

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

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**B.M., Appellant**

**and**

**DEPARTMENT OF JUSTICE, FEDERAL  
PRISON SYSTEM, Elkton, OH, Employer**

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**Docket No. 07-113  
Issued: May 7, 2007**

*Appearances:*  
*Alan Shapiro, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On October 17, 2006 appellant filed a timely appeal from the decision of the Office of Workers' Compensation Programs dated September 15, 2006 which denied his claim for compensation on the grounds that he failed to establish disability for work during the period claimed. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(1), the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant has established that his claim for disability for the period August 26 to October 18, 2006 are due to the accepted July 2, 2003 employment injury.

**FACTUAL HISTORY**

On October 29, 2003 appellant, then a 44-year-old correctional officer, filed a traumatic injury claim, Form CA-1, alleging that he pulled a muscle in his lower back on July 2, 2003 when he lifted a 40-pound box of equipment. On September 9, 2003 Dr. Karl Getzinger, a Board-certified family practitioner, diagnosed a strain to the lower left paraspinal muscles and

rib cage. On February 6, 2004 Dr. Edmund Mitchell, a Board-certified family practitioner, imposed a four-week work restriction that prohibited frequent bending and pushing, pulling or lifting more than 10 pounds. On February 20, 2004 the Office accepted appellant's claim for thoracic strain.<sup>1</sup> Appellant was placed in light-duty status by the employing establishment.

Dr. Jorge Martinez<sup>2</sup> began treating appellant in March 2004 for pain and dysfunction of the lower back by administering nerve blocks. He submitted reports from March 18 to August 5, 2004 detailing his administration of the nerve blocks and listing appellant's general physical condition. In these reports, Dr. Martinez noted that appellant complained of pain in the lower back at the right S1 joint along with pain in his lower left leg.

On April 12, 2004 the Office recognized Dr. Martinez as the physician of record. On June 3, 2004 Dr. Martinez reported that appellant sustained both thoracic and lumbar strain as a result of his employment injury. He stated that these soft tissue injuries affected appellant's muscle, fascia, ligaments, vessels, nerves and sympathetic system which caused chronic inflammation. On June 24, 2004 Dr. Martinez requested authorization for a magnetic resonance imaging (MRI) scan of appellant's lumbar spine to determine the full extent of his employment-related injuries. He believed that appellant sustained injury to more than his thoracic spine on July 2, 2003 based on the fact that within two weeks of his accepted employment injury, appellant experienced an exacerbation of his condition as pain shot up his spine, across his shoulder girdle region, up through the skull into the eyes.

On July 1, 2004 Dr. Martinez provided work restrictions that prohibited prolonged sitting or standing and lifting over seven pounds. In a report from the same day, he noted that appellant felt tenderness to finger-tip pressure applied to the lumbar facets, which was indicative of facet joint syndrome. Dr. Martinez also stated that appellant was experiencing severe generalized muscle spasms from his sacrum down through his left leg.

On July 26, 2004 Dr. Martinez submitted a disability certificate stating that appellant would be unable to work between July 26 and August 26, 2004. A treatment report he submitted the same day was identical to that made on July 15, 2004 and made no mention of changes in appellant's condition or explain why he was totally disabled for work. On July 29, 2004 Dr. Martinez submitted a medical report seeking approval for an additional eight weeks of nerve block treatments. He noted that appellant complained of pain in the lumbar area and showed increased pain during lumbar extension and flexion with positive cough and valsalva tests.

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<sup>1</sup> The Board notes that on March 30, 2004 appellant challenged this determination claiming that it was his lower back that was strained, not his thoracic spine. He submitted the staff injury assessment form completed by the employing establishment health unit on the day of his injury. The form states that appellant has a muscle strain and indicates the area of the strain with a circle extending from the bottom to the middle of the back. Appellant submitted no other medical information.

<sup>2</sup> Dr. Martinez's Board status as of 2004 could not be verified.

On August 12, 2004 appellant filed a claim alleging that he experienced a recurrence of disability on July 16, 2004.<sup>3</sup> By decision dated August 19, 2004, the Office accepted his recurrence for medical treatment only.

On August 23, 2004 Dr. Martinez submitted a certificate extending appellant's period of total disability to September 26, 2004.

Appellant did not return to work on September 27, 2004. He filed claims for compensation, Form CA-7, for leave without pay taken from August 26 to October 18, 2004.

