

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

C.T., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
LOUISVILLE, KY, Employer)

**Docket No. 10-2116
Issued: July 21, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On August 12, 2010 appellant filed a timely appeal from an August 6, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's compensation benefits effective October 31, 2008; and (2) whether appellant established that he had any continuing employment-related disability or condition after that date due to his accepted January 11, 2004 employment injury.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On January 11, 2004 appellant, then a 26-year-old clerk, filed a traumatic injury claim alleging that he sustained a back strain due to lifting a heavy mail tray at work. OWCP initially accepted his claim for back sprain and subsequently for disc protrusion and annular tear.

Appellant initially sought treatment from Dr. George O. Nobile, Board-certified in emergency medicine. Dr. Nobile submitted reports to the record through May 16, 2007.

On July 3, 2007 appellant was examined by Dr. Jeffrey W. Berg, a Board-certified anesthesiologist, who noted appellant's three-year history of lower back and right leg pain that began after lifting mail at work and reviewed appellant's social and medical history. Dr. Berg stated that a magnetic resonance imaging (MRI) scan revealed a two to three millimeter (mm) broad-based subligamentous disc protrusion suggestive of bilateral S1 nerve root irritation and some mild proximal foraminal narrowing bilaterally due to facet degenerative changes. Upon examination, he noted that appellant's back had mild paraspinous tenderness without erythema, edema or masses. Dr. Berg diagnosed appellant with lower back and right leg pain, secondary to L5-S1 disc protrusion, facet arthropathy, mild foraminal narrowing and bilateral S1 nerve root irritation. In a July 25, 2007 report, he reevaluated appellant and noted that appellant received an epidural injection approximately three weeks prior, which offered him some substantial overall improvement in symptoms and administered another epidural injection.

In a letter dated October 4, 2007, OWCP requested a current narrative medical report from appellant's physician regarding his accepted work condition. Appellant resubmitted a November 14, 2006 report by Dr. Richard T. Sheridan, a Board-certified orthopedic surgeon, who reviewed a February 2004 MRI scan report and observed a subligamentous disc herniation at L5-S1. A February 23, 2004 computerized axial tomography (CAT) scan of appellant's lumbar spine also revealed a small disc bulge or protrusion at L5-S1.

In a February 19, 2008 follow-up report, Dr. Berg reevaluated appellant for his back condition and stated that appellant felt 50 to 60 percent relief in his symptoms after receiving his last epidural injection.

On January 31, 2008 OWCP referred appellant to Dr. Stanley Collis for a second opinion evaluation. In an April 25, 2008 report, Dr. Collis reviewed the statement of accepted facts and appellant's medical history. He noted that appellant was lifting a big bag at work when he felt a sudden pain in his back. Appellant reported that he did not have back problems prior to this employment incident. Dr. Collis also pointed out that a February 10, 2004 CAT scan showed a bulge at L5-S1. Upon examination, he observed normal curvature in appellant's back with no listing or guarding, good motion and reflexes and no evidence of muscle weakness in the extremities. Appellant's straight leg raise test and lasegue sign were negative bilaterally. Dr. Collis ultimately opined that appellant's low back strain and L5-S1 center disc protrusion had resolved and that appellant did not have any work-related disability. He explained that appellant's examination and x-rays were not remarkable and that appellant would have some obvious objective findings if he had as many problems as he complained about for four years.

On May 8, 2008 OWCP provided Dr. Berg with Dr. Collis' report for review and comment. In a June 11, 2008 note, Dr. Berg reported that appellant complained of significantly increased right leg and lower back pain. He reviewed the report of Dr. Collis and recommended that his finding that appellant's conditions had resolved be confirmed with an MRI scan. In a June 20, 2008 MRI scan report, Dr. Beth Dubose, a Board-certified diagnostic radiologist, compared the test results to the previous February 2004 MRI scan. She observed that the vertebral bodies and marrow signal intensity were within normal limits. Dr. Dubose opined that appellant had a three to four mm central disc protrusion with annular tear at L5-S1 that was slightly increased from the previous examination. She also noted bilateral facet arthropathy and mild left posterolateral disc bulging.

OWCP found a conflict of medical opinion between Dr. Berg and Dr. Collis regarding whether appellant continued to have residuals of his accepted work injury. On June 9, 2008 it referred him to Dr. Martyn Goldman, a Board-certified orthopedic surgeon, for an impartial evaluation. In a July 31, 2008 report, Dr. Goldman reviewed the statement of accepted facts and appellant's medical records. He stated that appellant complained of lower back and right lower extremity pain and related the pain to a January 11, 2004 employment incident when he lifted a package of mail weighing 70 to 75 pounds. Upon examination, Dr. Goldman observed tenderness to light stroking in the midline low lumbar area of appellant's back and on the right sacroiliac joint and moderate pes planus bilaterally in appellant's lower extremities. Appellant's Trendelenburg test and straight leg raise test in the seated position were negative, but his straight leg raise test in the supine position and femoral stretch test resulted in complaints of low back pain. Appellant was able to walk without a limp and stand on his heels and toes, although he complained of low back pain. Dr. Goldman diagnosed degenerative disc disease L5-S1 with some evidence of symptom magnification and complaints of low back pain. He stated that appellant's subjective complaints outweighed the objective findings and that appellant's current condition was not causally related to the accepted injury. Dr. Goldman concluded that appellant's accepted work-related back strain had resolved and that his current L5-S1 disc protrusion and annular tear were a result of his underlying degenerative condition and not causally related to the January 11, 2004 injury. He found that appellant was capable of modified employment or light duty as long as it was sedentary and did not involve lifting 10 to 15 pounds or bending forward with the knees straight.

