United States Department of Labor
Employees' Compensation Appeals Board

S.B., Appellant	)	
and	)	**Docket No. 07-606**
	)	**Issued: June 21, 2007**
U.S. POSTAL SERVICE, RESEARCH TRIANGLE PARK STATION, Durham, NC, Employer	)	

Appearances:
Michael T. McCulley, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 26, 2006 appellant filed an appeal from the September 28, 2006 decision of an Office of Workers' Compensation Programs' hearing representative, which affirmed the termination of his compensation. 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 benefits, effective June 27, 2005, on the grounds that he had no disability or residuals causally related to his April 11, 2002 employment injury; and (2) whether appellant established that he continues to have disability or residuals related to his accepted employment injury. On appeal, appellant contends that the medical opinion on which the Office relied was inadequate and created a conflict of medical opinion with other physicians.

FACTUAL HISTORY

On April 11, 2002 appellant, then a 39-year-old express mail messenger, filed a traumatic injury claim, Form CA-1, alleging that he injured his back when he slipped and fell on some steps while carrying a tub of mail. The same day, an emergency room physician diagnosed lumbar strain and contusion and removed him from work. On April 26, 2002 the Office accepted appellant's claim for a lumbar strain.

On May 21, 2002 Dr. William Lestini, a Board-certified orthopedic surgeon, examined appellant and reviewed the results of a May 1, 2002 magnetic resonance imaging (MRI) scan. He noted that the 2002 scan appeared unchanged from one obtained in 1997 and showed degenerative disc disease at L4-5 and L5-S1 and questionable early degeneration at L3-4.[1] The scans did not show herniation, impingement, stenosis, infection, tumor or fracture, though they did show moderate narrowing at L5-S1 and L4-5. Dr. Lestini opined that the complaints of nonradicular mid to low back pain with occasional left-anterior thigh pain were likely caused by the degenerative changes in his spine, especially at L4-5. He stated that appellant could be a candidate for spinal fusion from L4 to S1, but noted that he had some liver and muscle problems that would first need to be resolved.

On October 24, 2002 Dr. Lestini reported that a discography conducted on appellant's lumbar spine on October 2, 2002 revealed internal derangement with central herniated nucleus pulposus at L5-S1 and L4-5. Because it appeared that appellant's pain symptoms were not caused by muscle myopathy or metabolic dysfunction, Dr. Lestini indicated that he was a candidate for surgical fusion of L4 through S1. On November 7, 2002 Dr. Lestini sought authorization for the surgery, noting that conservative care had not yielded positive results. On November 20, 2002 the Office medical adviser denied the request for surgery because appellant's injury had been accepted only for lumbar sprain and he had an undiagnosed muscle condition.

On January 7, 2003 the Office referred appellant for a second opinion evaluation to determine whether the requested surgery was medically necessary and to determine his work capacity.

On February 4, 2003 Dr. Lestini challenged the Office's statement that appellant had been accepted only for a low back strain. He noted that appellant had been diagnosed with lumbar disc disease and was previously treated with intradiscal electrothermal therapy (IDET).[2]

On March 10, 2003 a second opinion physician, Dr. Noel Rogers, a Board-certified orthopedic surgeon, found that the proposed surgery was appropriate treatment for appellant's condition. He found that appellant had chronic mechanical back pain, severe paraspinal spasm

[1] The Board notes that Dr. Lestini appears to have been involved in the treatment of appellant's previous employment-related back injuries, which occurred in 1996 and 2000. The record reveals that the 1996 back injury occurred on December 19, 1996, which the Office accepted for back strain. The 2000 back injury occurred on October 8, 2000 when appellant experienced back pain while unloading mail and packages in the performance of duty.

[2] The Board notes that this appears to be a reference to appellant's previous accepted back injuries.

and an "odd gait secondary to the spasm." Dr. Rogers found that it was employment related since appellant had no back problems prior to an employment-related back injury in 1996.

On April 4, 2003 the Office authorized Dr. Lestini to perform a spinal fusion from L4 to S1. On July 7, 2003 appellant informed the Office that he was not willing to undergo surgery because of concerns raised by the physicians investigating his myopathy-like condition.

