a response to the [c]larification [r]equest from my examination on [appellant]. The conditions of lumbar strain, cervical strain and aggravation of degenerative disc disease have unequivocally resolved. This is based on the history of the event. This patient did not sustain a significant injury based on the history.

"E: His physical findings are inconsistent. He would flex at the waist to only 30 degrees in the standing position but he could readily sit erect. He has no neurologic dysfunction.

"X: His x-rays show minimal degenerative change at L4-L5 and L5-S1.

"MR[I]: His MR[I] scans show only minimal disc bulges at L4-L5 and L5-S1 which can be a normal variation.

"P: His injury did not worsen or accelerate his degenerative disc disease which once again is minor."

Following a notice of proposed termination, the Office issued a decision on May 10, 2006 terminating appellant's compensation for medical benefits and wage loss. The Office found that the weight of the medical evidence demonstrated that he no longer had any residuals or disability due to the traumatic work injury on October 25, 1991.

On May 16, 2006 appellant requested reconsideration: “Request for last TA-50 to work at Charlotte, NC.”

In a decision dated May 31, 2006, the Office denied appellant’s request on the grounds that it neither raised substantive legal questions nor included new and relevant evidence.

LEGAL PRECEDENT -- ISSUE 1

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

If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.³ When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁴

ANALYSIS -- ISSUE 1

The Office accepted that on October 25, 1991 appellant sustained in the performance of duty a cervical strain, chronic low back strain and an aggravation of lumbar degenerative disc disease. The Office, therefore, bears the burden of justifying the termination of appellant’s compensation for these medical conditions.

Finding a conflict in medical opinion between Dr. Gammon, appellant’s internist and Dr. Mac, the orthopedic surgeon and Office referral physician, the Office properly referred appellant to an impartial medical specialist under section 8123(a) of the Federal Employees’ Compensation Act. The Office provided Dr. Fleischer with appellant’s case file and a statement of accepted facts so that he could base his opinion on a complete and accurate factual and medical history. Dr. Fleischer examined appellant and reported that the conditions of lumbar strain, cervical strain and aggravation of degenerative disc disease had unequivocally resolved. He based this opinion on the history of the event. Dr. Fleischer noted that appellant did not sustain a significant injury based on the history. He also noted that appellant’s physical findings were inconsistent and that he had no ongoing neurologic dysfunction. Further, appellant’s x-rays showed minimal degenerative changes at L4-5 and L5-S1 and his MRI scans showed only

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).

³ 5 U.S.C. § 8123(a).

⁴ *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

minimal disc bulges at L4-5 and L5-S1, which, Dr. Fleischer explained, could simply be a normal variation. Dr. Fleischer further explained that the minor injury on October 25, 1991 did not worsen or accelerate appellant's preexisting degenerative disc disease but could have aggravated the condition; however, the aggravation should have long since resolved.

The Board finds that Dr. Fleischer provided a reasoned opinion that was based on a proper history. His opinion is entitled to special weight and establishes that appellant no longer suffers residuals of his October 25, 1991 employment injury. The Board will affirm the Office's May 10, 2006 decision terminating compensation for medical benefits and wage loss.

LEGAL PRECEDENT -- ISSUE 2

The Act provides that the Office may review an award for or against payment of compensation at any time on its own motion or upon application.⁵ The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."⁶

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.⁷

An application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁸ A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.⁹

⁵ 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.605 (1999).

⁷ *Id.* § 10.606.

⁸ *Id.* § 10.607(a).

⁹ *Id.* § 10.608.

ANALYSIS -- ISSUE 2

Appellant's timely request for reconsideration meets none of the standards for obtaining a merit review of his case. As he offered no argument or evidence to support his request, the Board finds that the request is insufficient on its face to require the Office to reopen his case for a review of the merits. The Board will affirm the Office's May 31, 2006 decision denying appellant's request.

CONCLUSION

The Board finds that the Office met its burden of proof to justify the termination of appellant's compensation benefits. The weight of the medical evidence, as represented by the reasoned opinion of the impartial medical specialist, establishes that appellant no longer suffers residuals of his October 25, 1991 employment injury. The Board also finds that the Office properly denied appellant's request for reconsideration, which he did not support with argument or evidence.

ORDER

IT IS HEREBY ORDERED THAT the May 31 and 10, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 1, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board