

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

J.N., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
St. Louis, MO, Employer**

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**Docket No. 08-1727
Issued: March 18, 2009**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 4, 2008 appellant filed a timely appeal from an Office of Workers' Compensation Programs' hearing representative's decision dated March 25, 2008 which affirmed the denial of his recurrence claim. 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 on appeal are: (1) whether appellant met his burden of proof to establish a recurrence of disability beginning March 26, 2007 causally related to his November 2, 2006 employment injury; and (2) whether the Office properly terminated appellant's compensation and medical benefits effective August 4, 2007.

FACTUAL HISTORY

On November 2, 2006 appellant, then a 52-year-old full-time letter carrier, sustained injuries to his neck and back when his vehicle was rear-ended by another vehicle. He stopped

work on November 3, 2006.¹ On November 14, 2006 the Office accepted the claim for sprains of the neck and lumbar spine. It paid appellant compensation for injury-related disability for work. Appellant was released to work by Dr. Gary J. Gray, Board-certified in internal medicine, with restrictions on November 2, 2006. He returned to work in a light-duty capacity on December 20, 2006 for an average of six hours per day.

In a January 2, 2007 report, Dr. Brett Taylor, a Board-certified orthopedic surgeon, noted that appellant had complaints of neck and back pain and right leg numbness. He noted appellant's history of injury, which included preexisting pathologies in both the cervical and lumbar spine. Dr. Taylor advised that the mechanism of injury supported a significant trauma with a vehicle hitting his vehicle in a rear-ended fashion. He recommended additional diagnostic testing. A January 8, 2007 magnetic resonance imaging (MRI) scan of the cervical spine, read by Dr. Katie D. Vo and Dr. Zoltan Cseri, Board-certified diagnostic radiologists, noted findings which included kyphosis of the cervical alignment at C4-5; an abnormal signal at T1 and T2 hyperintense in the C5, C6 and C7 vertebral bodies which was "likely" degenerative. The physicians also noted disc space narrowing and desiccation from C3-4 through C6-7 and annular tears at C4-5 through C6-7 and an unremarkable craniocervical junction. Additionally, they made findings at C2-3 which included minimal diffuse disc bulging. A January 8, 2007 MRI scan of the lumbar spine revealed multilevel degenerative changes from C3-4 through C6-7 consisting of disc osteophyte complexes and uncontroverted osteoarthritis resulting in kyphotic deformity and canal and foraminal stenosis as well as an increased signal within the cord at C5-6 which was "likely related to the underlying canal stenosis."

On January 10, 2007 Dr. Taylor noted that appellant had evidence of multilevel degenerative changes at C3-4, C4-5, C5-6 and C6-7 with kyphotic deformity and stenosis, with an increased signal in the cord at C5-6 related to stenosis. He opined that "it is clear in my opinion that the accident was a significant aggravating factor exacerbating his condition. I do not feel that the accident caused all of his present pathology." Dr. Taylor noted that the accident did not cause his symptoms as "he had preexisting pathology prior to the accident." On February 7, 2007 he noted that he saw a "minimal increase at the C5-6 level, notably in his imaging studies comparing the pre and postoperative studies." Dr. Taylor opined that the work injury caused a permanent aggravation. He also advised that, based upon the imaging studies, appellant was a surgical candidate prior to his work-related accident and that the "accident was a significant aggravating factor exacerbating his condition. I do not feel that the accident caused all of his present pathology." Dr. Taylor indicated that appellant could work with restrictions on repetitive lifting over 20 pounds more than two times per hour and no pushing or pulling more than 25 pounds.

