

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

D.P., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Cleveland, OH, Employer**

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**Docket No. 10-552
Issued: November 19, 2010**

Appearances:

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 23, 2009 appellant, through his attorney, filed a timely appeal of August 7 and October 20, 2009 merit decisions of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUES

The issues are: (1) whether the Office met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective January 22, 2009; and (2) whether appellant has met his burden of proof in establishing any continuing disability or medical residuals on or after January 22, 2009 causally related to his June 24, 2006 employment injury.

FACTUAL HISTORY

On June 24, 2006 appellant, then a 46-year-old mail handler, filed a traumatic injury claim alleging that he injured his back on that date unloading a trailer in the performance of duty. A coworker, Leonard M. Natalis, completed a witness statement on June 25, 2006 and stated that

a violent lurch occurred in the trailer he and appellant were unloading. He stated that the trailer separated from the dock by about three feet. Appellant hit the sidewall of the truck. Mr. Natalis stated, "We then jumped from the trailer back on to the dock!" The Office accepted appellant's claim for sprain of the lumbar spine and left-sided lumbar radiculopathy on September 1, 2006.

Appellant's attending physician, Dr. Daniel Leizman, Board-certified in physical medicine and rehabilitation, examined appellant on September 22, October 10, 17 and 27, November 10 and 27 and December 20, 2006 and found persistent lumbar back pain which occasionally radiated to the left knee and included numbness in the thigh. On examination he found no paraspinal muscle spasm, but moderate tenderness to palpation and moderate restriction. Dr. Leizman diagnosed lumbar sprain and radicular syndrome of the lower limbs. He found that x-rays demonstrated thoracolumbar spondylosis at T11-12, L3-4 and L4-5.

Dr. Jonathan Waldbaum, Board-certified in physical medicine and rehabilitation, performed nerve conduction and electromyogram (EMG) studies on October 13, 2006. The results of these studies demonstrated that appellant had no electrodiagnostic evidence of left lower limb lumbosacral radiculopathy, focal nerve entrapment or peripheral polyneuropathy.

The Office referred appellant for a second opinion evaluation with Dr. Sheldon Kaffen, a Board-certified orthopedic surgeon, on November 6, 2006. In his December 19, 2006 report, Dr. Kaffen noted appellant's history of injury and medical history. He performed a physical examination and diagnosed lumbar sprain, resolved, mild degenerative disc disease L5-S1 and L4-5 and mild degenerative arthritis of the facets in the lower lumbar spine. Dr. Kaffen opined that appellant no longer required treatment for the accepted condition and that any work restrictions were due to his underlying conditions of degenerative disc disease and facet arthritis.

The Office referred Dr. Kaffen's report to Dr. Leizman for comment on January 8, 2007. Dr. Leizman completed a note on December 20, 2006 and repeated appellant's symptoms of persistent lumbar back pain with occasional radiation into the left lower extremity to the knee and also associated with numbness in the thigh. He duplicated his earlier findings and again diagnosed lumbar sprain and radicular syndrome of the lower limbs. Dr. Leizman opined that appellant was disabled from work from September 19, 2006 through March 20, 2007. He stated that appellant's disability was directly and causally related to his work injury and required further treatment including a functional capacity evaluation and work hardening. Dr. Leizman repeated his findings and diagnosis on January 22, 2007. On February 9, 2007 the Office entered appellant on the periodic rolls.

In a report dated February 19, 2007, Dr. Leizman noted appellant's history of injury and accepted diagnoses. He continued to diagnose lumbar spine sprain and radicular syndrome of the lower limbs. Dr. Leizman stated that appellant was disabled and required vocational rehabilitation services.