On July 8, 2003 the Office referred appellant for a second opinion evaluation to determine his work tolerance. The examination, performed by Dr. Andrew Bush, a Board-certified orthopedic surgeon, took place on August 7, 2003. On August 16, 2003 Dr. Bush reported that the only objective finding of disability was an absent left knee jerk reflex, which he stated was indicative of a lesion at L1-2 or L2-3. He noted that the 2002 MRI scan showed degenerative changes at L5-S1 and L4-5, but no central canal impingement, foraminal stenosis, spondylolisthesis or significant instability. Dr. Bush noted that the surgery did not seem warranted based on the relatively normal MRI scan and was not recommended because of appellant's possible myopathy. He recommended that the case be reassessed in light of the possible myopathy, that a functional capacity evaluation be performed, and that appellant undergo a "vigorous" physical therapy program. On October 10, 2003 Dr. Bush submitted an addendum to his report based on the results of a functional capacity evaluation conducted on September 16, 2003. He reported that the physical therapist had determined that appellant was unable to perform the duties of an express mail carrier.

On September 6, 2003 Dr. Lestini opined that appellant's current spinal condition was consistent with his 1996 employment injury. He reported that appellant had undergone conservative treatment multiple times, including an IDET in September 1999. Dr. Lestini stated that he had removed appellant from work pending determination of his workers' compensation claim.

On January 7, 2004 the Office requested clarification from Bush. As Dr. Bush did not respond to the request for a supplemental report, the Office referred appellant to Dr. Paul Wright, a Board-certified orthopedic surgeon, for a second opinion. On June 8, 2004 Dr. Wright diagnosed degenerative disc disease with degenerative joint disease of the lumbosacral spine, consistent with spinal stenosis. He opined that appellant's condition was medically connected to his accepted April 11, 2002 employment injury. Dr. Wright noted that appellant had previously injured his back in 1996 and 2000, but that he was functioning fully prior to the 2002 employment injury. He stated that "in all likelihood, [appellant] sustained additional direct injury to his discs, and he could have easily aggravated the facets … as well as the soft tissues in the low back." Dr. Bush opined that appellant likely developed neurogenic claudication with prolonged standing in a stationary position and sitting in the direct upright position. He stated that a spinal fusion surgery would improve appellant's symptoms and functionality, but did carry some risks. Dr. Wright found that he would only be able to work in a sedentary position that allowed him to lay down a few times an hour to relieve the pressure on his lumbar spine. He filled out a work capacity evaluation form limiting appellant's sitting, walking and standing and forbidding twisting, bending, pushing, pulling, lifting, squatting, kneeling and climbing.

On December 14, 2004 the employing establishment submitted a videotape and investigative report of appellant's activities on August 25 and 26, 2004. On December 23, 2004

the Office reviewed the videotape, which showed appellant walking in his neighborhood, driving, helping unload furniture from the back of a truck and carrying shopping bags. On December 26, 2004 the Office provided this information to Dr. Wright, who refused to review it or prepare a supplemental report discussing it.

On February 23, 2005 the Office referred appellant for another second opinion evaluation to determine whether he continued to have residuals from his employment injury. On April 8, 2005 appellant was examined by Dr. Donald Getz, a Board-certified orthopedic surgeon, who stated that appellant had a history of two previous employment-related back injuries. Dr. Getz reported that the MRI scan conducted following the 1996 injury revealed degenerative disc disease, that a 2002 MRI scan showed degeneration at L4 through S1, and that a discogram revealed concordant pain in the lower lumbar segments. He noted that appellant had been diagnosed with a type of polymyalgia with abnormal muscle enzymes, but that this condition was still under investigation. Dr. Getz found that appellant walked without a limp, bent over without difficulty, and had good spine motion without muscle spasms. He noted that appellant had mild low back pain during the straight leg raising test, but that the sitting root and axial compression were normal. Dr. Getz found symmetrical and hypoactive reflexes and no atrophy or gross sensory changes. He stated that his review of the employing establishment's surveillance videotape revealed appellant performing activities, particularly moving a large couch, that were inconsistent with significant disabling low back pain. Dr. Getz diagnosed asymptomatic degenerative disc disease and stated that the accepted April 11, 2002 employment injury was a "transient exacerbation of a preexisting condition, which has now returned to the baseline." He opined that appellant could return to work without restriction. Dr. Getz found that that the subjective complaints were not supported by objective medical findings on physical examination or review of the surveillance videotape.

