

FACTUAL HISTORY

This case was previously before the Board.¹ By decision dated March 7, 2003, the Board set aside an October 23, 2001 decision that denied appellant's claim for a back injury on October 28, 1999.² The Board's March 7, 2003 decision is herein incorporated by reference.

On October 29, 1999 appellant, then a 48-year-old mail handler, filed a traumatic injury claim alleging that the previous day he injured his lower back and right leg when he bent down to pick up mail from the floor, his right leg went out and he almost fell. He indicated that he had an accepted June 4, 1986 back injury and returned to work on October 8, 1999 in light-duty status due to the 1986 injury.³

Hospital records dated October 28, 1999 contain a diagnosis of chronic back pain syndrome.

In a report dated November 1, 1999, Dr. Jerome M. Cotler, an attending Board-certified orthopedic surgeon, indicated that appellant was bending down to pick up mail when he heard a "crack" and felt shooting pain in his back and right leg numbness. He provided findings on physical examination and indicated that x-rays suggested a fresh fracture at L2. Dr. Cotler indicated that he was not sure of the age of the L2 fracture but would consider it new until proven otherwise. He stated that he would review appellant's old x-rays. On December 15, 1999 Dr. Cotler diagnosed a fracture at L2 and indicated that appellant was totally disabled from November 1 to December 15, 1999. On December 30, 1999 Dr. Cotler stated that x-rays suggested that the L2 fracture was healing "pretty well." He recommended physical therapy, consisting of ultrasound, swimming, biking, massage, Williams' exercises and moist heat. Dr. Cotler indicated that he would reassess appellant's condition in six weeks "and then probably seriously consider returning [him] to gainful employment, although probably will be difficult to get him to do that."

An x-ray report dated November 1, 1999 noted status post laminectomy at L4-5 with posterior fusion of L4 to S1. A December 30, 1999 x-ray report indicated a spine compression fracture at L2.⁴

On May 28, 2003 following remand of the case by the Board, the Office provided Dr. Charlene M. Smith, a Board-certified diagnostic radiologist, with copies of x-rays of appellant's lower back and right leg dated November 27, 1997 and November 1 and

¹ Docket No. 03-61 (issued March 7, 2003).

² In prior decisions dated January 20, 2000 and February 12, 2001, the Office denied appellant's claim for a back injury on October 28, 1999.

³ Prior to October 28, 1999, appellant had been performing limited duty for four hours a day after an extended period of disability due to a work-related back injury sustained on June 4, 1986. The 1986 claim was accepted for a lumbosacral strain and herniated disc at L5-S1 and subsequent surgeries performed in 1987, 1988 and 1992.

⁴ The record contains a July 20, 1992 x-ray report indicating anterior loss of vertebral body height at L1 consistent with a possible old fracture. A November 21, 1997 x-ray report noted that a superior end-plate L2 compression appeared healed.

December 30, 1999 and a statement of accepted facts. The Office asked her whether there was evidence of a fracture at L2 on either the November 1 or December 30, 1999 x-ray.

On October 23, 2003 Dr. Smith stated that frontal and lateral x-rays dated November 1 and December 30, 1999 revealed a compression fracture at L2 of uncertain age and grade one spondylolisthesis at L5-S1. She opined that the compression deformity at L2 was present on a November 21, 1997 film and revealed no change when compared to the November 1 and December 30, 1999 x-rays.

The Office found a conflict in medical opinion between Dr. Cotler and Dr. Smith. On October 9, 2003 it referred appellant, together with a statement of accepted facts and the case file, to Dr. Edward J. Resnick, a Board-certified orthopedic surgeon, for an examination and evaluation as to whether appellant had any periods of disability causally related to his accepted low back strain and whether the L2 fracture was caused by the October 28, 1999 employment injury.

In a report dated October 28, 2003, Dr. Resnick provided a history of appellant's condition, course of treatment, a review of the medical records and findings on physical examination. He diagnosed a low back strain sustained on October 28, 1999, by history and status post L4, L5 and S1 spine fusion. Dr. Resnick stated:

“I have reviewed films of various studies. These include x-rays of [appellant's] lumbar spine consisting of an AP [anterior-posterior] view of November 21, 1997 and AP lateral and ending lateral views on November 1 and December 30, 1999. These, as reported, show no significant changes from one another. Posterior lumbar spine fusion of L4, L5 and S1 ... and marked narrowing of L5-S1 with anterolisthesis are all noted. There is also compression deformity of L2. There is, as stated, no significant change over the course of studies. I am in general agreement with the reports.

