

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of RICHARD P. COSTANZO and U.S. POSTAL SERVICE,  
POST OFFICE, Hicksville, NY

*Docket No. 99-874; Submitted on the Record;  
Issued April 13, 2000*

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DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,  
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective June 23, 1997 on the grounds that he had no further employment-related disability.

The Office accepted that appellant, a 37-year-old letter carrier, sustained a lumbosacral strain, low back derangement and aggravation of disc disease on April 13, 1987. On December 22, 1990 he underwent a multi-level laminectomy and spinal fusion at L3-4, L4-5 and L5-S1 with the internal placement of instrumentation and screws. Appellant was noted to have undergone a lumbar laminectomy in 1980. He stopped work following the injury and did not return.

A functional capacity evaluation performed on August 4, 1992 noted that appellant had decreased thoracic and lordotic curves, a left pelvic obliquity and a shortened left lower extremity. Trunk range of motion was noted to be limited in all directions due to the spinal fusion. Upon testing, appellant could carry 35 pounds 14 feet, push 40 pounds in a sled 25 feet, pull 80 pounds in a sled 7 feet and climb 10 flights of stairs in 5 minutes after which his pain level was 5 on a scale of 1 to 10. Appellant was unable to kneel or squat due to his exacerbated back pain and that he lost his balance occasionally. No positive Waddell's signs were noted. Continued physical therapy was recommended due to his extremely tight hamstrings, pelvic obliquity and hypomobile mid thoracic spine. The examiner opined that appellant could not perform his regular job as a postal letter carrier, but would do well in a light-duty job requiring 30- to 45-minute stints of sitting with periods of standing interspersed.

A May 5, 1994 work restriction evaluation completed by Dr. Michael Neuwirth, a Board-certified orthopedic surgeon, indicated that appellant could not work eight hours a day but could work limited duty depending on his back pain with three hours of intermittent sitting, two hours of intermittent walking and two hours of intermittent standing, but without lifting, bending, squatting, climbing, kneeling or twisting. He indicated that appellant could lift no more

than 20 pounds, should avoid pushing and pulling and should avoid cold and damp environments which would aggravate his severe back pain.

On May 11, 1995 Dr. Neuwirth indicated that appellant could work 2 to 3 hours per day, 3 times per week, with no lifting over 20 pounds and with 2 hours of intermittent sitting, 4 hours of intermittent walking, 1 hour of intermittent lifting and 1 hour of intermittent standing.

On November 10, 1995 appellant was evaluated by Dr. Martin A. Lehman, a Board-certified orthopedic surgeon and was found to be totally disabled due to his laminectomy and fusion at L3-S1. By narrative report dated November 16, 1995, he reviewed appellant's history of injury and noted that he walked with a flattened lumbar spine, that there was marked tenderness along the mid and lower lumbar spine with restricted flexion to 40 degrees, extension to 15 degrees, lateral bending to the right to 15 degrees and to the left to 20 degrees and that straight leg raising was positive on the right at 30 degrees and on the left at 40 degrees with ¼ inch atrophy of the right thigh and calf. Dr. Lehman noted that x-rays demonstrated fusion of the lower spine with clamps and screws in the third, fourth and fifth lumbar vertebra. He opined that appellant had significant disabilities which were permanent in nature and that he had been placed on restricted activity, muscle relaxants and use of support. By report dated December 19, 1995, Dr. Lehman noted that appellant continued to have pain in his lower back and was advised to rest and to continue on muscle relaxants. He opined that appellant was totally disabled and unable to work at that time. On April 22, 1996 Dr. Lehman reiterated his December 19, 1995 findings and opinion. On May 22, 1996 he reiterated his November 16, 1995 findings and opinions. On June 6, July 2, August 5, September 11, October 24 and November 27, 1996 Dr. Lehman reiterated his April 22, 1996 findings and opinion. On February 6, 1997 he continued to opine that appellant remained totally disabled and unable to work.