The Office determined that there was a conflict of medical opinion between Drs. Leizman and Kaffen and referred appellant to Dr. Alan Wilde, a Board-certified orthopedic surgeon, for an impartial medical examination. Dr. Wilde completed a report on March 20, 2007 and noted appellant's history of injury and medical history. He found no spasm in appellant's back and nonanatomic sensory loss which changed during the examination. Dr. Wilde noted that during

the examination appellant flexed to 30 degrees, but on informal examination flexed his lumbar spine 70 degrees. He opined that appellant had no continuing residuals from his back injury due to the changing physical examination. Dr. Wilde stated that appellant had no lumbar radiculopathy after October 13, 2006 the date of the negative EMG study. He opined that appellant was capable of performing his duties as a mail handler, that his degenerative disc disease preexisted his July 24, 2006 employment injury and that he jumped three feet out of the trailer on the date of injury, June 24, 2006, after his accepted employment injury occurred. Dr. Wilde stated that appellant had reached maximum medical improvement and did not require further treatment for the accepted injury. However, he noted that appellant did have preexisting degenerative disc disease which would likely continue to cause back pain.

On April 9, 2007 Dr. Leizman stated that appellant's back pain had increased necessitating a trip to the emergency room.

By letter dated April 24, 2007, the Office proposed to terminate appellant's compensation and medical benefits based on Dr. Wilde's report. It allowed 30 days for a response.

Dr. Alan Diamond, a Board-certified radiologist, performed a magnetic resonance imaging (MRI) scan on May 9, 2007 and found that appellant had degenerative disc disease at L4-5 and central disc herniation at the left S1 nerve root with no demonstrable morphologic neural impingement.

The Office terminated appellant's compensation and medical benefits by decision dated June 1, 2007, finding that Dr. Wilde's report constituted the weight of the medical evidence and established that appellant had no continuing employment-related disability or medical residuals.

Appellant, through his attorney, requested an oral hearing on June 5, 2007. He submitted a report dated June 1, 2007 from Dr. Leizman, who reviewed the diagnostic testing and stated that the May 9, 2007 MRI scan demonstrated a central disc herniation at L5-S1. Dr. Leizman opined that appellant sustained a traumatic injury to the lumbar spine at L5-S1 on June 24, 2006, which ultimately resulted in a disc herniation. He stated that in his opinion the L5-S1 disc herniation was the source of appellant's symptoms and that this disc herniation was directly attributable to the trauma sustained to the lumbosacral spine on June 24, 2006. Dr. Leizman recommended repeated electrodiagnostic testing as well as epidural spine block injections and opined that appellant was disabled due to his work injuries. He concluded, "My opinion is that [appellant's] complaints of low back pain with extension into the left lower limb, as well as findings on the MRI scans of the lumbar spine correlate with a lumbar spine injury of the L5-S1 disc which requires further medical care and treatment."

Appellant testified at the oral hearing on September 25, 2007. By decision dated December 18, 2007, the hearing representative reversed the Office's June 1, 2007 decision finding that Dr. Wilde did not review the most recent MRI scan in reaching his opinion and that the Office should provide him with all new evidence and request a supplemental report.

In a letter dated January 8, 2008, the Office requested that Dr. Wilde review the May 9, 2007 MRI scan and provide a supplemental report addressing the new electrodiagnostic testing and opining whether the additional diagnosis of herniated disc at L5-S1 should be accepted as

employment related. Dr. Wilde responded on January 15, 2008 and noted that the May 9, 2007 MRI scan demonstrated a central disc herniation at L5-S1 and that the report stated that there was no significant indentation in the thecal sac or demonstrable morphologic neural impingement. He stated, "This does not change my conclusions of my original report. As there is no indentation of the thecal sac or demonstrable morphologic neural impingement by the herniated disc, therefore, this does not change my conclusions from my original report."

The Office again proposed to terminate appellant's compensation benefits in a letter dated March 3, 2008. By decision dated April 16, 2008, it terminated his compensation and medical benefits. Appellant, through his attorney, requested an oral hearing on April 20, 2008. He again testified at the oral hearing on August 13, 2008 that he had not worked since 2006 and that he was currently taking pain medication.

