

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

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**E.K., Appellant**

**and**

**U.S. POSTAL SERVICE, COLLEGEVILLE  
POST OFFICE, Collegeville, PA, Employer**

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) **Docket No. 09-1330**  
) **Issued: April 19, 2010**  
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*Appearances:*

*Jeffrey P. Zeelander, Esq., for the appellant  
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 April 28, 2009 appellant, through counsel, filed a timely appeal of the April 8, 2009 merit decision of an Office of Workers' Compensation Programs' hearing representative who terminated his compensation benefits. 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 the Office properly terminated appellant's compensation benefits effective December 5, 2002 on the grounds that he no longer had any residuals causally related to his July 12, 2002 employment-related injuries.

On appeal, appellant's attorney contends that the opinion of the impartial medical specialist is not sufficiently rationalized to establish that appellant no longer had any residuals of his accepted conditions.

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>1</sup> In an April 21, 2006 decision, the Board affirmed the Office's November 14, 2005 decision which found that appellant did not sustain an injury while in the performance of duty.<sup>2</sup>

On August 29, 2006 appellant, through counsel, requested reconsideration before the Office. In an August 4, 2006 medical report, Dr. Karl Rosenfeld, an attending Board-certified orthopedic surgeon, advised that the July 12, 2002 employment injury permanently aggravated appellant's degenerative disc disease at L4-5 which hastened the need for surgery that was performed on December 5, 2002 by Dr. Lewis S. Sharps, a Board-certified orthopedic surgeon.

On September 25, 2003 the Office referred appellant, together with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. Steven J. Valentino, a Board-certified orthopedic surgeon, for a second opinion medical examination. In an October 22, 2003 medical report, Dr. Valentino found that appellant's July 12, 2002 employment-related lumbar sprain and strain had resolved. He stated that there was no aggravation, precipitation or acceleration of appellant's preexisting degenerative disc disease. Dr. Valentino noted that a magnetic resonance imaging (MRI) scan demonstrated chronic symptoms that predated the employment injury. He advised that a disc herniation and percutaneous discectomy could not be causally related to the employment injury. Dr. Valentino further advised that appellant's degenerative disc disease was a preexisting condition and the condition was not causally related to his employment.

On January 24, 2007 the Office found a conflict in the medical opinion evidence between Dr. Rosenfeld and Dr. Valentino as to whether appellant's July 12, 2002 employment injury permanently aggravated his preexisting degenerative disc disease and, if so, whether the aggravation resulted in the need for surgery.

By letter dated March 6, 2007, the Office referred appellant, together with a statement of accepted facts and medical record, to Dr. Evan S. Kovalsky, a Board-certified orthopedic surgeon, for an impartial medical examination. In an April 27, 2007 report, Dr. Kovalsky reviewed the history of appellant's July 12, 2002 employment injury, medical treatment and social background. He noted appellant's primary complaint of back pain after engaging in certain activities. Dr. Kovalsky listed essentially normal findings on physical examination. Appellant walked without a limp, list or pelvic obliquity. He stood on his toes and heels without

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<sup>1</sup> Docket No. 06-334 (issued April 21, 2006).

<sup>2</sup> On April 11, 2003 appellant, then a 51-year-old mail carrier, filed an occupational disease claim assigned Office File No. xxxxxx759. He alleged that on July 12, 2002 he became aware of his central disc herniation at L4-5 with mild degenerative changes at L2-3 and L3-4 and realized that his conditions were caused by his federal employment. Prior to the instant claim, he filed a traumatic injury claim assigned Office File No. xxxxxx109 for a July 12, 2002 back injury that was accepted by the Office for lumbar sprain. In a January 21, 2005 decision, the Board affirmed the Office's July 13, 2004 decision which terminated appellant's compensation on the grounds that he no longer had any residuals or disability causally related to his July 12, 2002 employment injury and found that he failed to establish that his herniated disc, degenerative disc disease and resultant surgery were due to the employment injury. Docket No. 04-1853 (issued January 21, 2005).

