

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

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A.K., Appellant )  
and ) Docket No. 08-1548  
U.S. POSTAL SERVICE, POST OFFICE, ) Issued: April 20, 2009  
Edison, NJ, Employer )  
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)

*Appearances:*

*Thomas R. Uliase, Esq.*, for the appellant  
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
DAVID S. GERSON, Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On May 6, 2008 appellant filed a timely appeal from the merit decisions of the Office of Workers' Compensation Programs dated July 26, 2007 and January 14, 2008 which terminated appellant's compensation and medical benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction to review the merits of this case.

**ISSUES**

The issues are: (1) whether the Office met its burden of proof to terminate appellant's medical and wage-loss compensation benefits effective January 11, 2005; and (2) whether appellant met his burden of proof to establish that he had any continuing disability or residuals after January 11, 2005.

**FACTUAL HISTORY**

On February 20, 2003 appellant, then a 36-year-old mail processor, filed an occupational disease claim alleging that he sustained a herniated disc in the L5-S1 area due to lifting 40- to 70-pound sacks of mail. He listed the date he first became aware of the illness as

February 15, 2002 and the date he became aware of the connection to employment as April 18, 2002. The employing establishment controverted the claim. On January 12, 2004 the Office accepted appellant's claim for aggravation of L5-S1 herniated nucleus pulposus, with radiculopathy. It initially paid wage-loss compensation from May 6 through October 28, 2002. On October 12, 2004 appellant filed a recurrence alleging that he had not returned to work since the date of his injury.

In support of his claim for wage-loss compensation, appellant submitted multiple reports by Dr. Rudy Panganiban, Jr., Board-certified physiatrist. In an August 30, 2004 report, Dr. Panganiban assessed appellant with left ankle pain, lumbar spondylosis and interstitial cystitis.

A September 3, 2004 magnetic resonance imaging (MRI) scan of appellant's lumbar spine was interpreted by Dr. Soheil Sooudi, a Board-certified radiologist, as showing L5-S1 level disc space narrowing and disc desiccation with a focal central disc protrusion.

In a September 22, 2004 report, Dr. Panganiban set out his plan for preventive health measures and medication. He recommended a radiofrequency blockade. In a September 23, 2004 report, Dr. Panganiban indicated that appellant underwent a lumbar radiofrequency denervation. In an October 20, 2004 report, he discussed appellant's pain management program.

In a December 29, 2004 decision, the Office denied appellant's claim for recurrence of disability from February 2 through July 23, 2004. Appellant requested an oral hearing.

In a January 24, 2005 report, Dr. Panganiban reviewed appellant's medical records and the course of appellant's treatment. He noted that appellant was status post work-related injury on February 18, 2002. Dr. Panganiban indicated that appellant initially underwent conservative measures including six weeks of physical therapy with significant but short-lived benefit. He stated that appellant's MRI scan suggested lumbar disc bulge with concomitant L5/S1 disc herniation and further physiological diagnostic studies included electrodiagnostic studies suggestive of L5 motor radiculopathy on the left side. Dr. Panganiban noted a trial of transforaminal lumbar epidural injections were attempted and that appellant then underwent a nucleoplasty of the L5-S1 disc followed by a posterior lumbar facet blockade and median branch blockade. He noted that this produced short-lived benefit so appellant subsequently underwent radiofrequency denervation. Dr. Panganiban noted that appellant has steadily digressed from full-time to part-time work. He noted that since June 9, 2004 appellant has received interventional rehabilitation and medicinal management. Repeat tests suggested common peroneal neuropathy, chronic L5 motor radiculopathy. Dr. Panganiban concluded that appellant continues to suffer from functional deficits with both basic and advanced activities of daily living warranting further care. Although he noted that appellant's interstitial cystitis was unrelated to his work injury, the primary cause of appellant's disability did stem from that injury. Dr. Panganiban indicated work restrictions of no hyperflexion or hyperextension, maintenance of neutral spine techniques, no heavy lifting, no prolonged sitting without interval breaks. He recommended revisiting a surgical opinion, coupled with vocational rehabilitation and a functional capacity evaluation. Dr. Panganiban opined that appellant had a guarded prognosis with recommendations for future medical care to include medicinal, rehabilitation and interventional pain management. Appellant continued his treatment with Dr. Panganiban and

treatment notes were submitted for March 18, April 14 and May 19, 2005. He had lumbar epidural steroid injections on May 13 and 23 and June 6, 2005.

