

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

T.G., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Washington Township, OH, Employer**

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**Docket No. 07-2231
Issued: June 2, 2008**

Appearances:

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 4, 2007 appellant, through counsel, filed a timely appeal from the August 8, 2007 decision of an Office of Workers' Compensation Programs hearing representative, affirming the termination of his medical and wage-loss compensation benefits. 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 wage loss and medical benefits effective December 29, 2006, on the grounds that he had no residuals or disability related to his accepted employment injuries; and (2) whether appellant established continuing disability or residuals related to his accepted employment injuries.

FACTUAL HISTORY

On October 5, 1998 appellant, then a 45-year-old letter carrier, injured his lower back while bending to lift a heavy tray of mail. The Office accepted his claim for aggravation of a

bulging lumbar disc. On June 14, 1999 it expanded the claim to include disc herniations at L2-3 and L3-4. On February 3, 2000 the Office authorized microdiscectomy at L3-4 and L4-5. Appellant elected not to proceed with the surgery.

On March 1, 2004 Dr. Scott West, a Board-certified osteopathic physician specializing in neurological surgery, stated that appellant continued to experience low back pain, with radiation into his right leg. He reported that a February 12, 2004 magnetic resonance imaging (MRI) scan of appellant's lumbar spine revealed severe bilateral foraminal stenosis and right-side herniation at L2-3 with degenerative disc changes at other levels of the lumbar spine. Dr. West opined that a microscopic decompression lumbar laminectomy at L2-3 would help resolve the right leg symptoms.

On April 2, 2004 appellant filed a claim for compensation for leave without pay. In a March 22, 2004 attending physician's report, Dr. West stated that appellant was totally disabled as of March 17, 2004. On May 5, 2004 he stated that, although appellant had undergone extensive conservative treatment with some temporary improvements, the disc herniations seen in the diagnostic studies revealed further degenerative disc changes and exacerbations of his condition caused by the 1998 employment injury based on a "flow through phenomenon" and that his ongoing work exacerbated his condition.

On May 24, 2004 appellant was seen by Dr. Gregory Fisher, a Board-certified orthopedic surgeon, for a second opinion examination. Dr. Fisher noted that the herniation at L2-3 had enlarged since the time of the original injury and was sufficient to cause appellant's lower extremity symptoms. He opined that surgery was warranted and related to appellant's accepted employment injury. The Office accepted appellant's claim for recurrence of disability beginning on March 16, 2007 and expanded his claim to include the herniated disc at L2-3.

On June 29, 2004 Dr. West performed a microscopic lumbar laminectomy with discectomy at L2-3. At the beginning of September 2004, appellant again began to experience low back and right leg pain. On November 28, 2004 he underwent a myelogram and a computerized tomography (CT) scan, which revealed an extradural anterior filling defect at L3-4 and L4-5, Grade 1 retrolisthesis of L3 on L4 and disc bulges at L3-4 and L4-5. There was no definite evidence of nerve root impingement at L3-4 and L4-5. On December 29, 2004 Dr. West stated that appellant was unable to return to work even with restrictions because of the degeneration and instability of his lumbar spine and the amount of physical activity involved in his position. On January 14, 2005 appellant was placed on the periodic rolls.

On February 10, 2005 the Office sought clarification from Dr. West about the cause, degree and duration of appellant's disability. Dr. West responded that appellant's spinal changes were related to both his preexisting degenerative disease and the aggravation caused by his employment injury. He opined that appellant would be unable to return to his date-of-injury position, but might be able to return to a very limited work if his pain management treatments were successful. On April 12, 2005 Dr. Richard Donnini, an osteopathic physician specializing in pain management, began treating appellant with medication, exercise and nerve root blocks.

On May 3, 2006 the Office referred appellant for a second opinion examination with Dr. Pietro Seni, a Board-certified orthopedic surgeon. It provided Dr. Seni with a statement of

accepted fact, dated July 8, 2004, listing the physical requirements of appellant's date-of-injury position and his history of employment-related low back injuries, which occurred in 1980, 1989, 1993 and 1996. These injuries were accepted for lumbar strains and bulging discs and subsequently closed. The statement noted that appellant's 1998 employment injury was accepted for aggravation of bulging lumbar disc with microdiscectomy at L3-4 and L4-5 and a herniated disc at L2-3 with decompression lumbar laminectomy.

