United States Department of Labor
Employees' Compensation Appeals Board

J.N., Appellant	)	
and	)	**Docket No. 08-1850**
	)	**Issued: June 18, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Miami, FL, Employer	)	

Appearances:
Stanley M. Rosenberg, 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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On June 19, 2008 appellant filed a timely appeal of the April 7, 2008 merit decision of the Office of Workers' Compensation Programs, denying his claim for wage-loss compensation for intermittent periods from February 8 through March 9, 2007. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction to review the merits of this appeal.

ISSUE

The issue is whether appellant established entitlement to wage-loss compensation for intermittent periods of disability from February 8 through March 9, 2007.

FACTUAL HISTORY

On October 15, 1999 appellant, a 41-year-old rural carrier, filed a traumatic injury claim alleging that he injured his back while lifting a tray of mail. The Office accepted his claim for lumbar strain and herniated nucleus pulposus at L5-S1. Appellant received compensation for intermittent periods of disability. He returned to full-time limited duty on November 27, 2006,

pursuant to restrictions recommended by his treating physician, Dr. Manuel A. Alzugaray, an orthopedic surgeon.

Appellant filed claims for compensation for intermittent periods of disability between February 8 and March 9, 2007. In a February 8, 2007 duty status report, Dr. Alzugaray opined that appellant was disabled from work due to a herniated disc condition sustained on October 15, 1999. He stated that appellant could return to full-time duty on February 12, 2007, provided that he be restricted from lifting or carrying more than 15 to 20 pounds; climbing, kneeling, bending, stooping, twisting, pushing or pulling; sitting for longer than five to six hours at a time; and walking or standing for more than one to two hours. In a February 15, 2007 work slip, Dr. Alzugaray diagnosed low back syndrome and opined that appellant was out of work until he was seen by a spine specialist.

In a narrative report dated February 15, 2007, Dr. Alzugaray stated that appellant was experiencing increasing pain in his lower back following a twisting injury and opined that he was unable to work for the entire week. His examination revealed tenderness from L1 to S1. Spasticity was 2+ of the lumbosacral region. Range of motion testing reflected flexion of 45 to 50 degrees and extension of 0 degrees. Right and left flexion was minimal. Dr. Alzugaray diagnosed low back syndrome with acute exacerbation.

The Office informed appellant that the evidence submitted was insufficient to establish his claims for intermittent periods of disability. Appellant was advised to provide rationalized medical evidence establishing total disability for work during the periods claimed.

The record contains reports for the period October 20, 1999 through April 10, 2007 from Dr. Alzugaray, reflecting his treatment of appellant for a herniated lumbar disc resulting from an October 15, 1999 work injury. On January 25, 2007 Dr. Alzugaray predicted antalgic and periodic disability related to appellant's work-related injury. On February 8, 2007 he noted that appellant had experienced increasing pain in the lumbosacral region for the previous 10 days and had difficulty walking or standing for more than 30 minutes. Dr. Alzugaray found tenderness from L5 to S1. Range of motion testing revealed flexion to 70 degrees and minimal extension. Right and left bending flexion was 7 to 10 degrees.

In a narrative report dated February 8, 2007, Dr. Alzugaray noted that appellant had been experiencing increased pain in the lumbosacral region for the previous 10 days, particularly when he attempted to walk for more than 30 minutes. Examination revealed: tenderness from L1 to S1; flexion of 70 degrees; minimal extension; right and left flexion 7 to 10 degrees. On April 10, 2007 Dr. Alzugaray stated that appellant's work-related herniated lumbar disc condition had not resolved and that he was unable to determine when he would fully recover.

The Office referred appellant to Dr. Philip R. Lozman, a Board-certified orthopedic surgeon, for an examination and an opinion as to whether there was a causal relationship between his current condition and his accepted injury and, if so, the extent of any associated disability. In a second opinion report dated March 27, 2007, Dr. Lozman diagnosed L5-S1 disc herniation. He observed that appellant walked with a normal gait and had no difficulty getting from a standing position to a seated position and into a lying position on the examining table. Dr. Lozman found a positive straight leg raise in the lying position at 40 degrees bilaterally and a

