

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

M.S., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
CUSTOMS & BORDER PROTECTION,)
New York, NY, Employer)

Docket No. 07-2015
Issued: November 16, 2007

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 July 31, 2007 appellant filed a timely appeal from the January 8 and July 25, 2007 decision of the Office of Workers' Compensation Programs. By decision dated July 25, 2007, the Office hearing representative affirmed the Office's January 8, 2007 denial of appellant's claim for recurrence of disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established that he sustained a recurrence of disability causally related to his accepted condition of lower back sprain. On appeal, he contended that the opinion of the impartial medical examiner was inaccurate and based on an incorrect factual basis. Appellant also argued that the Office should pay for medical treatment of his accepted condition.

FACTUAL HISTORY

On June 23, 1975 appellant, then a 30-year-old special agent, filed a traumatic injury claim alleging that on June 16, 1975 he hurt the muscles in his lower back when he twisted from one machine to another in a crowded space. In an x-ray report dated June 17, 1975, Dr. Beno Paciuc indicated that appellant had minimal straightening of the normal lordosis of the lumbar spine, probably due to muscle spasms. He found no fracture, dislocation or gross destructive lesion. Dr. Paciuc noted very minimal narrowing of the posterior aspect of the intervertebral space between L5 and S1. The emergency room physician at St. John's Riverside Hospital reviewed appellant's x-ray report and noted that he had muscle spasms but no spinal tenderness. The physician diagnosed myalgia of the lower back. Appellant stopped work the day of the incident and returned to full duty on June 23, 1975. The Office accepted appellant's claim for myalgia/lumbosacral sprain.

In late 1975 and again in 1978, appellant sought authorization for additional medical treatment related to back spasms. Because he submitted no additional medical information, the Office found no basis to authorize additional treatment. Appellant left the employing establishment on January 17, 1976.

On March 9, 2005 appellant filed a claim for recurrence of disability alleging that, following his accepted injury in 1975, he had intermittent back problems until 1995 when his back pain and right leg radiculopathy became chronic. He stated that he was placed in a light-duty position for two months following his accepted injury.

On March 18, 2005 the Office informed appellant of the evidence required to establish a claim for recurrence of disability and gave him 25 days to submit it. On March 26, 2005 appellant requested an extension of time to gather the necessary information. He stated that he sustained no injuries to his back following the accepted June 16, 1975 injury.

By decision dated April 18, 2005, the Office denied appellant's claim on the grounds that he had submitted no medical or factual evidence establishing that his alleged recurrence was causally related to his June 16, 1975 employment injury. On April 23, 2005 appellant requested an oral hearing.

On June 27, 2005 Dr. Sheldon Alter, a Board-certified nephrologist, stated that he began treating appellant in October 1980 for chronic low back syndrome with bilateral radiculopathy in his lower extremities. At that time appellant reported that he had experienced a number of recurrences of low back pain over the previous five years but had not sought medical treatment because he did not have a primary care provider and was able to alleviate his symptoms with anti-inflammatory and muscle relaxing medication. Dr. Alter reviewed the medical records related to the June 16, 1975 employment injury and found that appellant had been diagnosed with injury to his lower back musculature that impacted the normal lordosis of the lumbar spine. He stated that the x-ray report from 1975 did not disclose any preexisting pathology or evidence of previous injury. Dr. Alter stated that an x-ray taken at the initial examination revealed some straightening of the lumbar lordosis and some narrowing of the space between L5 and S1. He diagnosed low back syndrome directly related to appellant's 1975 employment injury. Dr. Alter

treated appellant with rest during acute exacerbation of symptoms, moderate activity after the acute phase and medication.

Dr. Alter saw appellant yearly from 1980, during which time he reported no new injuries, but complained of a variety of symptoms consistent with the original diagnosis. He reported that periodic radiographs showed increased straightening of the normal lumbar lordosis and increased narrowing of the L5-S1 intervertebral space. After 1995 appellant's episodes of radiculopathy became longer and more frequent, his acute low back exacerbations forced him to stay in bed several times and his right foot often felt numb. Dr. Alter stated that these symptoms were consistent with the radiographic findings and indicated gradual deterioration of the 1975 employment injury.

By decision dated July 14, 2005, the Office hearing representative found that the case was not in posture for a hearing and remanded the case for further medical development. He found that Dr. Alter's report was insufficient to establish appellant's claim because it did not include any diagnostic reports or complete examination findings. However, the hearing representative found that the report was sufficient to require further development of the claim.