On February 28, 2007 the Office referred appellant for a second opinion to Dr. John A. Gragnani, a Board-certified physiatrist. In a March 19, 2007 report, Dr. Gragnani described appellant's history of injury and treatment and performed a physical examination. Appellant had no evidence of muscle spasm in the back and neck, soft lumbar and cervical paraspinals, and self-limited range of motion of the back and neck. Dr. Gragnani found neck pain on rotation to

¹ The record reflects that appellant had a reversal of the cervical lordosis and severe degenerative disc disease at C3 to C7, and a lumbar disc herniation that preexisted the work-related injury.

the right and left, forward flexion and extension, a negative Spurling's test, symmetrical reflexes in the upper and lower extremities, normal temperatures in the hands and knees and negative straight leg raising. Diagnostic testing revealed marked degenerative changes of the cervical spine and, to a lesser degree, the lumbar region. Dr. Gragnani opined that appellant had cervical and lumbar spine pain without radiculopathy or myelopathy, a history of neck problems prior to the injury of November 2, 2006, consistent with degenerative changes of the cervical spine and a normal neurologic examination. He explained that appellant's subjective complaints were not supported by objective findings, with the exception of degenerative changes. Dr. Gragnani opined that there was "no indication that he has sustained any worsening or aggravation, just some exacerbation of symptoms." He opined that appellant's "preexisting degenerative condition was not made worse by the accident. Dr. Gragnani certainly has no radicular symptoms in the lumbar or cervical region at this time." He noted that appellant's injuries should have resolved within four to six weeks and that he should have reached maximum medical improvement. Dr. Gragnani also advised that there was "no reason why [appellant] would not be able to return to his regular work duties as a letter carrier." He completed a work restriction form with no restrictions.

In an April 12, 2007 disability certificate, Dr. Alberto Goldgaber, Board-certified in internal medicine, advised that appellant was disabled and unable to work from April 9 through 15, 2007 due to severe low back pain. In progress notes dated April 13, 18 and 25, 2007, Dr. Stephen Smith, Board-certified in anesthesiology and pain medicine, diagnosed a cervical herniated nucleus pulposus, cervical radiculopathy and myofascial pain. He provided appellant with trigger point injections and epidurals.

In a May 2, 2007 form report, Dr. Taylor diagnosed cervicgia and checked a box "yes" that he agreed that appellant's condition was caused or aggravated by an employment activity. He opined that appellant was totally disabled for the period beginning May 1, 2007.

On May 8, 2007 appellant filed a CA-7 claim for compensation for total disability beginning March 26, 2007. The employing establishment indicated that three different physicians provided coverage for the period March 26 to April 20, 2007. It also noted that appellant's physician did not take him off work until May 1, 2007.

In a report dated May 11, 2007, Dr. Taylor opined that appellant's condition was significantly aggravated by his motor vehicle accident but he had reached maximum medical improvement for nonoperative care and recommended surgical intervention. He requested that appellant undergo testing prior to surgery.

The Office found a conflict in opinion between Dr. Taylor and Dr. Gragnani regarding appellant's disability and residuals due to the work injury of November 2, 2008. On May 15, 2007 it referred appellant, together with a statement of accepted facts, and the medical record, to Dr. Bobby Vitaya Enkvetchakul, a Board-certified orthopedic surgeon, for an impartial medical evaluation.

In a May 30, 2007 report, Dr. Enkvetchakul reviewed appellant's history of injury and treatment. He advised that appellant had preexisting low back problems as of the 1980's and neck problems that began around July 2006. Dr. Enkvetchakul described the current physical

examination findings which included complaints of neck and low back pain. On examination, the lumbar spine was essentially normal and appellant's lumbar range of motion was "fairly well preserved." Dr. Enkvetchakul noted that cervical range of motion was limited to 30 degrees of flexion, extension, and 10 to 20 degrees of rotation bilaterally for about 30 degrees. He compared diagnostic testing both pre and post work injury and advised that there were no significant objective anatomic changes. Dr. Enkvetchakul advised that appellant did not sustain a permanent, significant, material aggravation of any condition as a result of the November 2, 2006 motor vehicle accident. He explained that there was no indication of any material change in appellant's condition and that he had increased the severity of his subjective complaints but he did not have any change in the location or character of pain. Dr. Enkvetchakul opined that the accepted conditions of cervical strain and lumbar strain resolved within 12 weeks or less and that there was insufficient evidence to support that appellant sustained an aggravation of any underlying disease process due to the motor vehicle accident. He advised that appellant had significant objective complaints of pain, but that there were no objective findings to preclude his return to work. Dr. Enkvetchakul opined that appellant was capable of returning to his regular duties.