weakness. There were no abnormal marks or deformity in appellant's back, except for a suggestion of some very small scars along the paraspinal region at around L4-5. There was no muscle spasm. There was no tenderness in the midline or paraspinals. Lumbar motion was very mildly limited. Forward flexion was to about 80 degrees, extension to 30 degrees and lateral bending to the right and left was 30 degrees. Dr. Kovalsky stated that none of these caused pain but, appellant felt tightness in his back. There was no tenderness in the sciatic region and no sensory loss in the perineum. Deep tendon reflexes were symmetric and intact. There was no clonus. Motor strength was good throughout the lower extremities without give out weakness. Sensation was intact in all dermatomes. Deyerle's and dangling straight leg raise at 90 degrees were negative. Straight leg raise bilaterally at 60 degrees caused tightness in appellant's hamstrings but, no radiating pain or back pain. Patrick's and Gaenslen's bilaterally caused him to complain of some sharp pains in the lower back. His calves were equal at 41 centimeters. There was no pain with gentle log rolling.

Dr. Kovalsky diagnosed multi-level lumbar degenerative disc disease, osteoarthritis, spinal stenosis at L4-5 and status post percutaneous discectomy based on MRI scan findings. He opined that the July 12, 2002 employment injury aggravated appellant's preexisting degenerative disc disease and arthritis and precipitated the need for surgery. Dr. Kovalsky further advised, however, that such aggravation was temporary and ceased following the December 2002 surgery. He found that appellant did not have any physical limitations based on his employment injury. Any residual impairment that he had was due to his underlying degenerative disc disease and arthritis.

Based on Dr. Kovalsky's April 27, 2007 medical opinion, the Office accepted appellant's claim on June 5, 2007 for temporary aggravation of preexisting degenerative disc disease of the lumbar spine at L4-5 and aggravation of degenerative arthritis of the low back which resolved in December 2002. It also approved of his December 5, 2002 back surgery. The Office found that Dr. Kovalsky's opinion was entitled to special weight accorded an impartial medical specialist. By letter dated June 6, 2007, it advised appellant about the acceptance of his claim and authorization of his back surgery.

On September 26, 2007 the Office reissued its June 5, 2007 acceptance decision with appeal rights. By letter dated September 28, 2007, appellant's attorney requested a telephonic hearing before an Office hearing representative.

In a December 10, 2007 decision, an Office hearing representative set aside the September 26, 2007 decision and remanded the case to the Office to obtain a supplemental opinion from Dr. Kovalsky explaining how the July 12, 2002 employment injury aggravated or worsened appellant's preexisting back conditions and precipitated the need for surgery, how the surgery resolved the employment-related aggravation and why appellant's continuing residuals were causally related to his preexisting back conditions and not the employment injury. The hearing representative also instructed the Office to double the instant claim, Office File No. xxxxxx759, and appellant's claim in Office File No. xxxxxx109 into a master case file, Office File No. xxxxxx759.

By letter dated January 16, 2008, the Office requested that Dr. Kovalsky provide a supplemental report addressing the hearing representative's specific concerns.<sup>3</sup>