The Office referred appellant for a second opinion examination to determine whether his current condition was causally related to his accepted employment injury. On September 7, 2005 Dr. Marc Berezin, a Board-certified orthopedic surgeon, issued a report of the second opinion examination. He reported that appellant had episodes of back pain, pain radiating down both legs and numbness of the right foot. Appellant reported that he had stiffness of the back on waking and pain with sitting, rising to standing, turning his back and sudden motions. Dr. Berezin reviewed doctor's notes from 1991 to 2005 provided by appellant and noted that many did not include a patient name or physician heading. The majority of the notes were prescriptions for Valium, though there was no indication of the purpose of such medication. A February 15, 1996 note stated that appellant had a history of low back pain and intermittent right foot numbness. A note from September 27, 1996 noted that appellant had persistent pain, but no weakness and that conservative management would continue. There is no mention of which body part Dr. Berezin was examining, though a partially cut off part of the note discussed cervical derangement. A note from October 1, 1996 indicated that appellant had modest improvement, limited mobility and no deterioration of motor function. Again, body part was not specified. On October 15, 1996 Dr. Berezin noted paraspinal spasm, minimal motion but no radicular component. A note from April 7, 1998 indicated that appellant's chief complaint was low back pain and noted a history of cervical derangement. A note from April 4, 2000 stated that he had a history of low back syndrome and occasional paresthesia in the right foot.

On examination, Dr. Berezin found that appellant walked independently with a nonanalgesic gait, could heel-toe walk and had no motor deficits in the lower extremities. Appellant had lower lumbar tenderness and right-side paravertebral tenderness, but no spasm or sacroiliac joint tenderness. Dr. Berezin noted 50 percent active forward flexion, full rotation and lateral rotation with complaints of pain and pain down the right leg. He found decreased sensation over the first through fourth metatarsal heads of the right foot and diminished patellar reflexes bilaterally. The straight leg test elicited low back pain radiating to the buttocks at 60 degrees bilaterally. The Fabere test was negative. Dr. Berezin reviewed an x-ray of the lumbar spine dated December 4, 1997 that revealed disc space narrowing at L4-5 and L5-S1 and some

spurring. He noted that the x-ray report from June 17, 1975 indicated very minimal narrowing of the posterior aspects of the intervertebral space between L5 and S1.

Dr. Berezin stated that appellant appeared to have a degenerative spinal process that was unrelated to his June 16, 1975 employment-related sprain. He found that appellant's current disability was related to a preexisting degenerative process. Dr. Berezin found that appellant's injury-related condition had resolved and required no further treatment.

By decision dated October 27, 2005, the Office denied appellant's claim for compensation benefits on the grounds that the weight of the medical evidence, as represented by Dr. Berezin's opinion did not establish that his condition was causally related to his accepted employment injury.

On November 12, 2005 appellant filed a request for an oral hearing. He contended that Dr. Berezin did not conduct an adequate examination and that there was no evidence to establish that his spinal condition was preexisting.

By decision dated March 2, 2006, the Office hearing representative remanded the case finding that it was not in posture for a decision. She found that Dr. Berezin had provided no explanation for his opinion that appellant's current condition was unrelated to his accepted injury. The Office hearing representative stated that on remand the Office should ask Dr. Berezin for a clarification of his opinion.

On March 15, 2006 Dr. Berezin stated that his opinion was based on the mechanism of the injury, the file treatment notes and the radiographic findings. He stated that appellant's current complaints were consistent with the radiographic findings of a degenerative process. Dr. Berezin stated that the mechanics of appellant's 1975 employment injury would not cause a degenerative process. He noted that the x-ray report of June 17, 1975 showed minimal narrowing of the posterior aspect of L5-S1 intervertebral space which was consistent with a degenerative process.

By decision dated April 19, 2006, the Office denied appellant's claim on the grounds that Dr. Berezin's opinion established that his condition was no longer employment related. On May 16, 2006 appellant requested an oral hearing.

By decision dated August 23, 2006, a third Office hearing representative found that the case was not in posture for a decision. She found that there was a conflict of medical opinion evidence between Dr. Alter and Dr. Berezin that required resolution by an impartial medical examiner.

On December 8, 2006 appellant was examined by an impartial medical examiner, Dr. Harvey Seigel, a Board-certified orthopedic surgeon, who reviewed the medical evidence in the file, which consisted of the 1975 emergency room report and x-ray report, Dr. Alter's report and the two reports of Dr. Berezin. Dr. Seigel disagreed with Dr. Alter's statement that the 1975 x-ray report revealed no preexisting pathology, noting that the narrowing of the L5-S1 space was evidence of degenerative disc disease at that level. He stated that appellant's current complaints included daily low back pain of varying degrees in the mid and low lumbar regions that radiated into the buttocks bilaterally and down the lower extremities to the posterior thigh. Appellant also

experienced numbness on the dorsum of his right foot, ranging from completely numb to tingling. Dr. Seigel noted that throughout the history taking process, appellant moved his head, neck, trunk and upper and lower extremities without evidence of physical discomfort.

