

to 1990, and first realized that his condition was work related in April 1992, when he developed a sharp pain and tingling in his right foot and leg while walking at work.¹

Appellant was originally treated by Dr. Seymore Leiner, a treating physician. In a June 8, 1995 report, Dr. Leiner opined that appellant's back pain was related to his use of forklifts at work and that he remained disabled from any gainful employment. In a report of a second opinion examination dated April 8, 1998, Dr. Mario J. Arena, a Board-certified orthopedic surgeon, provided an impression of resolved cervical and lumbosacral sprain/strain with underlying degenerative disc disease of the cervical and lumbar regions of the spine. Dr. Arena opined that appellant was capable of light-duty work with lifting restrictions of 25 pounds.

Finding a conflict in medical evidence between Dr. Leiner and Dr. Arena, the Office referred appellant to Dr. Paul L. Liebert, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict. In a July 25, 2000 report, Dr. Liebert discussed appellant's history of injury, reviewed the evidence of record and listed detailed findings on physical examination. Following a June 20, 2000 examination, Dr. Liebert stated that appellant demonstrated an uninhibited range of motion of his head and that there were no signs of thoracic outlet syndrome or cubital tunnel syndrome. He indicated that appellant's deep tendon reflexes were diminished but were intact and symmetrical with decreased sensation involving the right arm that was nonphysiologic and nonatomic. Dr. Liebert noted that appellant was able to sit in the examination chair for 30 minutes without shifting for comfort and was able to get up and move around the examination room without demonstrating any abnormal posturing or splinting behavior. Dr. Liebert stated that appellant had an absent right knee jerk and had decreased sensation involving all dermatomes of the right leg. He concluded that appellant had underlying degenerative disc disease in the lumbosacral spine, which prompted surgery in 1992. He noted that the record did not reflect any specific work injury that resulted in appellant's low back condition and opined that repetitive bending, lifting or driving would alone not worsen degenerative disc disease in the back. Dr. Liebert stated that, although appellant may have exacerbated underlying conditions involving his neck and lower back, these exacerbations would have fully resolved in four to six months. In an accompanying work capacity form, Dr. Liebert opined that appellant could return to work eight hours per day with restrictions, including walking up to four hours per day, standing up to six hours per day, twisting two hours per day, and squatting and kneeling up to one hour per day. He also indicated that appellant could lift, push and pull up to 3 hours per day, with a 25-pound lifting restriction.

In an August 22, 2000 decision, the Office denied appellant's claim for compensation on the grounds that the weight of the medical evidence established that appellant's low back condition was not a result of factors of employment.

Appellant requested a hearing, which was held on February 23, 2003. Appellant testified that, as he drove over the employing establishment's uneven floors, he bounced up and down for

¹ Appellant filed a previous claim for an October 20, 1993 injury, which he attributed to moving chairs while cleaning his office. The Office accepted that claim for a lumbosacral strain. The Office terminated compensation effective August 12, 1995. By decision dated January 5, 1999, the Board affirmed the termination of benefits. Docket No. 97-625 (issued January 5, 1999).

the entire eight-hour period, occasionally hitting potholes ranging from a few inches to a foot deep. Appellant also testified that, even as a supervisor, he was required to operate the forklift when he was “shorthanded.” Dr. Liebert testified that at the time he submitted his July 25, 2000 report, he was not aware that the surfaces over which appellant drove contained potholes and that the new information “materially changed [his] opinion.” He opined that bouncing around while driving a forklift and hitting potholes of the magnitude described by appellant would have exacerbated his underlying condition. Dr. Liebert opined that appellant’s work conditions contributed to his preexisting degenerative disc disease, which, in turn, contributed to the disc herniations. He indicated that his June 20, 2000 recommendation regarding appellant’s work restrictions “stands.” Dr. Liebert also opined that appellant was permanently partially disabled as of the time he stopped work on October 21, 1993.

By decision dated June 17 2003, an Office hearing representative instructed the Office to accept appellant’s claim for herniated discs at L3-4 and L4-5, as Dr. Liebert’s testimony established that appellant’s condition was causally related to employment factors.

On June 23, 2003 appellant filed a claim for compensation for the period August 22, 1995 to the “present.” Appellant also filed a claim for recurrence of disability dated June 23, 2003, stating that his claim was based on the termination of his benefits under his previous claim for an October 20, 1993 injury.²

In a decision dated November 18, 2003, the Office accepted appellant’s claim for herniated discs at L3-4 and L5 levels and found that appellant was entitled to compensation from August 22, 1995 through June 20, 2000. The Office further found that appellant was not entitled to wage-loss benefits after June 20, 2000, on the grounds that the restrictions outlined by Dr. Liebert were within the requirements of appellant’s date-of-injury job.