In an October 26, 2005 decision, the hearing representative set the December 29, 2004 decision aside and remanded the case for further development of the medical evidence. On March 15, 2006 the Office paid compensation benefits covering the period from October 26, 2002 through January 10, 2005.

Appellant continued to receive treatment from Dr. Panganiban and submitted progress reports chronicling his treatment.

By letter dated June 26, 2006, the Office referred appellant to Dr. Lisa A. Flaherty, an osteopath specializing in neurology, for a second opinion. In an opinion dated July 7, 2006, Dr. Flaherty diagnosed appellant's condition as "failed back, chronic low back pain, narcotic dependency and deconditioning secondary to inactivity." She noted that, although there was evidence at the time-of-injury of an acute L5 radiculopathy, there was no evidence that appellant's current disability was related to that original injury. Dr. Flaherty also noted that appellant could perform his full-time duties as a mail processor.

On August 10, 2006 the Office issued a notice of proposed termination of medical and compensation benefits as it determined that appellant's injury-related condition and disability had ended. It proposed to terminate medical and compensation benefits effective January 11, 2005. Appellant was given proper procedures to follow if he disagreed with the proposed decision.

In reports dated from August 28 through November 20, 2006, Dr. Panganiban assessed appellant with lumbar spondylosis and lumbar radiculopathy and noted that appellant was stable on current pain medication regimen.

By decision dated January 5, 2007, the Office finalized the proposed termination of compensation and medical benefits effective January 11, 2005.

By letter dated January 10, 2007, appellant, through his attorney, requested an oral hearing.

In further support of his claim, appellant submitted an October 25, 2006 report by Dr. Panganiban, which he summarized his treatment of appellant. Dr. Panganiban noted that he first saw appellant on June 9, 2004. He indicated that appellant has had approximately 30 to 50 percent relief, translating to improvement with functionality, but that appellant still demonstrated flares in his lumbar spine and also necessitated continued pain medication as well as an assistive device for ambulation. Dr. Panganiban also noted that restrictions remained (no hyperflexion, hyperextension, excess truncal rotation and heavy lifting). In a note dated January 29, 2007, he indicated that appellant had unresolved history of lumbar radiculopathy and spondylosis which necessitated continual interstitial rehabilitative and medicine management.

At a hearing held on May 15, 2007, appellant did not appear, but his attorney noted that appellant was still receiving treatment from Dr. Panganiban for his low back condition. Counsel argued that the Office did not meet its burden of proving that appellant did not suffer from

residuals of his work injury. He contended that Dr. Flaherty's report could not carry the weight of the evidence as Dr. Flaherty did not describe the work injury in her report or provide detailed rationale for her opinion. Counsel also noted that, although Dr. Flaherty did agree that appellant was suffering from a failed back and chronic low back pain, she stated that appellant had no current disability from the work injury and failed to explain her conclusion in light of the diagnostic testing. He noted that Dr. Flaherty indicated that appellant could return to his mail processor job but did not indicate any knowledge of the duties of this job which he contended involved lifting 70 pounds on a regular basis. Finally, Counsel contended that at a minimum, there was an unresolved conflict in the medical evidence.

In a statement from a supervisor dated June 11, 2007, the employing establishment indicated that he disagreed with the statement that appellant lifted 70 pounds on a regular basis in that mail processors working on the automation machines lifted no more than 30 pounds intermittently.

By decision dated July 26, 2007, the hearing representative found that the effects of the work injury resolved and that the evidence did not establish entitlement to disability compensation subsequent to October 2002.

In a July 11, 2007 statement received by the Office on July 30, 2007, appellant stated that he was working at the South River Plant when he was injured and at this plant everything was done by hand and that he was injured when he picked up a sack weighing about 70 pounds or more.

On November 14, 2007 appellant, through his attorney, requested reconsideration. In support thereof he submitted a September 19, 2007 medical report wherein Dr. Wayne L. Wittenberg, Board-certified neurosurgeon, listed his impression as lumbar radiculopathy. He noted that he would like to repeat the MRI scan with contrast. Dr. Wittenberg noted that he discussed appellant's surgical options.