By letter dated May 5, 2005, the Office provided Dr. Getz with a statement of accepted facts and a memorandum related to the surveillance videotape and asked him whether this information changed his previous findings. On May 18, 2005 he provided a supplemental report indicating that the only change in his opinion was that he believed appellant's handicap parking permit should be cancelled.

By decision dated May 24, 2005, the Office proposed termination of appellant's medical and wage-loss benefits. It found that Dr. Getz's report constituted the weight of the medical evidence as his opinion was well reasoned and based on a thorough physical examination and review of the medical records. The Office also noted that Dr. Lestini had not provided a report since September 2003 and that appellant had no other medical evidence to support his claim that he remained disabled from work.

On June 2, 2005 appellant responded with a letter challenging Dr. Getz's report and the manner in which the examination was conducted. He contended that his back was examined only briefly and that he was not asked to do a leg raising test. Appellant also submitted the March 30, 2005 report of Dr. Douglas Fullington, a Board-certified internist, who stated that appellant had some muscle spasms around his lumbar spine and discomfort on the straight leg raise, but that he had "nothing to suggest a herniated disc" and had no neurogenic claudication.

By decision dated June 27, 2005, the Office terminated appellant's medical and wage-loss benefits. It found that appellant had not presented evidence that overcame the weight of Dr. Getz's report.

On July 13, 2005 appellant requested an oral hearing, which was held on July 27, 2006. He testified that he had injured his back while throwing parcels in 1996 and 2000 and that the Office had accepted both claims for lumbar strain. Appellant had not experienced any problems with his back prior to his 1996 employment injury. In August 2004, when the employing establishment videotaped him moving furniture, he was helping an elderly neighbor because no one else was available. Appellant stated that he braced a large chair for a few feet from the truck tailgate to the porch while the delivery man bore its weight and that this caused pain. He said that the examination conducted by Dr. Getz was different than those conducted by other physicians because he did not have his reflexes checked, was not asked to raise his legs while lying on his back or side and had no new x-rays taken. Appellant said that Dr. Getz asked him questions, told him to lift his arms, checked his heart rate and observed him walking from one end of the room to another.

In a letter dated August 24, 2004, appellant contended that the surveillance videotape, which showed him exceeding his lifting restrictions on a particular day, was given undue weight by Dr. Getz. He also submitted medical records from his primary physician, Dr. Thaddeus West, a Board-certified internist. On October 27, 2003 Dr. West opined that appellant's lumbar pain was discogenic and that it was the cause of his muscle spasms. On April 19, 2004 he found that appellant's chronic back pain was at a baseline level. On July 26, 2004 Dr. West reported that appellant was experiencing back spasms. On October 25, 2004 he opined that appellant might be developing lumbar myelopathy and reported that his back pain was worsening and radiating down his legs and up his back. On January 26, 2005 Dr. West noted continued pain and mild spasms of the lumbar paraspinal muscles. On May 16, 2005 he stated that appellant's back had been sore for the previous few days. On July 25, 2005 Dr. West reported that appellant's back pain was helped by a new medication. On November 22, 2005 he noted that appellant's back ached regularly, especially in rainy weather and that he had episodes of muscle spasm in his back. On May 24, 2006 Dr. West stated that appellant's rheumatologist had diagnosed his complaints of waves of pain and muscle discomfort in his back and other areas of his body as myositis with unusual presentation.

An MRI scan performed on July 7, 2006 found concentrically bulging annulus fibrosis at L3-4, a small L4-5 herniation with extension into the right neural foramin, and an L5-S1 herniation in the center and on the left side. It also revealed that he had moderate to marked disc space narrowing at L4-5 and L5-S1, but provided no evidence of spondylolysis or spondylolisthesis.

By decision dated September 28, 2006, the Office hearing examiner affirmed the June 27, 2005 termination of appellant's compensation benefits. She found that the reports of Dr. West were insufficient to establish appellant's ongoing employment-related disability because they did not discuss the cause of appellant's back pain or to what extent he was able to work. The hearing representative noted that the Office did not dispute that appellant had degenerative disc disease but had never accepted that this condition related to his federal employment. She found that

Dr. Getz's opinion that appellant was no longer disabled for work constituted the weight of the medical evidence.