On October 18, 2004 appellant requested that the Office recognize Ohio Sport and Spine as the physicians of record.<sup>4</sup> That day he was seen by Dr. John L. Dunne, a Board-certified osteopath specializing in occupational medicine. Dr. Dunne diagnosed a work-related lumbar strain. He noted that appellant had slow motion and poor quality in flexion, extension and side-bending, but no neurological abnormalities. Dr. Dunne recommended that appellant pursue an aggressive physical therapy program for range of motion and core stabilization.

On November 2, 2004 Dr. Dunne stated that appellant had good flexion and extension, but poor stabilization and body proprioception. He reported that appellant's back pain was intermittent and that he wanted to return to work for financial reasons. Dr. Dunne released appellant to work without restrictions on November 3, 2004. Appellant returned to work in full-duty status on December 2, 2004.

Appellant was referred for a second opinion examination by Dr. Manhal Ghanma, a Board-certified orthopedic surgeon. In a December 16, 2004 report, Dr. Ghanma found no abnormalities in the thoracic spine and no spasms in either the thoracic or lumbar spines. He stated that appellant had no objective symptoms of thoracic sprain and that he was capable of performing his full duties without restrictions. Dr. Ghanma also stated that appellant's medical disability from August until November was not warranted and that the reports of Dr. Martinez were not creditable as he was arrested for improper over-treatment of his patients.

By decision dated January 5, 2005, the Office denied appellant's compensation for intermittent disability on the grounds that he had not established that he was disabled. Based on the opinion of Dr. Ghanma, the Office found that appellant had no remaining disability related to his accepted employment injury and that he had no further need of work restrictions or medical treatment. The Office noted that appellant had provided no medical evidence explaining how his condition worsened on July 16, 2004 or why he was incapable of performing his light-duty assignment.

On March 22, 2005 appellant requested an oral hearing which was held on June 29, 2006. Appellant, through his counsel, said that he stopped work on July 16, 2004 when he was assigned to a light-duty job. He did not believe that he could perform because the job required

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<sup>3</sup> This form is largely illegible and appellant's statement of the facts surrounding the alleged recurrence cannot be read.

<sup>4</sup> On September 19, 2004 appellant requested that the Office recognize Dr. Berislav Spahija, a Board-certified neurologist, as the physician of record.

“constant bending” to check visitor identification. Appellant said that visitor traffic was especially great on the weekends, when he was assigned to work. When he advised that he could not perform the job duties, the acting warden told him that he was to go home sick and not return until he could work full duty because his medical restrictions would no longer be honored. Given the choice of releasing appellant to full duty or removing him from work, Dr. Martinez elected to place him in a disabled status despite the fact that he could work with “very few” restrictions. Appellant stated that he believed himself capable of performing his regular full-duty job of patrolling the prison grounds in a vehicle.

On July 28, 2006 the employing establishment responded to appellant’s hearing testimony. It stated that the work restrictions in place on July 16, 2004 limited prolonged sitting and standing, but did not prohibit bending. The position appellant was assigned did not require constant bending and was within the restrictions provided by Dr. Martinez. It refuted the allegation that he was told his work restrictions would not be honored and contended that he voluntarily left when he decided not to accept the assigned light-duty position. The employing establishment also indicated that it could not place appellant in his regular assignment until he was released to full duty by a physician.

By decision dated September 18, 2006, the Office hearing representative affirmed the January 5, 2005 decision. She found that the statement of the employing establishment regarding the events of July 16, 2004 was more credible than the testimony of appellant and that he had no bending restrictions in place at the time that the light-duty position was assigned. The hearing representative also found that appellant had not provided sufficient medical evidence to establishing that he was unable to perform the assigned light-duty position.

### **LEGAL PRECEDENT**

Compensation for wage loss is available only for periods during which an employee’s accepted condition prevents him from earning his wages.<sup>5</sup> Even if the Office has accepted that an employee sustained an injury in the performance of duty. The employee still has the burden of establishing that his accepted condition resulted in disability during the specific periods for which he is claiming compensation.<sup>6</sup> The duration of a disability is a medical issue that must be proved by a preponderance of the reliable, probative and substantial evidence.<sup>7</sup>

The Board will not require the Office to pay compensation for disability in the absence of any medical evidence directly addressing the particular periods of disability for which compensation is claimed. To do so would have the effect of allowing employees to self-certify their disability and entitlement to compensation.<sup>8</sup> There is no requirement that an employee

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<sup>5</sup> *Judith A. Cariddo*, 55 ECAB 348 (2004); *see also* 20 C.F.R. § 10.500(a).

