

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of GARRY D. BURKHARD and U.S. POSTAL SERVICE,  
DETROIT BULK MAIL CENTER, Allen Park, MI

*Docket No. 97-2544; Submitted on the Record;  
Issued August 13, 1999*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective May 20, 1996.

On February 6, 1993 appellant, then a 41-year-old mail processor, was sitting on a scooter when it was hit by a forklift, pushing appellant backwards into house carts. He claimed that he sustained pain in the lower back and left leg and numbness in the left leg. In a February 22, 1993 report, Dr. H.J. Kim, a Board-certified surgeon, indicated that appellant had a history of back surgery in 1986, consisting of a laminectomy at the L4-5 level. Dr. Kim diagnosed a sacroiliac strain. He noted that an electromyogram (EMG) was negative for lumbosacral radiculopathy. Appellant was placed on light duty effective February 8, 1993 and released to full duty on May 17, 1993. The Office accepted appellant's claim for a lumbar strain. A May 19, 1993 magnetic resonance imaging (MRI) scan showed post operative changes at the L4-5 level without frank disc herniation recurrence, degenerative disc disease and lumbar spondylosis.

On March 6, 1995 appellant slipped on ice at the employing establishment and twisted his back. The Office again accepted his claim for lumbar strain. Appellant worked intermittently through July 25, 1995 and received continuation of pay for the periods March 8 to 26, 1995 and May 17 through June 11, 1995. The Office began payment of temporary total disability compensation effective August 12, 1995.

In a May 20, 1996 decision, the Office terminated appellant's compensation effective the date of the decision on the grounds that the evidence of record established that appellant's disability due to the March 6, 1995 employment injury had ceased by that time. In a September 26, 1996 decision, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted in support of the request was repetitious and therefore insufficient to warrant review of the prior decision. In a December 4, 1996 decision, the Office denied appellant's request for a hearing before an Office hearing representative. Appellant

appealed to the Board but withdrew his appeal to seek reconsideration before the Office.<sup>1</sup> In a May 5, 1997 merit decision, the Office denied appellant's request for modification of the May 20, 1996 decision. In a June 18, 1997 decision, the Office denied appellant's second request for a hearing before an Office hearing representative.

The Board finds that the Office did not meet its burden of proof in terminating appellant's compensation.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. 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.<sup>2</sup>

In a March 13, 1995 report, Dr. Paul Work diagnosed a lumbar strain. In a June 16, 1995 report, Dr. Michael J. Fugle, an osteopath, stated that an EMG showed a mild L5 radiculopathy. Dr. Fugle indicated that an MRI scan showed recurrent paracentral suligamentous disc protrusion. He reported that a myelogram showed disc protrusion throughout the lumbar spine due to disc degeneration. Dr. Fugle noted that a computerized tomography (CT) scan showed diffuse disc degeneration at the third, fourth and fifth intervertebral discs, chronic central disc herniation at the fourth intervertebral disc with evidence of calcification of the disc, and suggestion of a left paracentral herniation as well. He diagnosed mild L5 radiculopathy, disc herniation at L4-5, diffuse disc degeneration, disc bulges from L1 through S1, nerve root irritation and possible ruptured disc with scar tissue formation. In a June 27, 1995 report, Dr. James Newman, an osteopath, indicated that he directed appellant to stop work on May 17, 1995 because an MRI scan showed fibrosis in the anterior epidural fat around the L5 nerve root and evidence of recurrent left central paracentral subligamentous disc protrusion which was present at the time of the MRI but not apparent at the time of the 1993 examination. In a July 3, 1995 report, Dr. Fugle stated that the ruptured disc seen on the MRI scan was not present in 1993. He therefore concluded that appellant's ruptured disc was a result of the March 6, 1995 employment injury.<sup>3</sup>

The Office referred appellant, together with the statement of accepted facts and the case record, to Dr. Jeffrey E. Lawley, an osteopath, for an examination and second opinion. In a December 1, 1995 report, Dr. Lawley stated that his examination failed to reveal any evidence of lumbar radiculopathy as appellant's straight leg raising test was negative bilaterally as he was sitting. He reported that appellant's deep tendon reflexes and motor strength were intact. Dr. Lawley noted some decrease to sharp pinprick sensation which was not truly an objective finding. He found no evidence of muscle atrophy. Dr. Lawley indicated that he saw no clear-cut

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<sup>1</sup> Docket No. 97-958 (Order Dismissing Appeal issued April 2, 1997).

<sup>2</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989)

<sup>3</sup> Dr. Fugle stated that appellant fell on March 6, 1995. In a June 11, 1996 report, he corrected his history to state that appellant slipped on March 6, 1995 but reached the same conclusion relating appellant's disability to the employment injury.

evidence of a herniated disc on appellant's most recent MRI scan. He diagnosed low back and left leg pain without neurological deficit and status post lumbar laminectomy, L4-5. Dr. Lawley concluded that appellant did not need further medical treatment as a result of the March 6, 1995 employment injury. He proposed indefinite prophylactic job restrictions as a result of the previous lumbar laminectomy.

To resolve the conflict in the medical evidence between Drs. Fugle and Lawley, the Office referred appellant, together with the statement of accepted facts and the case record, to Dr. Satyabrata Maitra, an orthopedic surgeon, who stated that appellant's lower back was stable from a functional point of view and indicated that he could work with some restrictions. Dr. Maitra commented that appellant did not require any further orthopedic treatment for his subjective complaints. He concluded that appellant did not have any permanent injury to his lower back following the March 6, 1995 employment injury. He related the findings on appellant's lumbar x-rays to his laminectomy surgery.

The Office improperly selected Dr. Maitra to serve as an impartial specialist. Under the Office's procedures, an impartial specialist must be Board-certified unless the physician has special qualifications which allow him to act as an impartial medical specialist in a specific case.<sup>4</sup> As Dr. Maitra was not Board certified and has not been identified as having special qualifications for this particular case, he cannot serve as the impartial medical specialist. He can only be considered as a physician presenting a second opinion.

The reports of Drs. Lawley and Maitra do not outweigh Dr. Fugle's report. Dr. Lawley and Dr. Maitra concluded that the x-rays they examined showed results which they related only to appellant's laminectomy in 1986. They did not directly address Dr. Fugle's statement that a comparison of MRI scans taken in 1993 and 1995 showed a difference which he could relate only to the March 6, 1995 employment injury. Dr. Lawley only stated that he did not see a herniated disc in the 1995 MRI scan. Neither physician gave an explanation directly challenging Dr. Fugle's interpretation of the MRI scans.

Dr. Fugle's analysis was supported by Dr. Jacquelyn G. Lockhart, a Board-certified physiatrist. Dr. Lockhart stated that appellant's left lumbar radiculitis was causally related to the March 6, 1995 employment injury. She indicated that the March 6, 1995 employment injury and the February 6, 1993 employment injuries caused an increase in fibrosis in the lumbar region, as shown in comparing the MRI scans, which contributed to the recurrent L5 nerve root irritation along with the new disc protrusion.

In view of the medical evidence of record, particularly the reports of Drs. Fugle and Lockhart, the Office has not met its burden of proof in establishing that appellant's disability due to the March 6, 1995 employment injury, has ceased. It therefore improperly terminated appellant's compensation.

The decisions of the Office of Workers' Compensation Programs dated June 18 and May 5, 1997, and December 4 and September 26, 1996 are hereby reversed.

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<sup>4</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b)(1).

Dated, Washington, D.C.  
August 13, 1999

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member