negative straight leg raise in the seated position. There was no obvious paraspinous muscle spasm. Appellant exhibited normal strength in both lower extremities. His reflexes were 1+ at the knees and ankles. Toes were downgoing. Appellant had no clonus. He experienced no pain with axial compression of the skull, but he did have pain with passive rotation of the shoulders. Appellant was able to bend over and come to the level of the fingertips at the mid tibias. Side bending and rotation were normal and he had no superficial nonanatomic tenderness. X-rays of the lumbosacral spine demonstrated minimal degenerative changes. Dr. Lozman opined that the October 15, 1999 work-related condition of lumbar sprain had resolved. He further indicated that the herniated nucleus pulposus at L5-S1 appeared to be subjectively symptomatic and that there were no objective medical findings at that time to show that these conditions were still active and causing objective symptoms. Dr. Lozman noted that appellant's preexisting bulging disc at L5-S1, pursuant to a May 1999 injury, may have predisposed him to the accepted injury. He stated that it was unlikely that his herniated disc had returned to baseline, because a disc herniation is a permanent condition. Dr. Lozman opined that appellant was able to perform the functions of a rural carrier. However, he recommended a new magnetic resonance imaging (MRI) scan to ascertain the current condition of appellant's spine.

In a supplemental report dated June 20, 2007, Dr. Lozman noted that the herniated nucleus pulposus at L5-S1 was still present and evident on the June 11, 2007 MRI scan of the lumbar spine, which provided objective evidence of residual L5-S1 herniated nucleus pulposus. However, he stated that appellant's symptoms were subjective and not confirmed on physical examination. Noting evidence of a persistent herniation at L5-S1 on the recent MRI scan, Dr. Lozman opined that appellant's condition was permanent and would not return to baseline. He reiterated his opinion that appellant was capable of returning to his full-duty position as a rural carrier, based not only on the minimal nature of the extruded disc, but also on the absence of any nerve root impingement as a consequence of that disc and the absence of radiculopathy and radicular symptoms on examination. Dr. Lozman further opined that appellant would have reached maximum medical improvement within six months of the date of injury and that he required no further treatment.

By decision dated July 30, 2007, the Office denied appellant's claims for compensation for the following periods: February 8 through 9, February 15 through 16, February 19 through 23, February 26 through March 2 and March 7 through 9, 2007. It found that evidence failed to establish that appellant was disabled during the claimed periods or that his claimed condition was causally related to his accepted conditions.

On August 15, 2007 appellant requested an oral hearing. At the December 19, 2008 hearing, appellant's representative argued that Dr. Lozman's second opinion report was not well rationalized and failed to address medication required to treat pain experienced by appellant due to his work-related condition. He also contended that the medical evidence established that appellant's diagnosed current condition was causally related to his accepted injury.

Appellant submitted a September 27, 2007 report from Dr. Kenneth R. Hodor, a Board-certified orthopedic surgeon, who provided a detailed history of injury and treatment and indicated that he had reviewed the entire medical record. Dr. Hodor's examination revealed a normal gait with a slight decrease in "push off" on the right. Appellant was able to heel and toe walk with no evidence of a foot drop. There was no specific truncal shift. Inspection revealed a

small area of hypertrichosis over the mid-lumbar area. Appellant described discomfort to deep palpation at L5-S1 and S2, with associated paravertebral muscle tightness noted. Active range of motion testing revealed increasing pain past 20 to 25 degrees of forward flexion in the midline at L5-S1 and backward extension to 25 degrees, at which point appellant experienced pain more to the right of the midline at L5-S1. Right lateral bending at 20 to 25 degrees increased the pain in the right paralumbar area; right lateral rotation caused pain at 25 degrees in the right paralumbar area. There was no punch tenderness, no sciatic notch tenderness and no buttock droop. There was no percussion tenderness over the spinous processes. In the supine position, appellant demonstrated a painless range of motion of his hips. Pulses were equal at the femoral and dorsalis pedis. There were no trophic changes in either lower extremity and no obvious atrophy noted. Calf circumference at 15 centimeters distal to the inferior pole of the patella revealed his calf to measure equally bilaterally. There was a positive Patrick Faber test on the right, negative on the left. Abduction past 25 degrees on the right caused discomfort in the inferior portion of the right S1 joint. Straight leg raise maneuver on the right was positive at 50 degrees, with pain referred to the right paralumbar area at L5-S1 and pain in the posterior proximal thigh. Lasegue test was similarly positive at 55 degrees on the right. Straight leg raise on the left was to 80 degrees and Lasegue was negative. Seated straight leg raise was positive on the right at 50 to 55 degrees and negative to 90 degrees on the left. Manual muscle testing in both lower extremities was equal and symmetric. Sensory examination revealed some patchy diminished appreciation to pinwheel in the calf on the right in the S1-S2 distribution. Manual muscle testing proximally about the pelvis and hips revealed the muscle to be 5/5. Quadriceps were 5/5. X-rays revealed no evidence of acute fracture, dislocations or mobility abnormality of the lumbar spine.