In a January 24, 2008 supplemental report, Dr. Kovalsky reviewed appellant's medical records. He opined that based on the lack of any significant preexisting history of back problems, the onset and development of appellant's low back complaints began on July 12, 2002. Dr. Kovalsky reviewed the medical opinion of Dr. William H. Spellman, a Board-certified orthopedic surgeon, that appellant sustained a lumbar sprain and strain. The fact that appellant developed symptomatic pain at the L4-5 region as determined by Dr. Lewis S. Sharps, a Board-certified orthopedic surgeon, with a discogram indicated that there was an aggravation of his preexisting condition. Dr. Kovalsky advised that appellant developed new symptoms related to the low back which were not present prior to his employment injury. He found objective abnormalities based on MRI scan studies that were performed following the July 12, 2002 employment injury. They included a disc herniation at L4-5 together with degenerative disc disease and arthritis at multiple levels. Dr. Kovalsky noted that due to the failure of conservative treatments, Dr. Sharps performed a discectomy procedure at the L4-5 level. This procedure alleviated and significantly improved appellant's preoperative symptoms and pain. Based on these facts, the employment injury precipitated or accelerated the need for surgery at that level. Dr. Kovalsky could not determine whether the disc was present before the July 12, 2002 employment injury but, according to the medical records and history it was not symptomatic prior to the accepted injury. Dr. Kovalsky stated that this led to his opinion that appellant sustained more than just a sprain or strain type of injury as found by Dr. Spellman. If appellant had not sustained the employment injury, there may have been a subsequent need for surgery. However, there was clearly a cause and effect relationship between the employment injury and the development of appellant's symptoms.

Dr. Kovalsky found that Dr. Sharps' December 2002 surgery resolved the aggravation of appellant's underlying disc condition. Dr. Sharps advised that he was doing well following surgery. Appellant had significant improvement in his pain which he rated as 0 out of 10. Dr. Kovalsky stated that, at the time of his April 27, 2007 examination, appellant did not experience any specific pain. His only symptoms were stiffness and soreness in the back. When appellant performed heavy lifting or strenuous activities, he was sore the next day. Dr. Kovalsky stated that these symptoms would not be unusual or unexpected in someone who was appellant's age and who had underlying degenerative disc disease and arthritis at multiple levels. The MRI scan studies showed the presence of multilevel degenerative and arthritic changes. Dr. Kovalsky opined that appellant had returned to his baseline status and underlying degenerative disc disease and osteoarthritis in the lumbar spine following the disc procedure performed by Dr. Sharps. The removal of the disc would have taken care of the herniation and left appellant with his residual degenerative disc problems, which were often times symptomatic and exacerbated by strenuous and exertional type of physical activities. Based on his history, this seemed to be the only activity that really aggravated appellant's back. He opined that this was not a residual problem from the employment injury but from appellant's ongoing degenerative disease and the gradual slow progression of the underlying degenerative condition. Dr. Kovalsky advised that he

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<sup>3</sup> On January 16, 2008 the Office combined the claim in Office File No. xxxxxx759 and the claim in Office File No. xxxxxx109 into a master claim, Office File No. xxxxxx759.

did not demonstrate or complain of any significant sciatic symptoms. There was no indication of any nerve irritation or neurologic deficits at the time of his evaluation to indicate that there were any residuals from the July 12, 2002 employment injury.

Dr. Kovalsky stated that, on examination, there were no objective findings of specific residuals or impairment causally related to the employment-related injury or surgery. The procedure appellant underwent was a percutaneous procedure which would have minimally disrupted the muscles and soft tissues around the spinal region. Dr. Kovalsky did not find any specific residuals from the surgery. Had appellant undergone an open procedure with devascularization and denervation of the localized muscles, he would expect some residual impairment or residuals from that type of procedure. However, the procedure performed by Dr. Sharps was minimally invasive and would not physically cause or result in specific impairments or residuals.

By decision dated March 18, 2008, the Office terminated appellant's compensation for wage-loss and medical benefits with regard to his accepted employment-related injuries, effective December 5, 2002. It accorded special weight to Dr. Kovalsky's medical opinion that appellant no longer had any residuals causally related to his July 12, 2002 employment injury.

On April 15, 2008 appellant's attorney requested an oral hearing.

In an April 8, 2009 decision, an Office hearing representative affirmed the March 18, 2008 termination decision. Special weight was accorded to Dr. Kovalsky's impartial medical opinion.

### **LEGAL PRECEDENT**

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.<sup>4</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>5</sup> Furthermore, 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 a claimant no longer has residuals of an employment-related condition that requires further medical treatment.<sup>6</sup>

In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving

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<sup>4</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989).