“I have reviewed the file of medical records.... It would appear that Dr. Cotler had the impression, after the incident of October 28, 1999, that [appellant] had sustained a fracture of L2 in that incident. However, x-rays as far back as 1997 showed the same deformity. I am inclined to agree that this was old, prior to the 1999 incident and unrelated.”

* * *

“It would appear that [appellant] might have sustained a back strain on October 28, 1999. It would also appear that he did not require any further significant treatment for this after a course of physical therapy of approximately [three] months. He has not had, aside from prescription of pain medicines, any active treatment as far as I am able to tell since the early part of 2000 and certainly has had no active treatments for the past year or two aside from taking narcotic pain relievers. The present physical examination indicates some physical impairment associated primarily with the old lumbar spine fusion. There is no anatomic confirmation or basis for [appellant's] complaint of numbness over the

entire right lower extremity. This finding is considered to be primarily a probable psychogenic manifestation of unclear cause and unrelated objectively to the incident of October 28, 1999. In my opinion, he is capable of returning to full[-]time work of the type he was performing on October 28, 1999. I recognize that this is limited work compared to his usual work activity description. However, in view of [appellant's] very protracted record of not working, I doubt that there will be much success with any attempts to restore him to full unrestricted work in the future. I would consider this to be primarily because of unrelated nonmedical factors.”

By decision dated December 19, 2003, the Office accepted appellant's claim for a low back strain on October 28, 1999 resolved.

On January 30, 2004 appellant filed a claim for lost wages for four hours a day beginning October 28, 1999 through January 30, 2004. He noted that he was receiving compensation for four hours a day for his accepted June 4, 1986 back injury.

On February 11, 2004 the Office advised appellant that he was not entitled to compensation for any periods of disability due to his preexisting lumbar fracture. It noted that he was entitled to continuation of pay for his October 28, 1999 accepted low back strain for the period November 1 to December 15, 1999 based on Dr. Cotler's December 15, 1999 medical report. The Office advised that any period of disability caused by his back strain, rather than his lumbar fracture, would need to be established by rationalized medical evidence.

In a July 19, 2000 report, Dr. William J. Markmann, a Board-certified orthopedic surgeon, provided findings on physical examination and stated that appellant had a history of low back problems with spondylolisthesis treated with a lumbar fusion in 1992. He indicated that appellant returned to work in October 1999 for four hours a day but sustained a back injury at work later that month. Dr. Markmann stated that appellant had low back pain with radiation up the lower thoracic area and chronic numbness in his right leg, “which he says has been there since 1992.” He recommended new x-rays and a bone scan. Dr. Markmann did not address the issue of whether appellant had any disability causally related to his October 28, 1999 employment-related low back strain.

In a March 25, 2004 report, Dr. David Reinhardt, an orthopedic surgeon, provided a history of appellant's condition and findings on physical examination and diagnosed chronic low back pain with right leg sciatica. He recommended further testing to include a magnetic resonance imaging scan, electromyogram and a nerve conduction study. Dr. Reinhardt did not address the issue of disability. He noted that there was some question as to whether the L2 fracture was age indeterminate as an August 1993 film showed an L2 fracture. Dr. Reinhardt did not address the issue of appellant's disability due to his October 28, 1999 employment injury.

By decision dated April 27, 2004, the Office denied appellant's claim on the grounds that the medical evidence failed to establish that he was totally disabled from October 28, 1999 to January 30, 2004, due to his accepted October 28, 1999 low back strain.

Appellant requested an oral hearing that was held on February 24, 2005.

By decision dated October 4, 2005, an Office hearing representative affirmed the April 27, 2004 decision.⁵

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act⁶ has the burden of proving by the preponderance of the reliable, probative and substantial evidence that he was disabled for work as the result of an employment injury.⁷ Monetary compensation benefits are payable to an employee who has sustained wage loss due to disability for employment resulting from the employment injury.⁸ Whether a particular employment injury causes disability for employment and the duration of that disability are medical issues which must be proved by a preponderance of reliable, probative and substantial medical evidence.⁹

Section 8123(a) of the Act provides that "if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary [of Labor] shall appoint a third physician who shall make an examination."¹⁰ Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.¹¹

ANALYSIS

The Office accepted that appellant sustained a low back strain as a result of his employment duties on October 28, 1999. Appellant filed a claim for lost wages for total disability from October 28, 1999 to January 30, 2004. The Board notes that the Office advised appellant by letter dated February 11, 2004 that he was entitled to continuation of pay for his October 28, 1999 accepted low back strain for the period November 1 to December 15, 1999, based on Dr. Cotler's December 15, 1999 medical report. Therefore, the issue on appeal is whether appellant had any disability between December 16, 1999 and January 30, 2004, causally related to his October 28, 1999 work-related low back strain.