Appellant submitted a report dated September 22, 2008 from Dr. Leizman noting that appellant continued to experience persistent chronic low back pain in the lumbosacral spine as well as intermittent numbness and tingling in both lower limbs. Dr. Leizman reviewed x-rays dated August 18, 2008 and found mild multilevel lumbar spondylosis as well as mild to moderate lumbar degenerative disc disease at the L5-S1 level. He stated that electrodiagnostic studies on August 26, 2008 were negative for radiculopathy and that appellant's August 27, 2008 MRI scan demonstrated a stable L4-5 disc bulge with a small annular tear and disc desiccation. Dr. Leizman stated that the L5-S1 disc herniation included a small annular tear and noncompressive left neural foraminal narrowing and appeared to be decreasing in size. He opined that appellant was capable of performing sedentary work. Dr. Leizman diagnosed lumbar spine sprain, lumbar radicular symptoms of the lower limbs and lumbar disc herniation at L5-S1 due to the June 24, 2006 employment injury. He stated that appellant could not return to his date-of-injury position.

By decision dated October 17, 2008, the Office hearing representative vacated the Office's April 16, 2008 decision finding that the Office failed to provide Dr. Wilde with all the new evidence of record prior to the date he completed his supplemental report. The hearing representative directed the Office to request a second supplemental report from Dr. Wilde based on a statement of accepted facts and copies of all records received since March 29, 2007. The hearing representative requested that Dr. Wilde address whether or not appellant sustained a L5-S1 herniated disc as a result of the June 24, 2006 employment injury.

The Office requested another report from Dr. Wilde on December 10, 2008. It asked that he provide fully reasoned opinions addressing whether appellant sustained a work-related herniated disc, whether the herniated disc resulted in disability for work and if so, what restrictions resulted. Dr. Wilde responded on December 16, 2008 and noted reviewing additional medical records. He opined that appellant did not sustain a herniated lumbar disc at L5-S1 as a result of the June 24, 2006 employment injury as a witness stated that appellant was capable of jumping the three feet from the truck to the loading dock after the incident. Dr. Wilde concluded that this clearly indicated that appellant did not have a significant injury to his low back at that time. He found that the August 4, 2005 MRI scan showed degenerative disc disease at L4-5 and L5-S1 prior to the June 24, 2006 employment injury. Dr. Wilde stated that the subsequent MRI's scan did not demonstrate a ruptured disc impinging on the left S1 nerve root and that the October 13, 2006 an EMG study was negative for radiculopathy in either lower extremity. He

stated, “For all these reasons, I do not believe that [appellant] had a clinically significant herniated disc at L5-S1 as a result of the June 24, 2006 work injury.” Dr. Wilde repeated that during his physical examination he found variation in appellant’s abilities from the formal examination and appellant’s motions during dressing as well as nonanatomic sensory loss which changed during repeated examination of appellant’s lower extremities. He concluded, “[A]ppellant was capable of returning to his job as mail handler without restrictions.”

By decision dated January 15, 2009, the Office terminated appellant’s compensation and medical benefits effective January 17, 2009. It amended this decision on January 22, 2009 to reflect a termination date of January 22, 2009.

Appellant requested an oral hearing. He testified at the oral hearing on May 21, 2009 and described his current condition. Appellant denied that he jumped three feet from the trailer onto the dock and stated that Dr. Wilde’s report was factually incorrect. Following the hearing, he submitted a note from Dr. Leizman dated June 24, 2009, which noted that his June 8, 2007 electrodiagnostic study demonstrated proximal conduction delay, a new finding. Dr. Leizman repeated his diagnoses and stated that appellant was disabled.

The Office hearing representative issued a decision on August 7, 2009 and affirmed the Office’s decision terminating appellant’s compensation and medical benefits effective January 22, 2009.

Appellant requested reconsideration on September 22, 2009 based on the September 22, 2008 report from Dr. Leizman and an August 29, 2009 report from Dr. William N. Grant, a Board-certified internist, who noted appellant’s history of injury and found that normal curvature of the lumbar spine was absent with limited range of motion of the spine and hypoactive deep tendon reflexes. Dr. Grant reviewed appellant’s diagnostic studies and diagnosed multilevel disc disease and radiculopathy of the lumbar spine. He opined that these conditions were the direct result of the employment injury due to appellant’s symptoms of constant pain and paresthesias, limited movement of the lower back and constant use of pain medication. Dr. Grant concluded that appellant was permanently disabled due to severe lumbar spine disease, which was “more likely than not” caused by appellant’s fall.