<sup>5</sup> *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>6</sup> *Mary A. Lowe*, 52 ECAB 223 (2001); *Wiley Richey*, 49 ECAB 166 (1997).

the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.<sup>7</sup>

### ANALYSIS

The Board finds that the Office met its burden of proof to terminate appellant's wage-loss compensation and medical benefits as of December 5, 2002 on the grounds that he had no residuals of the accepted employment-related aggravation of preexisting lumbar disease and resultant surgery. The Board notes that a conflict in the medical opinion evidence arose between Dr. Rosenfeld, an attending physician, and Dr. Valentino, an Office referral physician, regarding whether appellant's July 12, 2002 employment injury permanently aggravated his preexisting degenerative disc disease and arthritis and whether the aggravation resulted in the need for surgery. Dr. Rosenfeld opined that the employment injury permanently aggravated appellant's preexisting degenerative disc disease which resulted in the need for surgery. Dr. Valentino opined that appellant's July 12, 2002 employment injury had resolved and that it did not aggravate his preexisting degenerative disc disease. Therefore, the surgery was not necessary.

The Office referred appellant to Dr. Kovalsky, the impartial medical specialist who provided an accurate history of injury and detailed essentially normal findings on physical examination. In reports dated April 27, 2007 and January 24, 2008, Dr. Kovalsky opined that the July 12, 2002 employment injury temporarily aggravated appellant's preexisting lumbar degenerative disc disease and arthritis, and precipitated the need for surgery. He found that the employment-related aggravation ceased following the December 5, 2002 discectomy, which alleviated and significantly improved appellant's preoperative symptoms and pain. Dr. Kovalsky advised that appellant had returned to his baseline status due to his underlying lumbar degenerative disc disease. He found no specific residuals from the surgical procedure as it was minimally invasive and did not disrupt the muscles and soft tissues around the lumbar region. On examination, Dr. Kovalsky did not find evidence of residuals or disability causally related to the employment-related injury or surgery. He found that appellant did not have any specific pain or significant sciatic symptoms. Dr. Kovalsky found no evidence of any nerve irritation or neurologic deficits. Although appellant experienced periodic stiffness and soreness in his back following strenuous activities, these symptoms were common and expected in someone who was appellant's age with underlying degenerative disc disease and arthritis in the back at multiple levels. Dr. Kovalsky further explained that the removal of the disc would have taken care of the herniation and appellant was left with residual degenerative disc problems that were symptomatic and exacerbated by strenuous and exertional type of physical activities and not by his employment injury. He advised that it was expected that appellant's degenerative disc disease and arthritis would slowly progress over the years.

The Board finds that Dr. Kovalsky's opinion is entitled to special weight accorded an impartial medical specialist and is sufficiently well reasoned and detailed to resolve the conflict of medical opinion evidence. He provided extensive findings on physical examination, reviewed the MRI scan findings and explained why he felt that appellant's current symptoms were not causally related to his July 12, 2002 employment-related aggravation of his preexisting lumbar

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<sup>7</sup> *Gloria J. Godfrey*, 52 ECAB 486 (2001).

conditions and resultant surgery. The Board finds, therefore, that the Office met its burden of proof to terminate appellant's compensation and medical benefits effective December 5, 2002.

The Board finds that appellant's argument on appeal that Dr. Kovalsky's medical opinion is not sufficiently rationalized to establish that he no longer has any residuals of his employment-related aggravation of his preexisting lumbar degenerative disc disease at L4-5 and arthritis, and resultant surgery is without merit for the reasons previously stated.

### **CONCLUSION**

The Board finds that the Office properly terminated appellant's compensation for wage-loss and medical benefits effective December 5, 2002 on the grounds that he no longer had any residuals causally related to his July 12, 2002 employment-related aggravation of preexisting lumbar degenerative disc disease at L4-5 and arthritis, and resultant surgery.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the April 8, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 19, 2010  
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