In a May 31, 2006 report, Dr. Seni advised that the statement of accepted facts provided by the Office was inaccurate to the extent that it stated that appellant had undergone a microdiscectomy at L3-4 and L4-5. He reported that appellant's current symptoms included low back pain that radiated into the lower extremities, right worse than left and numb toes. On examination, Dr. Seni noted normal spinal curvature, normal sensation, symmetrical 1+ reflexes and bilateral negative straight leg raising test. He found several paraspinal muscle trigger points and limitations in forward flexion, backward extension and lateral bending. Manual muscle testing was normal, but there was questionable weakness of the left extensor hallucis longus. In a supine position, appellant had a restricted range of motion in his left hip and a positive straight leg raising test at 60 degrees. Dr. Seni reviewed appellant's diagnostic tests and reports. He noted that an October 14, 2004 MRI scan showed postoperative scar tissue at L3-4, but no recurrent hernia at L4-5. An x-ray taken on October 20, 2004 showed extradural defects at L3-4 and L4-5, but no evidence of nerve root impingement.

Dr. Seni diagnosed degenerative disc disease of the lumbar spine from L2 down, but noted that it was difficult to establish the location of the pathology because appellant had a sacralized L5 vertebra, which might have led to inconsistent identification of the discs in previous diagnostic tests. He stated that his neurological examination did not reveal any evidence of nerve root radiculopathy that could be attributed to independent nerve root involvement. Dr. Seni opined that appellant sustained several temporary aggravations of his underlying age-related degenerative disc disease during his time as a letter carrier that were dealt with as they arose. He stated that the L2-3 disc herniation was a permanent aggravation that was fully resolved by the June 2004 surgery. Dr. Seni opined that appellant's remaining back pain was related to his preexisting degenerative disc disease and not his 1998 employment injury. He stated that appellant was unable to perform his date-of-injury duties because of his underlying degenerative disc disease. Dr. Seni found that appellant would be able to perform a sedentary position where he could alternate sitting and standing, with no bending, stooping or lifting more than 15 pounds.

On July 7, 2006 Dr. West reported that appellant continued to complain of lower back pain and lower extremity pain, numbness and weakness. He found tenderness, limited range of motion, weakness in the extensor hallucis longus muscles and a positive straight leg raising test. Dr. West opined that appellant had a low likelihood of success in any further operations and recommended that he apply for disability retirement.

On July 12, 2006 Dr. West commented on Dr. Seni's report, which he found to be thorough and well thought out. He agreed that appellant "had several aggravations ... which aggravated his preexisting disease." Dr. West opined that appellant could not "return to his former type of duties" because of the physical nature of his work.

On August 29, 2006 the Office found a conflict between the medical opinions of Dr. West and Dr. Seni and referred appellant for an impartial medical examination. On September 18, 2006 Dr. John Wolf, a Board-certified orthopedic surgeon selected as the impartial medical specialist, examined appellant and reviewed his medical record, including the July 8, 2004 statement of accepted facts. He noted that, because Dr. West did not rebut Dr. Seni's findings, the only conflict appeared to be whether appellant could return to work. Dr. Wolf stated that an October 15, 2004 MRI scan showed "disc bulging at L1 and L2," but no recurrent disc herniation. A November 29, 2004 CT scan showed broad-based disc bulges at L3-4 and L4-5, with possible nerve root impingement. Dr. Seni stated that appellant did not undergo a microdiscectomy as indicated by the statement of accepted facts. On physical examination Dr. Wolf found that appellant had no palpable muscle spasms, was able to bend to 15 degrees on each side without pain and had no evidence of lower extremity weakness, atrophy or sensory deficit. He found full range of motion at both hips and positive leg raising bilaterally due to tightness behind the knee and in the hamstrings. Dr. Wolf opined that appellant had no residuals related solely to his employment injury or his surgery. He stated that appellant's residual of back pain radiating down both legs was related to his multilevel degenerative disc disease. Dr. Wolf found that appellant should not return to his letter carrier position because his spine was poorly suited to repetitive bending, twisting and lifting motions. He found that appellant could perform a sedentary position with permanent restrictions. Dr. Wolf stated that appellant had reached maximum medical improvement from his work-related injury.