On June 28, 2007 the Office issued a notice of proposed termination of compensation, on the basis that the weight of the medical evidence, as represented by the report of Dr. Enkvetchakul, established that residuals of the November 2, 2006 work injury had resolved.

By decision dated June 29, 2007, the Office denied appellant's claim for a recurrence of disability on March 26, 2007.

By decision dated August 1, 2007, the Office terminated appellant's compensation benefits effective that date.

Appellant requested a hearing that was held on January 8, 2008. He submitted medical evidence, including reports from physical therapists dated March 13 to April 4, 2007. The Office also received an accident report dated November 2, 2006, a personal history report dated November 8, 2006 and chiropractic notes from November 6 to December 14, 2006.

In a January 24, 2008 report, Dr. Lukasz Curylo, a Board-certified orthopedic surgeon, noted that appellant had complaints of pain in the neck, bilateral shoulders, and right arm paresthesias, which was severe in the neck. Appellant attributed the onset to a motor vehicle accident which he had as a postal worker on November 2, 2006, but did admit to having these symptoms before the injury. He noted that a January 8, 2007 cervical MRI scan was consistent with severe cervical stenosis and opined that appellant would benefit from a multilevel cervical decompression and fusion.

In a February 27, 2008 operative report, Dr. Curylo performed an anterior cervical discectomy with removal of disc herniation and foraminotomy at C4-5 and C5-6 with decompression of spinal cord, anterior cervical interbody fusion at C4-5 and C5-6. He noted that appellant was involved in a motor vehicle accident which caused a cervical disc herniation at C4 and C5 and C5 and C6, which was superimposed on degenerative changes "which the patient had chronic."

By decision dated March 25, 2008, the Office hearing representative affirmed the June 29 and August 1, 2007 decisions.

LEGAL PRECEDENT -- ISSUE 1

Section 10.5(x) of the Office regulations provide that a recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.²

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantive evidence, a recurrence of total disability and to show that he or she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the light-duty job requirements.³

Causal relationship is a medical issue and the medical evidence required to establish a causal relationship, generally, is rationalized medical evidence.⁴ This consists of a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors.⁵ The physician's opinion must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁶

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's claimed condition became apparent during a period of employment nor his belief that his condition was aggravated by his employment is sufficient to establish causal relationship.⁷

ANALYSIS -- ISSUE 1

Appellant's claim was accepted for cervical and lumbar sprains. He returned to light duty on December 20, 2006 but subsequently claimed a recurrence of total disability beginning March 26, 2007. On May 17, 2007 the Office advised appellant of the medical and factual evidence needed to establish his claim for a recurrence of disability. However, appellant did not

² 20 C.F.R. § 10.5(x); see *Theresa L. Andrews*, 55 ECAB 719 (2004).

³ *Richard E. Konnen*, 47 ECAB 388 (1996); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

⁴ *Elizabeth Stanislav*, 49 ECAB 540, 541 (1998).

⁵ *Duane B. Harris*, 49 ECAB 170, 173 (1997).

⁶ *Gary L. Fowler*, 45 ECAB 365, 371 (1994).