By decision dated October 20, 2009, the Office reviewed the merits of appellant’s claim but denied modification of its prior decisions.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.¹ After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.² Furthermore, the right to medical

¹ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

² *Id.*

benefits for an accepted condition is not limited to the period of entitlement for disability.³ 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.⁴

When there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of the Federal Employees' Compensation Act which 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 and resolve the conflict of medical evidence.⁵ This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.⁶ 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 the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.⁷ When the Office secures an opinion from an impartial medical specialist and the opinion of the specialist requires clarification or elaboration, it has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original report.

ANALYSIS -- ISSUE 1

The Office accepted appellant's claim for sprain of the lumbar spine and left-sided lumbar radiculopathy. It terminated his wage-loss compensation and medical benefits effective January 22, 2009. Appellant's attending physician, Dr. Leizman, continued to support appellant's claim for disability and medical residuals as a result of his accepted employment injury. The Office second opinion physician, Dr. Kaffen, examined appellant and reviewed the factual and medical history. He determined that appellant's accepted medical conditions had resolved with no residuals. The Board finds that the Office properly determined that there was a conflict of medical opinion evidence and referred appellant for an impairment medical examination with Dr. Wilde.

Dr. Wilde's initial report dated March 20, 2007 noted findings of inconsistent abilities demonstrated on formal versus informal examination. He reviewed appellant's electrodiagnostic studies and found that appellant had no radiculopathy after October 13, 2006 based on these studies. Dr. Wilde noted that appellant had jumped three feet immediately after the employment incident and opined that he had not sustained a severe injury given this ability. He found that appellant could return to his date-of-injury position but that his preexisting degenerative disc

³ *Furman G. Peake*, 41 ECAB 361, 364 (1990).

⁴ *Id.*

⁵ 5 U.S.C. §§ 8101-8193, 8123; *M.S.*, 58 ECAB 328, 331 (2007); *B.C.*, 58 ECAB 111, 118 (2006).

⁶ *R.C.*, 58 ECAB 238, 241 n.6 (2006).

⁷ *Nathan L. Harrell*, 41 ECAB 402, 407 (1990).

disease could cause additional nonemployment-related symptoms. Dr. Wilde concluded that appellant did not continue to suffer from the effects of the June 24, 2006 work injury.

Following this report, Dr. Leizman submitted and reviewed additional electrodiagnostic studies, which demonstrated a herniated disc at L5-S1. He attributed this diagnosis to appellant's employment injury. Due to the additional findings, the Board finds that the Office properly requested a supplemental report from Dr. Wilde. He was asked whether appellant sustained a work-related herniated disc, whether the herniated disc resulted in disability for work and, if so, what restrictions.

Dr. Wilde responded on January 15, 2008 and reviewed the May 9, 2007 MRI scan finding of central disc herniation at L5-S1. He stated, "This does not change my conclusions of my original report. As there is no indentation of the thecal sac or demonstrable morphologic neural impingement by the herniated disc, therefore, this does not change my conclusions from my original report."

Following that clarification from Dr. Wilde, additional medical evidence was received from Dr. Leizman, including x-rays dated August 18, 2008. Dr. Wilde was again properly requested to review and evaluate all the remaining evidence. His report of December 16, 2008 was thorough, well rationalized and consistent with no further disability. Dr. Wilde acknowledged preexisting degenerative disc disease but noted that there was not a clinically significant herniated or ruptured disc impinging on the left S1 nerve root and, after reviewing the nerve conduction/EMG studies, he found no radiculopathy of either right or left leg. He noted that appellant could return to work with no restrictions.

For each supplemental report from the referee physician, additional evidence had been received and the Office was proper in requesting supplemental reports to ensure he had reviewed all the evidence in the record.⁸

As the impartial medical specialist's report was sufficiently well rationalized and based upon a proper factual background, the Office accorded special weight to Dr. Wilde's findings which established that appellant's work-related conditions had ceased. Therefore, the Office met its burden of proof to establish that appellant's work-related injury had resolved.