On September 19, 2006 appellant underwent an x-ray and MRI scan of his lumbar spine that showed normal motion on flexion and extension, status post right L2 and L3 laminectomies, multilevel disc disease with facet arthropathy and slight retrolisthesis of L2 on L3 and L1 on L2. In an October 13, 2006 report, Dr. West stated that these studies revealed postoperative changes. He diagnosed post laminectomy syndrome.

On October 10, 2006 the Office sought clarification of Dr. Wolf's opinion, who stated that appellant's current symptoms and inability to return to his date-of-injury position were due solely to his preexisting degenerative disc disease and not his work-related disc herniation.

By notice dated November 17, 2006, the Office proposed termination of appellant's medical and wage-loss compensation benefits. It found that the opinion of Dr. Wolf carried the weight of the medical opinion evidence and formed the medical basis for the decision. The Office provided appellant 30 days to provide relevant evidence and arguments in opposition to the termination.

Appellant submitted two patient progress forms from the Pain Evaluation & Management Center of Ohio, dated August 4 and September 7, 2006, which listed the symptoms of and treatments for his lower back pain.

By decision dated December 28, 2006, the Office terminated appellant's benefits effective December 29, 2006. It found that the new medical evidence was not relevant to the issue of whether appellant's disability or residuals were employment related.

In a report dated December 15, 2006 and received by the Office on January 2, 2007, Dr. West reiterated his opinion that appellant had degenerative disc disease and post laminectomy syndrome and that he would be unable to return to his former type of employment.

On January 14, 2007 appellant, through counsel, requested an oral hearing. At the hearing, held on May 23, 2007, he contended that the Office had not properly developed the medical evidence and that Dr. Wolf's decision was not based on a proper factual history.

By decision dated August 8, 2008, the Office hearing representative affirmed the December 28, 2006 decision. She found that the impartial medical examiner was entitled to the special weight of the medical evidence because he provided a comprehensive examination and a report with a rationalized opinion on the cause of appellant's disability. The Office hearing representative noted that Dr. West offered no rationale or examination findings that supported the claim that appellant had residuals or disability causally related to the accepted employment injuries.

LEGAL PRECEDENT -- ISSUE 1

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.¹ The Office may not terminate compensation without establishing that disability has ceased or that it is no longer related to the employment injury.²

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.³

The Federal Employees' Compensation 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.⁴ Likewise, the implementing regulations 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.⁵ It is well established that, when a case is referred to an impartial medical specialist for the purpose of

¹ *Elaine Sneed*, 56 ECAB 373 (2005).

² *Fred Reese*, 56 ECAB 568 (2005).

³ *James F. Weikel*, 54 ECAB 660 (2003).

⁴ 5 U.S.C. §§ 8101-8193, 8123(a).

⁵ 20 C.F.R. § 10.321.

resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on proper factual and medical background, must be given special weight.⁶

ANALYSIS -- ISSUE 1

The Office accepted appellant's claim for aggravation of lumbar disc bulge and disc herniations at L2-3 and L3-4. 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 related to his accepted injuries.

On May 31, 2006 Dr. Seni, a Board-certified orthopedic surgeon, conducted a second opinion examination. He noted that appellant's L5 vertebra was sacralized, which might have led to inconsistent disc numbering in some diagnostic tests. On examination, Dr. Seni found trigger points in the paraspinal muscles, limitations in lumbar range of motion and possible weakness of the left extensor hallucis longus. When lying down, appellant had restricted movement in his left hip and a positive straight leg raising test at 60 degrees. Dr. Seni diagnosed age-related degenerative disc disease of the lumbar spine from L2 down. He opined that appellant had sustained several temporary aggravations of this underlying condition during his time as a letter carrier, but that all of these, except for the herniated L2-3 disc, had resolved without surgery. Dr. Seni stated that June 2004 surgery corrected appellant's L2-3 herniation, which had no remaining residuals. He opined that appellant's remaining back pain was related exclusively to his degenerative disc disease and that he had no disability related to his accepted injuries. Dr. Seni stated that appellant could work only in a sedentary position because of his underlying degenerative disc disease.