In support of a request for review of the written record, appellant submitted a July 20, 1995 vacancy announcement from the employing establishment for a material expediter forklift supervisor, reflecting that the position involved “standing on hard surfaces, bending, stooping, and occasional lifting of items weighing up to 50 pounds.”

In an October 26, 2004 decision, an Office hearing representative found that the weight of medical evidence, which was contained in Dr. Liebert’s June 20, 2000 report, established that appellant was capable on that date of returning to his preinjury employment.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.³ The Office

² The record does not contain a final decision regarding appellant’s recurrence claim. Therefore, the Board does not have jurisdiction over the merits of the claim. *See* 20 U.S.C. § 501.2(c) (the Board has jurisdiction to consider and decide appeals from final decisions; there shall be no appeal with respect to any interlocutory matter disposed of during the pendency of the case).

³ *See Beverly Grimes*, 54 ECAB 543 (2003).

may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁴ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵ The fact that the Office accepts appellant's claim for a specific period of disability does not shift the burden of proof to appellant. The burden is on the Office with respect to the period subsequent to the date when compensation is terminated or modified.⁶

Section 8123(a) of the Federal Employees' Compensation Act⁷ provides, "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."⁸ In situations where there are 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 on a proper factual background, must be given special weight.⁹

ANALYSIS

The Board finds that this case is not in posture for a decision. In its November 18, 2003 decision, the Office accepted appellant's claim for herniated discs, finding that he was entitled to compensation from August 22, 1995 through June 20, 2000. The Office also found that appellant was not entitled to wage-loss benefits after June 20, 2000, on the grounds that he was capable of performing the duties of his preinjury job at that time. Once it accepted appellant's claim and placed him on the periodic rolls, the Office had the burden of establishing that appellant was capable of performing the duties of his regular job prior to modifying his compensation benefits. The Office hearing representative affirmed the November 18, 2003 decision, stating that the restrictions set by Dr. Liebert were within the physical requirements of appellant's date-of-injury position of forklift operator supervisor. He concluded that appellant was capable at that time of performing his regular job. The Board finds, however, that the evidence of record does not support that conclusion.

Dr. Liebert opined that appellant could work 8 hours per day with restrictions, including standing for no more than 6 hours per day, walking for no more than 4 hours per day, and pushing, pulling or lifting no more than 25 pounds. The Office concluded that appellant was not entitled to wage-loss compensation as of the date of the examination, based on Dr. Liebert's

⁴ *Id.*

⁵ *James M. Frasher*, 53 ECAB 794 (2002).

⁶ *See George J. Hoffman*, 41 ECAB 135 (1989); *Raymond M. Shulden*, 31 ECAB 297 (1979).

⁷ 5 U.S.C. §§ 8101-8193.

⁸ 5 U.S.C. § 8123(a).

⁹ *See Beverly Grimes*, *supra* note 3. *See also Willie M. Miller*, 53 ECAB 697 (2002).

evaluation of appellant's work capacity. The only evidence of record indicating the physical requirements of appellant's preinjury position is contained in a July 20, 1995 vacancy announcement from the employing establishment. It describes the position as "standing on hard surfaces, bending, stooping and occasional lifting of items weighing up to 50 pounds." Although the record does not contain evidence of the current physical requirements of appellant's date-of-injury job, the existing evidence suggests that the lifting requirements of appellant's preinjury job exceeded the physical restrictions set by Dr. Liebert.

The Board finds that Dr. Liebert's opinion requires clarification. At the February 20, 2003 hearing, Dr. Liebert testified that bouncing up and down on a forklift over large potholes would likely exacerbate appellant's degenerative condition and likely contributed to his disc herniation. At the time he conducted the June 20, 2000 examination of appellant, he was unaware of the magnitude of the rough surface conditions at the employing establishment and that the new information he received at the hearing "materially changed [his] opinion." At the same time, he testified that his recommendations regarding appellant's physical capabilities were unchanged. However, Dr. Liebert did not explain how his new understanding of appellant's work exposure affected his recommendations. In order for the Board to properly determine whether appellant could have performed the duties of his preinjury position on June 20, 2000, Dr. Liebert must clarify his recommended restrictions. The Office has the responsibility to obtain a supplemental report from an impartial medical specialist to correct any defects in the original report.¹⁰ On remand, the Office should ask Dr. Liebert to clarify his opinion regarding whether appellant could have returned to full duty in his regular position as a material expeditor forklift operator supervisor in a full-time capacity on June 20, 2000. The Office should also confirm the physical requirements of appellant's preinjury job on June 20, 2000.

CONCLUSION

The Board finds that the case is not in posture for decision.

¹⁰ See *Richael O'Brian*, 53 ECAB 234 (2001).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 26, 2004 is set aside and remanded for action consistent with this decision.

Issued: February 14, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board