By decision dated January 14, 2008, the Office reviewed appellant's claim on the merits, but found that the opinion of Dr. Wittenberg was insufficient to outweigh the report of Dr. Flaherty and, therefore, modification was not warranted.

#### **LEGAL PRECEDENT**

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>1</sup> The Office may not terminate compensation without establishing that disability ceased or that it was no longer related to the employment.<sup>2</sup> The fact that the Office accepted an employee's claim for a specified period of disability does not shift the

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<sup>1</sup> *I.J.*, 59 ECAB \_\_\_\_ (Docket No. 07-2362, issued March 11, 2008); *Fermin G. Olascoaga*, 13 ECAB 102, 104 (1961).

<sup>2</sup> *J.M.*, 58 ECAB \_\_\_\_ (Docket No. 06-661, issued April 25, 2007); *Anna M. Blaine*, 26 ECAB 351 (1975).

burden of proof to the employee. The burden is on the Office with respect to the period subsequent to the date of termination or modification.<sup>3</sup>

The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>4</sup> The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability. To terminate authorization for medical treatment, the Office must establish that an employee no longer has residuals of an employment-related condition which require further medical treatment.<sup>5</sup>

Section 8123 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 shall appoint a third physician who shall make an examination.<sup>6</sup>

### ANALYSIS

The Office accepted appellant's claim for aggravation of L5-S1 herniated nucleus pulposus with radiculopathy. Appellant was paid wage-loss compensation from May 6, 2002 through January 10, 2005. The issue is whether the Office properly terminated his compensation and medical benefits effective January 11, 2005. The Board notes that the hearing representative erroneously found that the issue to be determined was whether appellant was entitled to any compensation subsequent to October 2002. The Office paid appellant compensation benefits through January 10, 2005. It gave notice of its intention to terminate appellant's compensation benefits effective January 11, 2005. Benefits cannot be terminated prior to that date as proper notice was not given to appellant in the form of a pretermination notice.

The Office did not properly terminate appellant's medical and compensation benefits effective January 11, 2005. Appellant's treating physician, Dr. Panganiban, over the course of his progress reports, noted that appellant had lumbar spondylosis and lumbar radiculopathy and continued to note that he had residuals from the work injury and restrictions from this injury. In his January 24, 2005 report summarizing appellant's condition, he noted that appellant continued to suffer from functional deficits with both basic and advanced activities of daily living warranting further care. Dr. Panganiban listed work restrictions of no hyperflexion or hyperextension, maintenance of neutral spine techniques, no heavy lifting and no prolonged sitting without interval breaks. The second opinion physician, Dr. Flaherty, opined on July 7, 2006 that, although there was evidence of an acute L5 radiculopathy, there was no evidence that appellant's current disability was related to the original injury. She further noted that appellant could perform full-time duties as a mail processor. Accordingly, there was an unresolved conflict between appellant's treating physician, Dr. Panganiban, and the second opinion physician, Dr. Flaherty, with regard to whether appellant had any remaining work-related

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<sup>3</sup> *Elsie L. Price*, 54 ECAB 734, 739 (2003); *George J. Hoffman*, 41 ECAB 135, 140 (1989).

<sup>4</sup> *T.P.*, 58 ECAB \_\_\_\_ (Docket No. 07-60, issued May 10, 2007); *Larry Warner*, 43 ECAB 1027 (1992).

<sup>5</sup> *T.P.*, *id.*; *Furman G. Peake*, 41 ECAB 361, 364 (1990).

<sup>6</sup> 5 U.S.C. § 8123(a).

condition or any continuing disability from the accepted injury. Since the Office has not resolved the existing conflict in the medical evidence, it has failed to meet its burden of proof in terminating appellant's benefits.<sup>7</sup>

**CONCLUSION**

The Board finds that the Office failed to meet its burden of proof to terminate appellant's medical and wage-loss compensation benefits effective January 11, 2005.<sup>8</sup>

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated January 14, 2008 and July 26, 2007 are reversed.

Issued: April 20, 2009  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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<sup>7</sup> *Mary A. Moultry*, 48 ECAB 566 (1997).

<sup>8</sup> In light of the disposition of this issue, the remaining issue is moot.