On August 12, 2008 the employing establishment submitted an investigative memorandum and requested that OWCP terminate appellant's claim on the grounds that he was not disabled and could return to work. The report noted that video surveillance of appellant during the period June 9 to July 7, 2008 showed him walking up to one mile, getting in and out of motor vehicles and going shopping without apparent discomfort on multiple occasions. The report included an interview with Dr. Berg, appellant's treating physician, who reviewed the surveillance video and stated that the video showed that appellant was not disabled.

In a letter dated September 18, 2008, OWCP proposed to terminate appellant's compensation benefits based on Dr. Goldman's report. It found that Dr. Goldman attributed appellant's complaints of back pain to a degenerative condition and concluded that appellant no longer had a disability or residuals due to his accepted January 11, 2004 employment injury.

Appellant responded by submitting a September 23, 2008 medical report by Dr. Berg. He stated that his symptoms were ongoing and increased over the last several weeks. Dr. Berg noted a recent MRI scan which showed that appellant's L5-S1 disc protrusion may be slightly enlarged from his previous MRI scan. In an October 16, 2008 medical report, he administered another epidural shot.

By decision dated October 31, 2008, OWCP finalized the termination. It concluded that the weight of the medical evidence rested with the opinions of Drs. Goldman and Collis and that Dr. Berg's September 23 and October 16, 2008 medical reports did not outweigh the objective evidence submitted by the referee physician.

On December 20, 2008 appellant, through his representative, requested reconsideration. He contended that appellant's employing establishment began investigating his claim in retaliation for appellant's successful, race-based equal employment opportunity claim. Appellant also submitted additional medical evidence. In a September 24, 2008 medical slip, Dr. Berg stated that appellant was seen in his office with complaints of continuous lower back and intermittent leg pain. He reported that an MRI scan of the lumbar spine revealed disc protrusion that was probably work related.

In a November 21, 2008 letter, Dr. Berg stated that he first examined appellant on July 3, 2007 for lower back and right leg pain that began after a work-related injury. He noted that an MRI scan of the lumbar spine revealed a two to three mm broad based subligamentous disc protrusion at L5-S1, small annular tearing, mild thecal sac effacement with suggestions of S1 nerve root irritation and degenerative disc changes. Appellant further resubmitted the June 26, 2008 MRI scan report.

By decision dated February 24, 2009, OWCP denied modification of its October 31, 2008 termination decision.

In a letter dated August 8, 2009, appellant, through his representative, again requested reconsideration, alleging that his condition had not changed since it was initially accepted. In a July 16, 2009 medical report, Dr. Berg stated that appellant did not have any complaints of back pain or documented abnormal pathology until his January 11, 2004 work-related injury and that appellant's lower back pain was significant. An MRI scan also revealed a two to three mm broad based subligamentous disc protrusion at L5-S1, small annular tearing, mild thecal sac effacement with suggestion of S1 nerve root irritation and degenerative disc changes. Dr. Berg further stated that subsequent imaging revealed that not only was the initial injury still present but it had worsened, as noted by the enlargement in the size of the disc protrusion. He explained that appellant may have injured himself as a result of his employment and that his condition had clearly not resolved in respect to the initial injury.

In a December 4, 2009 decision, OWCP denied modification of its termination decision on the grounds that Dr. Goldman's referee report, which did not support that appellant was still disabled due to his accepted lumbar conditions, was the weight of the medical evidence and the new opinion from Dr. Berg was insufficient to overcome the weight of the medical evidence because he essentially repeated his earlier findings and conclusions.

On December 31, 2009 appellant submitted a request for reconsideration. He pointed out that there was no medical evidence demonstrating that he had a preexisting back condition prior to the January 11, 2004 work injury. In a letter dated January 22, 2010, OWCP denied appellant's request for reconsideration because he did not submit any new and relevant evidence.

On February 17, 2010 appellant submitted a request for reconsideration, a personal statement and Dr. Sheridan's November 14, 2006 second opinion evaluation report. In an April 9, 2010 decision, OWCP denied appellant's request for reconsideration on the grounds that he did not submit any new and relevant evidence.