On physical examination, Dr. Seigel found that appellant had diminished flexion in the lumbosacral spine. He noted that appellant had no pain when straightening from a forward bend but did express pain when rising from a resting supine position. Dr. Seigel stated that appellant had diminished tilt, left more than right but normal rotation bilaterally. He found no tenderness or muscle spasms in the paraspinal musculature of the lumbosacral spine, no tenderness of the sacroiliac joint but mild tenderness at the mid-sacrum, slightly to the right of the midline. Dr. Seigel also noted a mild degree of scoliosis to the right. The straight leg raising test from the seated position was positive on the right at 60 degrees and negative on the left. In the supine position, leg pain was noted on the straight leg raise at 30 degrees on the right and 60 degrees on the left. Dr. Seigel found diminished sensation all over appellant's right foot, especially in the S1 distribution but found no muscle weakness.

Dr. Seigel took x-rays of appellant's spine and found no evidence of fracture, dislocation or old or new trauma. He noted that disc spaces were significantly narrowed at several levels of the lumbar spine and that several of the vertebrae had osteophyte formations, many of which encroached on neural foramina. Dr. Seigel found no evidence of scoliosis, spondylosis or spondylolisthesis. He stated that the lumbosacral carrying angle was normal, though there was a mild diminution of the normal lordotic curvature. Dr. Seigel diagnosed multilevel degenerative disc disease of the lumbosacral spine involving four discs. He opined that this condition was not related to the accepted employment injury. Dr. Seigel stated that the x-ray taken the day after appellant's accepted employment injury revealed that he already had degenerative disc disease in his lower back, which was present "long before" his lumbosacral sprain. He found that appellant's lumbosacral sprain cleared after a week of rest and that he was able to return to full duty on June 23, 1975. Based on the report of Dr. Alter, Dr. Seigel found that appellant did not seek treatment for his low back condition until 1980, by which time his preexisting degenerative disc disease had progressed. He stated that appellant's current spinal condition was not caused, accelerated or precipitated by the June 16, 1975 employment injury. Dr. Seigel found that appellant's current radiographic studies revealed damage to four discs that took years to develop and therefore could not have possibly been caused by the low back sprain that had resolved long ago. He stated that appellant's current condition was the consequence of the relentless progression of preexisting degenerative disease. Dr. Seigel noted that appellant would be unable to perform a physically demanding job but was capable of performing the regular duties of his current occupation, that of an attorney.

By decision dated January 8, 2007, the Office denied appellant's claim for recurrence of disability. It found that the opinion of the independent medical examiner, Dr. Seigel, carried the weight of the medical opinion evidence and that this evidence did not support the claim that appellant's current condition was related to the accepted injury. On January 14, 2007 appellant requested an oral hearing. He challenged Dr. Seigel's finding that there was evidence of preexisting degenerative disease, that he was not treated for his back between 1975 and 1980 and that he had no ongoing symptoms related to his back sprain after returning to work in 1975.

On May 31, 2007 the Office hearing representative conducted a hearing. Appellant stated that Dr. Seigel performed a thorough examination but that he reached an inaccurate decision related to causation because he found that the 1975 radiographic finding of narrowing of one intervertebral space was evidence of preexisting degenerative disc disease. He said that he went through very rigorous training for the employing establishment and other law enforcement agencies without any back problems which would not have been possible with a preexisting condition. Appellant stated that he experienced low back pain with regularity following his accepted injury but had no intervening injury.

By decision dated July 25, 2007, the Office hearing representative affirmed the Office's January 8, 2007 decision. She found that Dr. Seigel's opinion was entitled to the special weight of the medical evidence because it was well reasoned and based on proper factual background.

LEGAL PRECEDENT

A claimant seeking compensation under the Federal Employees' Compensation Act¹ has the burden of establishing the essential elements of his claim by the weigh of reliable, probative and substantial evidence.² To establish a claim for recurrence of disability, a claimant must establish that he experienced a spontaneous material change in the employment-related condition without an intervening injury or new exposure to the work environment that caused the illness.³ A claimant's burden of proof includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the condition is causally related to the employment injury and supports the conclusion with sound medical rationale. Where no such rationale is present, the medical evidence is of diminished probative value.⁴

The Act provides that, if there is a disagreement between a physician making an examination for the United States and the physician of the employee, the Secretary must appoint a third physician to make an examination.⁵ Likewise, the implementing regulation states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser or consultant, the Office must appoint a third physician to make an examination. This is called a referee examination and the Office is required to select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case.⁶ It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the

¹ 5 U.S.C. §§ 8101-8193.

² *Edward W. Spohr*, 54 ECAB 806 (2003).

³ *Carlos A. Marrero*, 50 ECAB 117 (1998); *Philip L. Barnes*, 55 ECAB 426 (2004); 20 C.F.R. § 10.5(x).