LEGAL PRECEDENT -- ISSUE 1

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.[3] The Office may not terminate compensation without establishing that disability has ceased or that it is no longer related to the employment injury.[4]

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.[5]

ANALYSIS -- ISSUE 1

The Office accepted appellant's April 11, 2002 traumatic injury claim for lumbar strain. Appellant stopped work on the date of the injury and has not returned. The issue to be determined is whether the Office has met its burden of proof to establish that appellant had no remaining disability or residuals due to his accepted injury.

On July 8, 2003 the Office referred appellant to Dr. Bush, a Board-certified orthopedic surgeon, for an opinion on the extent and degree of his employment-related disability. Dr. Bush issued reports on August 16 and October 10, 2003, but refused to clarify his opinion regarding the issue as requested by the Office. The Office, therefore, properly referred appellant to Dr. Wright, a Board-certified orthopedic surgeon, to resolve the issue of his disability status.[6] On June 8, 2004 Dr. Wright submitted a report and provided a number of physical restrictions to which appellant was subject. On December 26, 2004 the Office asked Dr. Wright to supplement his report, and address a surveillance videotape obtained by the employing establishment showing appellant walking, driving, carrying bags and helping to move a piece of furniture on August 25 and 26, 2004. Dr. Wright refused to review the video or supplement his report.

The Office therefore properly referred appellant to Dr. Getz, a Board-certified orthopedic surgeon, for an opinion of his work capacity and ongoing disability.[7] On April 8, 2005 Dr. Getz noted a history of two previous employment-related back injuries, degenerative disc disease and

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[3] *Elaine Sneed*, 56 ECAB ___ (Docket No. 04-2039, issued March 7, 2005).

[4] *Mary A. Lowe*, 52 ECAB 223, 224 (2001).

[5] *James F. Weikel,* 54 ECAB 690 (2003).

[6] *See Ayanle A. Hashi*, 56 ECAB __ (Docket No. 04-1620, issued December 27, 2004) ("When the Office refers a claimant for a second opinion evaluation and the report does not adequately address the relevant issues, the Office should secure an appropriate report on the relevant issues.") *See also Mae Z. Hackett,* 34 ECAB 1421 (1983) (once the Office undertakes further development, it has the responsibility of obtaining an evaluation which will resolve the issue).

[7] *See id.*

a type of polymyalgia with abnormal muscle enzymes that was still under investigation. On physical examination, he found that appellant walked without a limp, bent over without difficulty, and had good spine motion without muscle spasms. Dr. Getz noted that appellant had mild low back pain during the straight leg raising test and hypoactive reflexes, but his back and legs were otherwise normal. Based on the surveillance videotape, he found that appellant was able to perform activities that were inconsistent with significant disabling low back pain. Dr. Getz diagnosed asymptomatic degenerative disc disease and opined that appellant's April 11, 2002 injury was a "transient exacerbation of a preexisting condition" that had returned to the baseline. He stated that appellant could return to work without restriction and that his subjective complaints were not supported by objective medical evidence.

The Board finds that the Office properly relied on the report of Dr. Getz, as it was rationalized, based on a thorough medical history and physical examination, and addressed all of the questions raised by the Office. Dr. Getz opined that appellant's accepted lumbar sprain was an exacerbation, or aggravation, of a preexisting degenerative disc condition that had since returned to the baseline. An employee's entitlement to compensation for an employment-related aggravation is limited to the period of disability caused by the aggravation.[8] An employee who is disabled solely because of a preexisting condition does not qualify for compensation, as the disability is not due to an injury caused by federal employment.[9] Because Dr. Getz found that there was no objective evidence that appellant had any remaining disability or residuals from his accepted lumbar strain, the Office properly terminated appellant's compensation for wage-loss and medical benefits.