<sup>6</sup> *Dorothy J. Bell*, 47 ECAB 624 (1996).

<sup>7</sup> *Edward H. Horton*, 41 ECAB 301 (1989).

<sup>8</sup> *Fereidoon Kharabi*, 52 ECAB 291 (2001).

show an independent medical evaluation for each day of claimed disability, but the employee must provide some medical evidence that she was disabled on those days.<sup>9</sup>

When an employee on a light-duty assignment seeks a recurrence of disability based on a change in the requirements of the assignment, he must demonstrate by reliable, probative and substantial evidence that the alterations exceed his established physical limitations.<sup>10</sup>

### ANALYSIS

The record establishes that the Office accepted appellant's claim for thoracic strain as a result of reaching for a heavy box on July 2, 2003. Appellant subsequently claimed disability for intermittent dates commencing August 26, 2004. He has the burden of establishing that his employment injury caused him to be disabled from his light-duty assignment from August 26 to October 18, 2004. The Board finds that appellant has not established that he was disabled for work during the claimed period.

Appellant contended at his oral hearing that he claimed a recurrence of disability because he was assigned to a light-duty position that he could not perform. He stated that the position required constant bending which caused him back pain. Appellant alleged that he was not told that his work restrictions against bending would not be honored and that he was presented with the choice of working full duty or not working at all. The employing establishment stated that the assigned light-duty position was within his work restrictions, but that appellant chose to leave work rather than accept it.

The Board finds that appellant's contention that he could not accept the assigned light-duty position because it required too much bending is not supported by the evidence. The record establishes that appellant's work restrictions included only limitations on standing, sitting and lifting. These restrictions were issued by Dr. Martinez approximately two weeks before appellant's reassignment. Though Dr. Mitchell, a Board-certified family practitioner limited appellant's bending in February 2004, there is no medical evidence in the record indicating that appellant had any such restrictions as of July 16, 2004. The Board finds that appellant has not established that he was disabled because of his reassignment to a light-duty job that required bending.

Appellant has not shown that any other physical requirements of the position assigned on July 16, 2004 exceeded his physical limitations. Dr. Martinez submitted disability certificates covering the period July 26 to September 26, 2004. However, Dr. Martinez did not provide any rationale as to why appellant was totally disabled for work during that period. The Board notes that the reports Dr. Martinez submitted after the accepted recurrence are nearly identical to those he submitted prior to it and do not mention appellant's employment or its physical requirements. The medical report completed on July 26, 2004 does not provide any description of appellant's

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<sup>9</sup> *Id.* (finding that "less than definitive medical evidence" may be adequate proof of disability when an employee has an accepted employment-related condition and a doctor has provided a medical opinion that the effects of the condition are likely reoccur).

<sup>10</sup> *See* 20 C.F.R. § 10.5(x); 20 C.F.R. § 10.104(b).

condition or an explanation of why he would be unable to perform the light-duty position he was assigned. Dr. Martinez's reports are thus, insufficient to establish appellant's disability during the claimed periods.

The medical opinion evidence provided by Dr. Dunne, a Board-certified osteopath, is also insufficient to establish appellant's disability. On October 18, 2004 Dr. Dunne diagnosed a work-related lumbar strain, but did not provide any opinion of how the July 2, 2003 employment injury caused disability for the claimed period. He did not address whether appellant was disabled for work and the Board notes that the period of claimed disability was prior to the examination by Dr. Dunne. Though he noted poor stabilization and body proprioception in his November 2, 2004 report, Dr. Dunne released appellant to work without restrictions on November 3, 2004. These reports are not sufficient to establish disability during the claimed period.

The Board notes that Dr. Manhal, a Board-certified osteopathic surgeon, examined appellant on December 16, 2004 and found no objective evidence of disability related to his accepted thoracic strain. His report also postdates the period of claimed compensation. The Board finds that this report contains no evidence to support appellant's claim that he was disabled from work because he could not perform the light-duty position assigned.

The medical evidence does not establish that appellant was disabled for work during the period claimed or that the assigned light-duty position exceeded his physical limitations.

### **CONCLUSION**

The Board finds that appellant has not established his claim for compensation for the period August 26 to October 18, 2006.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated September 15, 2006 is affirmed.

Issued: May 7, 2007  
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