In an undated letter, appellant requested reconsideration and submitted additional medical evidence. In a May 19, 2010 medical report, a nurse practitioner and Dr. Nobile, Board-certified in emergency medicine, provided a history of injury and noted appellant's complaints of lower back and right leg pain and numbness. Dr. Nobile reported that an April 20, 2010 MRI scan revealed a disc desiccation and three to four mm broad-based disc protrusion with annular tear at L5-S1. Upon examination, he observed moderate tenderness to palpation in appellant's lumbar area and right paralumbar region with mild muscle spasm, normal range of motion and no evidence of trauma in appellant's extremities. Dr. Nobile diagnosed appellant with lumbar strain, radiculopathy lumbar and lumbar disc protrusion with annular tear. In a June 3, 2010 handwritten medical note, he confirmed that appellant was being treated for work injuries he sustained in January 2004. Dr. Nobile noted that an MRI scan revealed lumbar disc protrusion with an annular tear or fissure and disc desiccation at L5-S1. He opined that appellant would likely always have pain, which could affect his ability to work.

In an April 20, 2010 MRI scan report, Dr. Dubose noted that the height of appellant's vertebral bodies and conus medullaris were normal and unremarkable. She also observed disc desiccation and a three to four mm broad-based central disc protrusion at appellant's L5-S1, which mildly effaced the ventral thecal sac and approached the traversing S1 nerve roots. Dr. Dubose further reported a probable small annular tear or fissure along the dorsal margin of the disc, mild ligamentum flavum hypertrophy and facet arthropathy.

In a decision dated August 6, 2010, OWCP denied modification of OWCP's October 31, 2008 termination decision. It determined that the medical evidence did not refute the second opinion and referee reports, which concluded that his conditions had resolved.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits by proving that the disability has ceased or lessened.² It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment injury.³ As part of its burden of proof to

² *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

³ *I.J.*, 59 ECAB 408 (2008); *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Elsie L. Price*, 54 ECAB 734 (2003).

terminate compensation, OWCP must furnish rationalized medical opinion evidence based on a proper factual and medical background.⁴

Section 8123(a) of FECA 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.⁵ If the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist must be given special weight so long as it is sufficiently well rationalized and based on proper factual background.⁶

ANALYSIS -- ISSUE 1

OWCP accepted appellant's claim for back sprain, disc protrusion and annular tear as a result of a January 11, 2004 work injury when he lifted a heavy container filled with mail. On October 31, 2008 it terminated his compensation benefits. OWCP determined that a conflict in medical evidence existed between the opinions of Dr. Berg, appellant's treating physician, and Dr. Collis, OWCP's referral physician, regarding whether appellant continued to suffer residuals of his January 11, 2004 work injury. It then properly referred appellant to Dr. Goldman, Board-certified in orthopedic surgery, for an impartial evaluation.

The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation. The report of the impartial medical specialist, Dr. Goldman, is not sufficient to constitute the weight of the medical evidence.

In a July 31, 2008 medical report, Dr. Goldman provided a history of injury and noted appellant's complaints of low back pain. He also extensively reviewed appellant's medical history provided by other medical reports of record. Upon examination of appellant's back, Dr. Goldman observed tenderness to light stroking in the midline low lumbar area but none on the left side and the greater trochanter or sciatic notch. An examination of appellant's lower extremities revealed moderate pes planus bilaterally. The Trendelenburg test and straight leg raise test in the seated position were both negative and the straight leg raise test in the supine position resulted in low back pain. Dr. Goldman ultimately diagnosed appellant with degenerative disc disease L5-S1 with some evidence of symptom magnification. He further stated that appellant's subjective complaints outweighed his objective findings and that appellant's current condition was not causally related to the original injury. Dr. Goldman advised that appellant's lumbar strain had resolved and that the current disc protrusion and annular tear were not related to the original work injury, but resulted from appellant's degenerative disc disease, which preexisted the January 11, 2004 employment incident.

⁴ See *J.M.*, 58 ECAB 478 (2007); *Gewin C. Hawkins*, 52 ECAB 242 (2001); *Del K. Rykert*, 40 ECAB 284 (1988).

⁵ 5 U.S.C. § 8123(a); see *Geraldine Foster*, 54 ECAB 435 (2003); *Furman G. Peake*, 41 ECAB 361, 364 (1990); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

⁶ *Manuel Gill*, 52 ECAB 282 (2001); *Nathan L. Harrell*, 41 ECAB 401, 407 (1990); *B.P.*, Docket No. 08-1457 (issued February 2, 2009).

The Board finds that, as Dr. Goldman did find that appellant still had current findings related to his low back injury and he in fact found that appellant still had residuals of the accepted conditions of disc protrusion and annual tear, his report does not support a finding that these conditions had resolved.

While Dr. Goldman opined that appellant's accepted disc protrusion and annual tear did not arise from the accepted employment injury, but rather were due to a degenerative condition, this issue had already been determined by OWCP. OWCP had already accepted that appellant sustained these conditions as a result of the employment injury. Dr. Goldman offered no medical explanation as to why these accepted conditions, which had not resolved, would no longer be causally related to the accepted employment injury.⁷

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation benefits.

ORDER

IT IS HEREBY ORDERED THAT the August 6, 2010 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 21, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

⁷ In light of the Board's disposition of the first issue, the second issue of continuing disability is moot.