LEGAL PRECEDENT -- ISSUE 2

As the Office met its burden of proof to terminate appellant's compensation benefits, the burden shifted to him to establish that he had any disability causally related to her accepted injury.⁹

Where an employee claims that, a condition not accepted or approved by the Office was due to an employment injury, he bears the burden of proof to establish that the condition is

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.11(d) and (e) (April 1995).

⁹ See *Joseph A. Brown, Jr.*, 55 ECAB 542, 544 n.5 (2004); *Manuel Gill*, 52 ECAB 282, 287 (2001).

causally related to the employment injury.¹⁰ To establish a causal relationship between the condition claimed, as well as any attendant disability and the employment event or incident, an employee must submit rationalized medical evidence based on a complete medical and factual background supporting such a causal relationship.¹¹ Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.¹² Neither the fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.¹³

ANALYSIS -- ISSUE 2

After the Office properly terminated appellant's compensation effective January 22, 2009, the burden of proof shifted to him to establish continuing employment-related disability.¹⁴ Appellant disagreed with the Office's reliance on Dr. Wilde claiming it was factually incorrect. He further submitted the June 24, 2009 treatment note and September 28, 2008 report from his treating physician, Dr. Leizman, which repeated his earlier diagnosis of disability. Appellant also provided the August 29, 2009 report of Dr. Grant finding that he was permanently disabled due to severe lumbar spine disease which was "more likely than not" caused by his work-related injury.

Dr. Leizman was on one side of the conflict which was resolved by Dr. Wilde. His recent records are essentially duplicative of his prior reports in finding that appellant continues to be disabled as a result of his employment injury. Dr. Leizman's opinion helped to create the conflict and the new evidence is insufficient to give rise to a new conflict or otherwise show that the termination was improper.¹⁵ Accordingly, the Board finds that Dr. Wilde's opinion constitutes the special weight of medical opinion and supports the Office's decision to terminate compensation and denying any entitlement to continuing disability based on the accepted employment conditions.

Appellant also offered the report from Dr. Grant, who examined him on August 29, 2009. Although Dr. Grant had not been involved in the medical care of appellant's injury prior to 2009, he noted that "[I]t is much more likely than not that [appellant's] fall on the mail truck caused his injury." His report, however, is not based on an accurate factual history. Dr. Grant's report does not reference the key point of Dr. Wilde's report that, after appellant's fall in the truck, he was able to jump from the truck to the loading dock. As such, the report has diminished probative value. The weight of a medical opinion is determined by the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts of the

¹⁰ See *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

¹¹ *G.T.*, 59 ECAB 447, 451 (2008); *Elizabeth Stanislave*, 49 ECAB 540, 541 (1998).

¹² *Jacqueline M. Nixon-Steward*, 52 ECAB 140, 141 n.6 (2000).

¹³ *Ernest St. Pierre*, 51 ECAB 623 (2000).

¹⁴ *Supra* note 9; *I.J.*, 59 ECAB 408, 415 (2008); *Joseph A. Brown, Jr.*, 55 ECAB 542, 544 n.5 (2004).

¹⁵ *M.S.*, 58 ECAB 328, 333 (2007).

case, the medical history provided the care of analysis manifested and the medical rationale expressed in support of the stated conclusions.¹⁶ Further, the report being three years after the employment injury renders the report of lesser probative value.¹⁷ Appellant has failed to establish any continuing disability after termination of benefits effective January 22, 2009.

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation benefits effective January 22, 2009 on the grounds that he no longer had any residuals or disability causally related to her accepted employment injury. The Board also finds that he has failed to establish that he had any employment-related residuals or disability after January 22, 2009.

ORDER

IT IS HEREBY ORDERED THAT the October 20 and August 7, 2009 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 19, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁶ See *Anna C. Leanza*, 48 ECAB 115, 124 (1996).

¹⁷ See *Eileen R. Kates*, 46 ECAB 573, 575 (1995) (a physician's contemporaneous medical opinion is of greater probative value on appellant's ability to work than the opinion of another physician who did not examine appellant until later).