

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

T.D., Appellant)
and) Docket No. 13-1567
U.S. POSTAL SERVICE, BRODERICK) Issued: November 12, 2013
STATION, Albany, NY, Employer)

)

Appearances:
Paul Kalker, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 19, 2013 appellant, through his attorney, filed a timely appeal from a May 16, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied continuing compensation. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this decision.

ISSUE

The issue is whether appellant is entitled to continuing compensation for the accepted employment injury.

FACTUAL HISTORY

On September 5, 2006 appellant, a 50-year-old letter carrier, sustained a traumatic injury in the performance of duty while loading a tray. OWCP accepted his claim for a mild disc bulge

¹ 5 U.S.C. § 8101 *et seq.*

at the L4-5 level aggravation of mild disc bulge at the L4-5 level. Appellant received compensation for temporary total disability on the periodic rolls.²

A conflict in medical opinion arose between Dr. John T. Whalen, the attending Board-certified orthopedic surgeon, and Dr. Edwin E. Mohler, a Board-certified orthopedic surgeon and OWCP second-opinion physician, on whether appellant continued to have residuals from the accepted employment injury. Dr. Whalen found that appellant had permanent marked disability causally related to the September 5, 2006 employment injury. Dr. Mohler found that the accepted medical condition had resolved.

Dr. Bryan S. Bilfield, a Board-certified orthopedic surgeon and impartial medical specialist selected to resolve the conflict and found that the disc bulge at the L4-5 level had resolved. He noted that although the first imaging study after the September 5, 2006 incident showed a bulge at L4-5, subsequent imaging studies did not. This indicated that the disc bulge no longer existed, which was consistent with the absence of any localizing neurologic findings on physical examination.

In a decision dated September 13, 2012, OWCP terminated compensation benefits for the accepted aggravation of mild disc bulge at the L4-5 level. It found that the weight of the medical evidence rested with the well-reasoned opinion of Dr. Bilfield, the impartial medical specialist.

On February 15, 2012 appellant, through his authorized representative, requested reconsideration of OWCP's decision to terminate compensation for the accepted aggravation of mild disc bulge at the L4-5 level. He argued that OWCP's acceptance of the claim was erroneously limited, as he also had injuries from L1 to L4 as a result of the September 5, 2006 work injury. Appellant added that his earlier injury-related conditions were again currently disabling, each of which constituted a recurrence.

Appellant submitted a November 6, 2012 report from Dr. Whelan, who observed that appellant had a stable fusion at L4-S1 and that it was unlikely, without a fairly high-energy injury, such as motorcycle accident or fall from a significant height, that the September 5, 2006 work injury would have damaged the fusion itself or the discs contained within L4-S1. It appeared instead, Dr. Whelan stated, that the damage was to the discs above the fusion.

In a decision dated May 16, 2013, OWCP, reviewed the merits of appellant's case but denied modification. It found that the argument and evidence submitted were insufficient to establish his entitlement to continuing compensation for the accepted medical condition. OWCP found that any disability due to another injury was not relevant to whether appellant had any disability due to the accepted aggravation of mild disc bulge at the L4-5 level. It noted that any claim of recurrence due to a condition accepted in another claim could be pursued under such claim.

² Appellant had two earlier employment injuries, one in 1990 that resulted in a noninstrumented fusion L4-S1 (OWCP File No. xxxxxx419), and another in 2004 that resulted in a right shoulder impingement syndrome for which he underwent surgery that same year (OWCP File No. xxxxxx015).

On appeal, appellant's representative argued that OWCP's acceptance was erroneously limited and that the September 5, 2006 work injury caused injuries at the L1-2, L2-3 and L3-4 levels, injuries that should be compensated with continued medical and wage-loss benefits.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of his duty.³ After a termination of compensation payments, warranted on the basis of the medical evidence, the burden shifts to the claimant to show by the weight of the reliable, probative and substantial evidence that, for the period for which he claims compensation, he had a disability causally related to the accepted employment injury resulting in a loss of wage-earning capacity.⁴

ANALYSIS

OWCP accepted that the September 5, 2006 work injury caused an aggravation of mild disc bulge at the L4-5 level. It paid appellant medical and wage-loss benefits on the basis of that acceptance. When the medical evidence established that the bulge at L4-5 had resolved, OWCP terminated the compensation it had been paying for that specific medical condition based on the opinion of the impartial medical referee.

The issue, then, is whether appellant is entitled to continuing medical and wage-loss benefits for the accepted aggravation of mild disc bulge at L4-5. Appellant's representative did not argue the point. He argued that appellant should receive medical and wage-loss benefits for other medical conditions, some of which OWCP accepted in earlier cases, some of which OWCP has not accepted in this case.

The issue on appeal is not whether appellant sustained a recurrence of disability causally related to medical conditions accepted in other cases. Appellant is free to pursue a claim that the September 5, 2006 work injury caused additional medical conditions, for which he bears the burden of proof. The issue presently before the Board is whether he should continue to receive medical and wage-loss benefits for the accepted aggravation of mild disc bulge at the L4-5 level.

The Board finds that the argument and evidence presented to support appellant's February 15, 2012 reconsideration request are irrelevant or immaterial to the September 13, 2012 termination of compensation. The position of Dr. Whelan, the attending orthopedic surgeon, that the September 5, 2006 work injury was unlikely to have damaged any of the discs contained within L4-S1, because appellant had a stable fusion, undermines any entitlement to continuing medical and wage-loss benefits for the accepted aggravation of mild disc bulge at the L4-5 level.

The Board finds that the evidence is insufficient to establish that appellant is entitled to continuing medical and wage-loss benefits for the accepted aggravation of mild disc bulge at L4-5. The medical evidence created a conflict which was referred to Dr. Bilfield, the impartial

³ 5 U.S.C. § 8102(a).

⁴ *Wentworth M. Murray*, 7 ECAB 570 (1955); *Maurice E. King*, 6 ECAB 35 (1953).

medical specialist, who found that the accepted medical condition has resolved. The Board will therefore affirm OWCP's May 16, 2013 decision.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant is not entitled to continuing compensation for the accepted employment injury.

ORDER

IT IS HEREBY ORDERED THAT the May 16, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 12, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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