Dr. Hodor diagnosed status post acute twisting injury to the lumbosacral spine involving the S1-S2 dermatome, with acute lumbar radicular pattern and herniated disc at L5-S1, as evidenced by MRI scan studies. He stated that appellant had experienced recurrent exacerbations of pain during his course of work during the seven years since his accepted injury, necessitating periods of time out of work every year. Dr. Hodor opined that there was a definite relationship between appellant's claimed condition and disability and the accepted injury, which continued to be the cause of his recurrent episodes of pain in the lumbar spine. He stated that appellant did not report any new injuries, but rather had exacerbations of pain when he was back at work doing his regular activities, necessitating return to his treating orthopedist. Dr. Hodor stated that "these types of aggravations were frequent and recurrent in nature."

The record contains an October 16, 2007 report of a spine consultation from Dr. Dan S, Cohen, a Board-certified orthopedic surgeon, who indicated that appellant injured his back on October 15, 1999 and had been experiencing low back pain, without relief, since that time. His examination revealed restricted range of motion, secondary to low back pain and a slightly antalgic gait pattern. A June 11, 2007 MRI scan reflected a herniated disc at L5-SI with decreased signal intensity. Dr. Cohen recommended that appellant undergo a discogram, which he opined was medically necessary and related to his accepted injury.

In a March 28, 2008 report, the district medical adviser recommended approval of a lumbar fusion at L5-S1. He concluded that the proposed procedure was indicated in the treatment of the employee's employment-related injury of October 1, 1999, which resulted in

lumbar strain and herniated nucleus pulposus at L5-S1. On March 31, 2008 the Office approved appellant's request for lumbar spine fusion.

By decision dated April 7, 2008, the Office hearing representative affirmed the July 30, 2007 decision. The representative found that the medical evidence did not contain an explanation supporting disability during the claimed periods; nor did the evidence show how the alleged disability was causally related to the accepted condition.

LEGAL PRECEDENT

A claimant has the burden of proving by a preponderance of the evidence that he is disabled for work as a result of an accepted employment injury and is required to submit medical evidence for each period of disability claimed.[1] Whether a particular injury causes an employee to be disabled for employment and the duration of that disability, are medical issues.[2] The issue of whether a particular injury causes disability for work must be resolved by competent medical evidence.[3]

The Board will not require the Office to pay compensation in the absence of medical evidence directly addressing the particular period of disability for which compensation is sought. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.[4]

ANALYSIS

The Office accepted appellant's claim for lumbar strain and herniated nucleus pulposus at L5-S1. Appellant returned to full-time limited duty on November 27, 2006, pursuant to restrictions recommended by his treating physician. He has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between the accepted conditions and his claimed disability during intermittent periods from February 8 through March 9, 2007.[5]

In support of his claim, appellant submitted numerous reports from his treating physician, Dr. Alzugaray, from October 20, 1999 through April 10, 2007, reflecting his treatment of appellant for the accepted herniated lumbar disc. On February 8, 2007 Dr. Alzugaray opined that appellant was disabled from work until February 12, 2007, due to a herniated disc condition sustained on October 1, 1999. He noted that appellant had experienced increasing pain in the lumbosacral region for the previous 10 days and had difficulty walking or standing for more than 30 minutes. Dr. Alzugaray found tenderness from L5 to S1. Range of motion testing revealed

[1] *See Fereidoon Kharabi*, 52 ECAB 291 (2001).

[2] *Id.*

[3] *See Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

[4] *Fereidoon Kharabi*, *supra* note 1.

[5] *Alfredo Rodriguez*, 47 ECAB 437 (1996).

flexion to 70 degrees and minimal extension. Right and left bending flexion was 7 to 10 degrees. On February 15, 2007 Dr. Alzugaray diagnosed low back syndrome with acute exacerbation. His examination revealed tenderness from L1 to S1. Spasticity was 2+ of the lumbosacral region. Range of motion testing reflected flexion of 45 to 50 degrees and extension of 0 degrees. Right and left flexion was minimal. Dr. Alzugaray indicated that appellant was experiencing increasingly severe pain in his lower back following a twisting injury, he opined that appellant was unable to work until he was evaluated and treated by a spine specialist. On April 10, 2007 he stated that appellant's work-related herniated lumbar disc condition had not resolved and that he was unable to determine when he would fully recover. Thus, Dr. Alzugaray consistently opined that the accepted herniated disc condition disabled appellant for work intermittently during the period in question.