On July 12, 2006 Dr. West, an osteopathic physician specializing in neurological surgery, stated that Dr. Seni's report was thorough and well thought out. He concurred with the finding that appellant had sustained several aggravations of his preexisting condition. Although it is unclear from this statement whether Dr. West believed that the aggravations were permanent, in an April 2, 2004 report, he stated that appellant's employment injury had been a causal factor in the degenerative spinal condition. He stated that appellant was unable to return to his previous type of work and recommended that he take disability retirement.

The Office found a conflict of medical opinion evidence between Dr. West and Dr. Seni on the cause and extent of appellant's disability and referred him to an impartial medical examiner to resolve the conflict.

On September 18, 2006 Dr. Wolf, a Board-certified orthopedic surgeon, conducted a physical examination and review of appellant's medical history. He utilized the statement of accepted facts provided by the Office. Dr. Wolf indicated that, because Dr. West did not rebut Dr. Seni's findings, the primary conflict was whether appellant was capable of returning to work. He noted that an October 15, 2004 MRI scan showed disc bulging at L1 and L2, but no recurrent disc herniation and that a November 29, 2004 CT scan showed broad-based disc bulges at L3-4 and L4-5, with possible nerve root impingement. On physical examination, Dr. Wolf found no palpable muscle spasms, 15 degrees of side bending on each side without pain, full range of

⁶ *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

motion at both hips and no evidence of lower extremity weakness, atrophy or sensory deficit. He noted positive leg raising tests bilaterally, but found that they were due to tightness behind the knees and in the hamstrings. Dr. Wolf stated that appellant's work injury was an aggravation of a preexisting condition and was corrected by his surgery. He concurred with Dr. Seni's opinion that the back pain radiating down appellant's legs was related to his multilevel degenerative disc disease and not his employment injury or surgery. Dr. Wolf stated that, because of the underlying condition, appellant could return to work only in a sedentary position. In a subsequent report, he stated that appellant's condition and his degree of disability were due solely to his preexisting degenerative disease.

The Board finds that the report of Dr. Wolf is not entitled to the special weight of the medical opinion evidence because it was based on an inaccurate statement of accepted facts and was not sufficiently rationalized. The Board notes that Dr. Wolf relied on the Office's July 8, 2004 statement of accepted facts, which failed to include herniation of the L3-4 disc as an accepted condition.⁷ It is well established that medical opinions based on an incomplete or inaccurate history are of diminished probative value.⁸ Because the herniation of L3-4 was not included in the list of accepted conditions, Dr. Wolf made no findings and gave no opinions related to its status or residuals. His opinion is therefore not based on a proper factual history. The Board has also held that medical opinion that is not fortified by rationale is of diminished probative value.⁹ Dr. Wolf gave no medical explanation for his opinions that appellant's ongoing disability was related solely to his preexisting condition and that his accepted conditions had fully resolved. Although he made several clinical and diagnostic findings in his report, he did not discuss them in his analysis and did not explain how they formed the basis for his conclusions. For these reasons, the Office improperly relied on the opinion of Dr. Wolf to establish that appellant had no remaining disability or residuals from the accepted injuries of disc bulge aggravation and herniations of L2-3 and L3-4.

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation because the report of the impartial medical examiner was not sufficiently rationalized to resolve the conflict of medical opinion.

CONCLUSION

The Board finds that the Office did not properly terminate appellant's wage loss and medical benefits, effective December 29, 2006, on the grounds that he had no residuals or disability related to his accepted employment injuries.¹⁰

⁷ The statement of accepted facts also erroneously indicated that appellant had undergone a microdiscectomy at L3-4 and L4-5. However, Dr. Wolf noted this error and did not use it as a basis for his decision.

⁸ *Douglas M. McQuaid*, 52 ECAB 382 (2001).

⁹ *Cecilia M. Corley*, 56 ECAB 662 (2005).

¹⁰ In light of the Board's findings on the first issue, the second issue is moot.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 8, 2007 and December 28, 2006 are reversed.

Issued: June 2, 2008
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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