In reports dated November 1 and December 15, 1999, Dr. Cotler diagnosed a new spinal fracture at L2 as a result of the October 28, 1999 employment incident and indicated that

⁵ Appellant submitted additional evidence subsequent to the Office decision of October 4, 2005. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

⁶ 5 U.S.C. §§ 8101-8193.

⁷ *Thomas M. Petroski*, 53 ECAB 484 (2002).

⁸ *Debra A. Kirk-Littleton*, 41 ECAB 703 (1990).

⁹ *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹⁰ 5 U.S.C. § 8123(a); *see also Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

¹¹ *See Roger Dingess*, 47 ECAB 123 (1995); *Glenn C. Chasteen*, 42 ECAB 493 (1991).

appellant was totally disabled. On December 30, 1999 Dr. Cotler stated that x-rays suggested that the L2 fracture was healing “pretty well” but he would assess appellant’s work capability in six weeks.

Dr. Smith opined that 1997 x-rays revealed that appellant’s L2 fracture was present at that time and was not caused by the October 28, 1999 employment incident.

Due to the conflict in medical opinion between Dr. Cotler and Dr. Smith, the Office properly referred appellant, together with a statement of accepted facts and the case file, to Dr. Resnick to determine whether appellant had any periods of disability causally related to his accepted low back strain and whether his L2 fracture was caused by the October 28, 1999 employment injury.

In a report dated October 28, 2003, Dr. Resnick provided a history of appellant’s condition, course of treatment, a review of the medical records and findings on physical examination. He diagnosed a low back strain sustained on October 28, 1999, by history and records and status post L4, L5 and S1 spine fusion. Dr. Resnick stated that x-rays of appellant’s lumbar spine dated November 21, 1997, November 1 and December 30, 1999, indicated a compression fracture at L2 and showed no significant changes from one another. He stated:

“It would appear that Dr. Cotler had the impression after the incident of October 28, 1999, that [appellant] had sustained a fracture of L2 in that incident. However, x-rays as far back as 1997 showed the same deformity. I am inclined to agree that this was old, prior to the 1999 incident and unrelated.

* * *

It would appear that [appellant] might have sustained a back strain on October 28, 1999. It would also appear that he did not require any further significant treatment for this after a course of physical therapy of approximately [three] months. He has not had, aside from prescription of pain medicines, any active treatment as far as I am able to tell since the early part of 2000 and certainly has had no active treatments for the past year or two aside from taking narcotic pain relievers. The present physical examination indicates some physical impairment associated primarily with the old lumbar spine fusion. There is no anatomic confirmation or basis for [appellant’s] complaint of numbness over the entire right lower extremity. This finding is considered to be primarily a probable psychogenic manifestation of unclear cause and unrelated objectively to the incident of October 28, 1999. In my opinion, he is capable of returning to full[-]time work of the type he was performing on October 28, 1999.”

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

On the issue of whether appellant’s L2 fracture was caused by his October 28, 1999 employment injury, Dr. Resnick indicated that the fracture was sustained prior to the October 28, 1999 employment injury because it had been revealed on a 1997 x-ray and there was no significant change in the deformity as compared to the 1999 x-rays.

However, on the issue of disability related to the October 28, 1999 employment injury, Dr. Resnick's report is not sufficient to resolve the conflict in the medical opinion evidence. He noted that appellant underwent three months of physical therapy following the accepted October 28, 1999 low back strain but did not address the issue of whether appellant was totally disabled during this time. Dr. Resnick indicated that appellant received treatment for his accepted condition through early 2000 but he did not address the issue of disability during this period. Additionally, Dr. Resnick indicated that appellant was capable of returning to full-time work. However, appellant was working only four hours a day as of his October 28, 1999 employment injury, due to residuals from his 1986 employment injury. Due to these deficiencies, Dr. Resnick's report is not sufficient to resolve the conflict as to whether appellant had any periods of disability causally related to his October 28, 1999 employment injury.

CONCLUSION

The Board finds that this case requires further development on the issue of whether appellant had any disability between December 16, 1999 to January 30, 2004, causally related to his October 28, 1999 employment injury. When the Office obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, the Office must secure a supplemental report from the specialist to correct the defect in his original report.¹² On remand of the case, the Office should request a supplemental report from Dr. Resnick explaining whether appellant had any disability causally related to his October 28, 1999 work-related low back strain and, if so, the dates of disability. After such further development as the Office deems necessary, it should issue an appropriate decision.

¹² *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232 (1988); *Ramon K. Ferrin, Jr.*, 39 ECAB 736 (1988).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 4, 2005 is set aside and the case is remanded for further development consistent with this decision.

Issued: July 20, 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