On February 13, 1997 the employing establishment provided the Office with an investigative memorandum, including photographs of appellant and requested a determination as to whether appellant remained entitled to Federal Employees' Compensation Act benefits or as to whether a wage-earning capacity determination should be made.<sup>1</sup>

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<sup>1</sup> The investigative memorandum noted that appellant was placed under surveillance and was observed driving vehicles and "assisting" work crews for his family's plumbing business. Appellant was observed at his friend's baseball card shop and on one occasion was observed closing and securing the shop. He was also observed running errands and shopping. The surveillance revealed that appellant drove his own Buick frequently and was seen as a passenger in a company van, was seen unloading supplies from the van, was seen crawling through the van, was seen measuring and cutting copper pipe, was seen making a food stop at a delicatessen, was seen carrying shopping bags, was seen purchasing gasoline and was seen bringing shirts into the baseball card shop. He was also noted performing banking, meal purchasing and counter tending at the baseball card shop. The memorandum noted that appellant traveled to Las Vegas to get married on July 11, 1996, that he was observed working on his automobile engine while bent over, leaving a store with groceries and leaving a mall with merchandise and that he was noted as walking very briskly without problems.

On February 28, 1997 the Office referred appellant together with a statement of accepted facts, a clerk's and a carrier's job descriptions<sup>2</sup> and questions to be answered, to Dr. Robert Swearingen, a Board-certified orthopedic surgeon, for a second opinion as to appellant's continuing disability related to the accepted conditions of lumbosacral sprain, low back derangement and aggravation of disc disease.<sup>3</sup> It also asked Dr. Swearingen to opine as to whether appellant was capable of performing his date-of-injury job.

By report dated March 11, 1997, Dr. Lehman noted that appellant was not working, that he had a flattened lumbar spine and that he continued to have marked pain and difficulty bending and moving. He noted that appellant demonstrated restricted spinal flexion of 40 degrees, restricted extension of 15 degrees and limited lateral bending of 15 degrees to the right. Dr. Lehman noted that straight leg raising was positive bilaterally and that appellant had one quarter inch of atrophy of the right thigh and calf, with diminution of ankle jerks, more on the right. He opined that appellant demonstrated continued marked pain with inability to work and with inability to do any bending, squatting, lifting, sitting for more than 10 to 15 minutes, lifting more than 5 to 7 pounds, or walking for more than one block. Dr. Lehman also opined that these disabilities were causally related to the April 13, 1987 accident and that, with his intractable pain, appellant had no prospects for working in the future. On an attached work restriction evaluation he opined that appellant could sit and walk for two hours per day and could stand for one and that he could lift up to 20 pounds, but that he could not work and was totally disabled.

In a report dated March 18, 1997, Dr. Swearingen reviewed appellant's history of injury and treatment, noted his present complaints, reviewed the medical records and radiographic findings and conducted a brief physical examination consisting of palpation, range of motion in flexion only and a neurological examination consisting of straight leg raising, reflex checking, sensation and strength testing. He opined that appellant had a mild disability of the back which was, at that time, seen as an exacerbation of his preexisting condition. Dr. Swearingen viewed the videotapes from the employing establishment investigatory branch and noted that appellant carried "heavy" buckets in one hand, cut pipe, got materials out of a van and leaned or bent over to pick up objects, which was not consistent with continuing back problems. He noted that appellant's gait on film was free from any rigidity unlike his gait upon examination and that his postures were not consistent with someone with back problems. Dr. Swearingen opined that appellant had back problems, but that, based upon viewing the video and the examination, he could do the work as a postal carrier and needed no specific treatment other than routine follow-up. He opined that appellant could lift up to 100 pounds.

On April 29, 1997 the Office issued appellant a notice of proposed termination of compensation finding that Dr. Swearingen's report constituted the weight of the medical evidence in establishing that he was capable of working eight hours a day as a letter carrier. The

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<sup>2</sup> The Board notes that the job of clerk requires that the employee be able to handle and lift heavy sacks weighing up to 70 pounds and that the job of carrier requires that he lift and carry up to 35-pound shoulder satchels and to unload 70-pound mail sacks.

<sup>3</sup> The Office did not clarify that it had also accepted the laminectomies and spinal fusions from L3-S1 as being causally related to appellant's employment.

Office found that Dr. Lehman's reports lacked objective medical findings to substantiate his conclusions.<sup>4</sup>

By report dated May 16, 1997, Dr. Lehman advised that he had reviewed the report of Dr. Swearingen and opined that, in view of the L3-4, L4-5 and L5-S1 laminectomies and fusions with clamps and screws, appellant was certainly not capable of lifting up to 100 pounds or even 70 pounds and that it would be considered hazardous for him to do so.