The Board finds that the medical evidence submitted by appellant's treating physicians is not sufficient to overcome the weight of Dr. Getz's opinion. On September 6, 2003 Dr. Lestini opined that appellant's spinal condition was based on his 1996 employment injury. He removed appellant from work pending determination of his workers' compensation claim. Dr. Lestini's report did not address how appellant's degenerative disc disease was related to his April 11, 2002 employment injury. Rather, he attributed the condition to the 1996 injury. Additionally, Dr. Lestini did not state that appellant had been removed from work because he was disabled, but because the status of his workers' compensation claim had not been determined. His opinion is therefore insufficient to establish appellant's disability continuing due to the accepted condition of lumbar strain. Dr. Fullington, a Board-certified internist, noted on March 30, 2005 that appellant had muscle spasms around his lumbar spine and discomfort on the straight leg raise. However, this report did not state whether there was any causal connection between appellant's condition and his accepted employment injury and did not state that appellant was disabled from work. As these reports were of diminished probative value they do not overcome that of Dr. Getz or create a conflict in medical opinion.[10]

[8] *Gaeten F. Valenza*, 39 ECAB 1349 (1988); *James Hearn*, 29 ECAB 278 (1978).

[9] *See id.*

[10] *John D. Jackson*, 55 ECAB 465 (2004) ("A simple disagreement between two physicians does not, of itself, establish a conflict. To constitute a conflict of medical opinion, the opposing physicians' reports must be of virtually equal weight and rationale.")

The Board notes that appellant challenged the adequacy of Dr. Getz's physical examination, which he alleged was conducted in an unprofessional and incomplete manner. Appellant has presented no evidence to support his claim that the examination was incomplete or rushed. The Board therefore finds that Dr. Getz's examination was adequate and his resulting opinions carried the weight of the medical opinion evidence.

LEGAL PRECEDENT -- ISSUE 2

Once the Office meets its burden of proof to terminate appellant's compensation benefits, the burden shifts to appellant to establish that she had disability causally related to her accepted injury.[11] He must submit rationalized medical evidence to establish the causal relationship between her continuing disability and the employment injury.[12] To be rationalized, the opinion must be based on a complete factual and medical background of the claimant,[13] and must be one of reasonable medical certainty,[14] explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[15] Neither the fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[16]

ANALYSIS -- ISSUE 2

Following the termination of his benefits, appellant submitted several medical records from Dr. West, a Board-certified internist, to demonstrate that he continued to be disabled from work. The issue to be determined is whether appellant has submitted medical evidence sufficient to establish ongoing disability.

Dr. West reported pain and symptoms involving appellant's lumbar spine and back from 2003 to 2006. On August 27, 2003, over a year following the accepted employment injury, he noted episodes of lumbar spasms and back pain and opined that they were discogenic in origin. The Board notes that on April 19, 2004 he stated that appellant's back pain was at a baseline level. Dr. West reported periods of back spasm and pain intermittently from July 26, 2004 to November 22, 2005. On May 24, 2006 he stated that waves of pain in appellant's back and other areas of his body had been diagnosed as myositis with an unusual presentation. In none of his reports did Dr. West state that appellant's symptoms were related to his employment injury and did not address whether he was totally or partially disabled from work. He did not provide an opinion as to whether appellant's April 11, 2002 employment injury caused or exacerbated his degenerative disc disease. An MRI scan conducted July 7, 2006 provided evidence of

[11] *Manuel Gill*, 52 ECAB 282 (2001).

[12] *Id.*

[13] *Tomas Martinez*, 54 ECAB 623 (2003); *Gary J. Watling*, 52 ECAB 278 (2001).

[14] *John W. Montoya*, 54 ECAB 306 (2003).

[15] *Judy C. Rogers*, 54 ECAB 693 (2003).

[16] *Ernest St. Pierre*, 51 ECAB 623 (2000).

degenerative disc disease, but did not provide any medical opinion as to whether the condition was caused or aggravated by the accepted employment injury.

For these reasons, the Board finds that the reports of Dr. West are insufficient to establish either that appellant is disabled from work or that his current condition is causally related to his accepted employment injury. The Board therefore finds that appellant has not met his burden of proof to establish an ongoing disability caused by his federal employment.

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation benefits, effective June 27, 2005, on the grounds that he had no residuals or disability causally related to his accepted employment injury. The Board further finds that appellant failed to meet her burden of proof to establish continuing employment-related disability or residuals causally related to the April 11, 2002 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 28, 2006 is affirmed.

Issued: June 21, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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