On September 27, 2007 Dr. Hodor provided a history of injury and treatment, as well as detailed findings on examination. He diagnosed status post acute twisting injury to the lumbosacral spine involving the S1-S2 dermatome, with acute lumbar radicular pattern and herniated disc at L5-S1, as evidenced by MRI scan studies. Dr. Hodor stated that appellant had experienced recurrent exacerbations of pain during his course of work during the seven years since his accepted injury, necessitating periods of time out of work every year. He opined that there was a definite relationship between appellant's claimed condition and disability and the accepted injury, which continued to be the cause of his recurrent episodes of pain in the lumbar spine. While Dr. Hodor did not address specific periods of disability, his report supports appellant's claim that his condition was intermittently disabling and that the disability was causally related to the accepted work injury.

In an October 16, 2007 report, Dr. Cohen stated that appellant had been experiencing low back pain, without relief, since his 1999 injury. His examination revealed restricted range of motion, secondary to low back pain and a slightly antalgic gait pattern. A June 11, 2007 MRI scan reflected a herniated disc at L5-SI with decreased signal intensity. Dr. Cohen recommended that appellant undergo a discogram, which he opined was medically necessary and related to his accepted injury. On March 28, 2008 the district medical adviser recommended approval of a lumbar fusion at L5-S1. He concluded that the proposed procedure was indicated in the treatment of the employee's employment-related injury of October 1, 1999, which resulted in lumbar strain and herniated nucleus pulposus at L5-S1. These reports strongly support a causal relationship between appellant's current condition and his accepted injury.

In his second opinion reports dated March 27 and June 20, 2007, Dr. Lozman opined that the October 15, 1999 work-related condition of lumbar sprain had resolved. He further indicated that the herniated nucleus pulposus at L5-S1 appeared to be subjectively symptomatic and that there were no objective medical findings at that time to show that these conditions were still active and causing objective symptoms. Dr. Lozman was not asked to and did not address, the relevant issue of whether appellant was disabled for intermittent periods of time from February 8 to March 7, 2007. Rather, he was directed by the Office to provide an opinion only as to whether there was a causal relationship between appellant's condition on the date of his examination and his accepted injury and, if so, the extent of any associated disability. Therefore, Dr. Lozman's report is of diminished probative value and the hearing representative improperly relied on his opinion in reaching his decision.

Although Dr. Alzugaray's reports are not sufficiently rationalized to meet appellant's burden of proof in establishing his claim, his opinion is consistent and uncontroverted and is, therefore, sufficient to require further development of the case by the Office.[6] His opinion is supported by other medical evidence of record, including reports from Dr. Cohen, Dr. Hodor and the district medical adviser. Proceedings under the Federal Employees' Compensation Act are not adversarial in nature and the Office is not a disinterested arbiter. While appellant has the burden to establish entitlement to compensation, the Office shares responsibility to see that justice is done.[7] Accordingly, once the Office undertakes to develop the medical evidence further, it has the responsibility to do so in a proper manner.[8] Therefore, the Board finds that the case must be remanded to the Office for further development regarding Dr. Alzugaray's opinion that appellant was disabled due to the accepted work-related herniated disc condition during the claimed periods. Following this and any other development deemed necessary, the Office shall issue an appropriate decision in the case.

CONCLUSION

The Board finds that the case is not in posture for a decision regarding the claimed intermittent periods of disability from February 8 through March 9, 2007, as the case must be remanded for further development of the medical evidence consistent with this opinion.

[6] *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 280 (1978).

[7] *Jimmy A. Hammons*, 51 ECAB 219 (1999); *Marco A. Padilla*, 51 ECAB 202 (1999); *John W. Butler*, 39 ECAB 852 (1988).

[8] *Melvin James*, 55 ECAB 406 (2004).

ORDER

IT IS HEREBY ORDERED THAT that the April 7, 2008 decision of the Office of Workers' Compensation Programs is set aside and remanded for action in accordance with the provisions of this decision.

Issued: June 18, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board