⁷ *Walter D. Morehead*, 31 ECAB 188 (1986).

submit sufficient medical evidence which contained a rationalized opinion from a physician addressing how his disability was causally related to the employment injury.⁸ The medical evidence must demonstrate that the claimed recurrence was caused or aggravated by the accepted injury. In this regard, medical evidence of bridging symptoms between the recurrence and the accepted injury must support the physician's conclusion of a causal relationship. While the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, the opinion must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty.⁹

Appellant submitted an April 12, 2007 disability certificate from Dr. Goldgaber, who advised that appellant was disabled and unable to work from April 9 through 15, 2007 due to "severe low back pain (recurrent)." However, Dr. Goldgaber did not address or provide a full history of appellant's condition or explain how his low back condition was caused by the accepted injury. His report is of little probative value.¹⁰ Further, the Board has held that a diagnosis of "pain," alone does not constitute the basis for the payment of compensation.¹¹

The Office also received progress notes from Dr. Stephen Smith, Board-certified in anesthesiology and pain medicine, who diagnosed a cervical herniated nucleus pulposus, cervical radiculopathy and myofascial pain. However, it only accepted a cervical sprain as related to the November 2, 2006 injury. For conditions not accepted by the Office as being employment related, it is appellant's burden to provide rationalized medical evidence sufficient to establish causal relationship.¹² Dr. Smith did not adequately address how the diagnosed cervical disc was causally related to the accepted injury or explain how the conditions he treated were employment related and not the product of any preexisting conditions. Furthermore, he did not provide any opinion regarding whether appellant was disabled on or after March 26, 2007.

Appellant submitted a May 2, 2007 form report from Dr. Taylor, who diagnosed cervicalgia and checked a box "yes" that he agreed that appellant's condition was caused or aggravated by an employment activity. Dr. Taylor opined that appellant was totally disabled for the period May 1, 2007 and continuing. While he checked the box "yes" in response to whether appellant's condition was caused or aggravated by an employment activity, he did not explain how appellant's condition had worsened such that he was unable to perform his limited-duty work. The Board has held that marking a form box "yes" that a disability was causally related to employment is insufficient without further explanation or rationale, to establish causal relationship.¹³ On May 11, 2007 Dr. Taylor opined that appellant's preexisting condition was significantly aggravated by his motor vehicle accident and recommended surgical intervention.

⁸ See *Helen K. Holt*, 50 ECAB 279 (1999).

⁹ *Ricky S. Storms*, 52 ECAB 349 (2001).

¹⁰ See *id.*

¹¹ *John L. Clark*, 32 ECAB 1618 (1981).

¹² See *Jaja K. Asaramo*, 55 ECAB 200 (2004).

¹³ See *Barbara J. Williams*, 40 ECAB 649 (1989).

However, he did not offer a rationalized medical opinion as to how appellant's employment caused or aggravated his condition such that he had a recurrence of disability on March 26, 2007.

Furthermore, the Board notes that the record contains a May 30, 2007 report from Dr. Enkvetchakul, who concluded that appellant's employment-related condition should have resolved within 12 weeks or less from the date of injury and advised that he could return to regular duty. While Dr. Enkvetchakul was not selected to resolve a conflict regarding disability beginning March 26, 2007, his opinion provides no support for disability during this period.

In the instant case, none of the medical reports submitted by appellant contained a rationalized opinion to explain why he could no longer perform the duties of his light-duty position or how his disability or continuing condition would be due to the accepted condition. As appellant has not submitted any medical evidence establishing that he sustained a recurrence of disability due to his accepted employment injury, he has not met his burden of proof.

The Board also notes that appellant has not shown a change in the nature and extent of the light-duty job requirements and the record contains no evidence supporting any such change.

LEGAL PRECEDENT -- ISSUE 2

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.¹⁴ Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.¹⁵ The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.¹⁶ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.¹⁷

The Federal Employees' Compensation Act¹⁸ provides that, if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination.¹⁹ In cases where the Office has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.²⁰

¹⁴ *Curtis Hall*, 45 ECAB 316 (1994).

¹⁵ *Jason C. Armstrong*, 40 ECAB 907 (1989).

¹⁶ *Furman G. Peake*, 41 ECAB 361, 364 (1990); *Thomas Olivarez, Jr.*, 32 ECAB 1019 (1981).

¹⁷ *Calvin S. Mays*, 39 ECAB 993 (1988).