Appellant also submitted a May 13, 1997 report from Dr. James Liguori, an osteopathic neurosurgeon, which noted appellant's history of injury and subsequent surgery and which included a detailed neurological examination. He noted that upon motor examination appellant demonstrated a slight weakness in the tibialis anterior on the left leg and a drop left knee reflex. Dr. Liguori noted upon sensory examination that there was a decreased light touch and pinprick in an L4-5 dermatomal distribution on the left and a positive straight leg raising on the left to 30 to 40 degrees and on the right to 50 to 60 degrees. He noted paraspinal muscle spasm and tenderness and he opined that appellant demonstrated lumbosacral radiculopathy status post surgical laminectomy. Dr. Liguori opined that appellant was disabled and opined that this was directly related to his employment injury.

On June 23, 1997 the Office terminated appellant's compensation and medical benefits effective June 23, 1997 on the grounds that the weight of the medical evidence established that his injury-related disability ceased no later than that date. The Office repeated that Dr. Lehman's reports did not contain any objective physical findings and that Dr. Liguori had no knowledge of appellant being videotaped, such that his report was of no probative value.

By letter dated June 5, 1998, appellant, through his representative, requested reconsideration of the termination decision. His representative made new legal arguments regarding the weighing of the medical evidence. Attached were copies of reports previously submitted to the record and already considered by the Office, in addition to a new medical report from Dr. Liguori dated June 1, 1998. He reviewed the video tape made by the employing establishment, noted that the weight of the buckets appellant was seen carrying was not established and was, by appellant's admission, approximately 10 pounds. Dr. Liguori reviewed Dr. Swearingen's report and disagreed with his comments regarding the video tape. He reiterated that appellant was totally disabled.

By decision dated October 21, 1998, the Office denied appellant's request for reconsideration finding that the evidence submitted in support was immaterial and had no bearing on the claim. However, in the accompanying memorandum of justification, the Office thoroughly reviewed the new medical evidence on the merits and opined that Dr. Liguori was proceeding from an inaccurate understanding of appellant's actual capabilities. The Office also considered appellant's representative's arguments regarding the weighing of the medical evidence. Accordingly, the Board finds that the Office conducted a merit review of appellant's

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<sup>4</sup> The Board notes, however, Dr. Lehman did provide objective findings in his measurement of right leg atrophy, and in measurement of reduced spinal motion on extension and laterally, as well as on flexion and that Dr. Swearingen failed to examine for these previously documented objective findings.

case on October 21, 1998, such that the merits of this case are now before the Board upon this appeal.

The Board finds that the Office did not meet its burden to terminate appellant's compensation benefits.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>5</sup> 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>6</sup> Further, the right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for wage loss.<sup>7</sup> To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition that require further medical treatment.<sup>8</sup>

Dr. Lehman identified multiple objective findings, including deficiencies on spinal lateral bending and extension and including measurable atrophy of the right leg, for which Dr. Swearingen listed no physical findings. Further, Dr. Liguori performed measurements not included in Dr. Swearingen's examination, which demonstrated objective weakness and sensory disturbances, which he related to appellant's accepted employment injury which rendered appellant totally disabled. Dr. Swearingen, however, listed his findings on examination but concluded appellant's mild disability of the back was due to his preexisting condition and not the employment injury. He noted that, upon viewing the videotape, appellant's gait was free from rigidity and demonstrated the capacity to return to his regular duty as a letter carrier. Dr. Lehman, however, reviewed Dr. Swearingen's report and stated his disagreement, noting appellant did not have a capacity for lifting as was noted by Dr. Swearingen.

In this case, Drs. Lehman and Liguori support, based upon objective findings documented in their reports, that appellant has atrophy, weakness, sensory disturbance and limited motion, which support continued disability and/or medical residuals related to his accepted employment injury. On the other hand, Dr. Swearingen found that appellant has no such deficits, disability or residuals and could lift 100 pounds.

The Board finds a conflict in medical opinion evidence between Drs. Lehman and Liguori, who support continued employment-related disability and Dr. Swearingen, who supports no such disability or residuals. For this reason, the Office did not meet its burden of proof to terminate appellant's compensation benefits.

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<sup>5</sup> *Harold S. McGough*, 36 ECAB 332 (1984).

<sup>6</sup> *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

<sup>7</sup> *Marlene G. Owens*, 39 ECAB 1320 (1988).

<sup>8</sup> *See Calvin S. Mays*, 39 ECAB 993 (1988); *Patricia Brazzell*, 38 ECAB 299 (1986); *Amy R. Rogers*, 32 ECAB 1429 (1981).

Accordingly, the decision of the Office of Workers' Compensation Programs dated October 21, 1998 is hereby reversed.

Dated, Washington, D.C.  
April 13, 2000

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member