⁴ *Mary A. Ceglia*, 55 ECAB 626 (2004).

⁵ 5 U.S.C. §§ 8101-8193, 8123(a).

⁶ 20 C.F.R. § 10.321.

opinion of such specialist, if sufficiently well rationalized and based on proper factual and medical background, must be given special weight.⁷

ANALYSIS

The Office accepted that appellant sustained a lumbosacral strain on June 16, 1975. The issue to be resolved is whether appellant has established that he sustained a recurrence of disability causally related to this injury.

The Office properly determined that there was a conflict of medical opinion between Dr. Alter, a Board-certified nephrologist, and Dr. Berezin, a Board-certified orthopedic surgeon, on the issue of whether appellant's current condition was causally related to his accepted injury. Appellant was referred for an impartial medical examination with Dr. Seigel, a Board-certified orthopedic surgeon, to resolve the conflict.

On physical examination, Dr. Seigel found, among other things, that appellant's lumbar spine had pain when rising from a resting supine position but no tenderness or muscle spasms in the paraspinal musculature. He noted that the lumbar spine had diminished flexion and diminished tilt, primarily on the left, but normal rotation bilaterally. Dr. Seigel also found mild tenderness at the mid-sacrum, slightly to the right of the midline.

Dr. Seigel reviewed current x-rays of appellant's lumbar spine and found no evidence of fracture, dislocation or trauma. He noted that disc spaces were significantly narrowed at four levels of the lumbar spine and that several of the vertebrae had osteophyte formations, many of which encroached on neural foramina. Dr. Seigel found no evidence of scoliosis, spondylosis or spondylolisthesis. He stated that the lumbosacral carrying angle was normal, though there was a mild diminution of the normal lordotic curvature. Dr. Seigel diagnosed multilevel degenerative disc disease of the lumbosacral spine involving four discs. He opined that appellant's current condition was the consequence of the relentless progression of preexisting degenerative disease and was not caused, accelerated or precipitated by the June 16, 1975 employment injury.

In support of his opinion, Dr. Seigel stated that the x-ray taken on June 17, 1975 revealed that appellant already had degenerative disc disease in his lower back at the time of his accepted lumbosacral sprain. He found that appellant's lumbosacral sprain cleared after a week of rest and that appellant was able to return to full duty on June 23, 1975. Based on the report of Dr. Alter, Dr. Seigel found that appellant did not seek treatment for his low back condition until 1980, by which time his preexisting degenerative disc disease had progressed. He found that the damage to the discs took years to develop and therefore could not have been caused by the low back sprain that had resolved long ago. The Board finds that the report of Dr. Seigel is entitled to the special weight of the medical opinion evidence because his medical opinion was sufficiently rationalized and was based on a thorough physical examination and review of the medical evidence of record.

On appeal, appellant contended that the Office improperly relied on the opinion of Dr. Seigel in denying his claim. He contended that Dr. Seigel's medical reasoning was flawed,

⁷ *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

but presented no new medical evidence to challenge his findings. The Board had held that the issue of medical causation can be proved only by a preponderance of the reliable, probative and substantial medical evidence.⁸ As Dr. Seigel's report was well rationalized and supported by findings on physical examination and diagnostic testing, it constitutes the special weight of the medical evidence. Appellant also challenged the factual basis on which Dr. Seigel based his opinion. However, he provided no corroborating evidence to establish that any of the facts that Dr. Seigel relied on were inaccurate. The Board therefore finds that appellant did not establish any error in Dr. Seigel's report.

The Board finds that the special weight of the medical evidence establishes that appellant's spinal condition is not a recurrence of disability causally related to his accepted injury.

On appeal, appellant also contended that he was entitled to medical treatment for his accepted injury. The Board has held that, while the Office is obligated to pay for treatment of employment-related conditions, the employee has the burden of establishing that the expenditure is incurred for treatment of the effects of such conditions.⁹ Because the special weight of the medical evidence establishes that appellant has no continuing employment-related residuals, he is not entitled to medical treatment for the effects thereof.

CONCLUSION

The Board finds that appellant has not established that he sustained a recurrence of disability causally related to his accepted condition of lower back sprain.

⁸ *Tammy L. Medley*, 55 ECAB 182 (2003).

⁹ The Board has held that, while the Office is obligated to pay for treatment of employment-related conditions, the employee has the burden of establishing that the expenditure is incurred for treatment of the effects of such conditions. *Kennett O. Collins, Jr.*, 55 ECAB 648 (2004).

ORDER

IT IS HEREBY ORDERED THAT the July 25, 2007 decision of the Office of Workers' Compensation Programs' hearing representative and the January 8, 2007 Office decision are affirmed.

Issued: November 16, 2007
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