¹⁸ 5 U.S.C. §§ 8101-8193, 8123(a).

¹⁹ 5 U.S.C. § 8123(a); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

²⁰ *Gloria J. Godfrey*, 52 ECAB 486 (2001); *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

ANALYSIS -- ISSUE 2

The Office determined a conflict of medical opinion between Drs. Taylor and Gragnani regarding the change in underlying symptoms due to the work injury of November 2, 2008. Therefore, it properly referred appellant to an impartial medical examiner, Dr. Enkvetchakul, a Board-certified orthopedic surgeon.

The Board finds that Dr. Enkvetchakul's May 30, 2007 report is sufficiently well rationalized and based upon a proper factual background such that it is entitled to special weight in establishing that residuals of appellant's employment injury had ceased. Dr. Enkvetchakul provided an extensive review of appellant's medical history, reported his examination findings and determined that there were no objective findings to correspond with appellant's subjective complaints. He found no objective evidence of any work-related disability. Dr. Enkvetchakul reviewed diagnostic testing both pre and post work injury and concluded that there were no significant objective anatomic changes. He explained that there was no indication of any material change in appellant's condition. Dr. Enkvetchakul advised that, although appellant had increased the severity of his subjective complaints, there was no change in the location or character of pain. He advised that a cervical strain and lumbar strain, should have resolved within 12 weeks or less. Dr. Enkvetchakul opined that there was insufficient evidence to support that appellant sustained an aggravation of any underlying disease process as a result of the motor vehicle accident and noted that appellant could return to his regular duties. He found no basis on which to attribute any continuing residuals to appellant's accepted employment injury. Dr. Enkvetchakul determined that appellant could return to his regular duties. In these circumstances, the Office properly accorded special weight to the impartial medical examiner's May 30, 2007 findings.

When an impartial medical specialist is asked to resolve a conflict in medical evidence, his opinion, if sufficiently well rationalized and based on a proper factual background, must be given special weight.²¹ The Board finds that Dr. Enkvetchakul's report represents the weight of the medical evidence and established that there were no ongoing objective findings of residuals of the work injury of November 2, 2006.

Appellant submitted additional evidence, including a January 24, 2008 report from Dr. Curylo noting the work injury but advised that appellant also noted having the same symptoms before the work injury. Dr. Curylo did not specifically opine that appellant continued to have residuals of the accepted conditions. In a February 27, 2008 operative report, he noted performing the surgery but did not provide any opinion regarding whether appellant had continuing residuals of the accepted conditions of neck or lumbar sprain. Thus, Dr. Curylo's reports are not sufficient to overcome or create a new conflict with the opinion of Dr. Enkvetchakul.

²¹ See *id.*

Appellant also submitted several reports from physical therapists dating from March 13 to April 4, 2007. However, lay individuals such as physical therapists are not competent to render a medical opinion under the Act.²²

The Office also received chiropractic notes from November 6 to December 14, 2006. In assessing the probative value of chiropractic evidence, the initial question is whether the chiropractor is considered a physician under section 8101(2) of the Act.²³ A chiropractor cannot be considered a physician under the Act unless it is established that there is a subluxation as demonstrated by x-ray to exist.²⁴ There is no indication that there was a subluxation as demonstrated by x-ray. Thus, these reports would be insufficient to overcome or create a new conflict with the opinion of Dr. Enkvetchakul.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish a recurrence of disability beginning March 26, 2007. The Board also finds that the Office met its burden of proof in terminating appellant's compensation benefits effective August 4, 2007.

²² See *David P. Sawchuk*, 57 ECAB 316 (2006).

²³ 5 U.S.C. § 8101(2).

²⁴ *Thomas R. Horsfall*, 48 ECAB 180 (1996).

ORDER

IT IS HEREBY ORDERED THAT the March 25, 2008 decision of the Office of Workers' Compensation Programs' hearing representative is affirmed.

Issued: March 18, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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