

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

RODNEY T. McLEAN, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Portland, OR, Employer**

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**Docket No. 03-1445
Issued: March 1, 2004**

Appearances:
Rodney T. McLean, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On May 19, 2003 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated November 1, 2002 and finalized November 4, 2002, denying modification of an Office decision terminating his wage-loss compensation benefits. Under 20 C.F.R. §§ 501.2(c), 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office met its burden of proof to terminate appellant's compensation benefits effective October 12, 2001; and (2) whether appellant met his burden of proof, following the Office's termination of compensation, to establish that he had any continuing employment-related disability after October 12, 2001.

FACTUAL HISTORY

On July 9, 1991 appellant, then a 43-year-old mark-up clerk,¹ filed an occupational disease claim alleging that, beginning in 1988, he began experiencing upper back and neck pain

¹ As a mark-up clerk, appellant's duties included prepping, casing, bagging and loading mail onto dollies, keying

as a result of the performance of his duties. The Office accepted appellant's claim for permanent aggravation of cervical degenerative disc disease and herniated cervical discs with myelopathy at C5-6 and C6-7. The Office also accepted appellant's claims for fibromyalgia, anterior cervical discectomies and fusion, of C5-7, performed October 13, 1992, aggravation of the cervical fusion C5-7, left carpal tunnel syndrome and right rotator cuff tendinitis. Appellant did not stop work, but was reassigned to limited duty on February 4, 1991. On June 28, 1992 appellant stopped work and underwent further cervical surgery. He returned as a modified mark-up clerk on October 12, 1993 with no wage loss.² Appellant stopped work on October 21, 1993 due to exposure to cold, but returned to work four hours a day on November 12, 1993 increased work to six hours per day on November 25, 1993 and returned to full-time work on February 3, 1994. In a decision dated May 31, 1994, the Office found that the modified mark-up clerk position fairly and reasonably represented appellant's wage-earning capacity. Appellant again stopped work on October 28, 1994 and the Office accepted that he sustained a recurrence of total disability. On October 16, 1995 appellant returned to his modified mark-up position, with some additional restrictions,³ but after working only four hours he stopped work and did not return. Appellant was paid appropriate compensation benefits for total disability.

The Office continued to develop the claim and, in January 1999, referred appellant for a second opinion evaluation. Subsequently, the Office found that a conflict in medical opinion existed between appellant's treating physician, Dr. Eric W. Long, a Board-certified physiatrist, and the Office referral physician, Dr. James A. Coulter, a Board-certified neurological surgeon, regarding whether appellant was totally disabled or capable of work. The Office referred appellant to Dr. Dean S. Ricketts, a Board-certified orthopedic surgeon, and Dr. Richard E. Marks, a Board-certified neurologist, for an impartial medical evaluation.

In a letter dated August 30, 2001, the Office proposed to terminate appellant's compensation benefits on the grounds that the weight of the medical evidence, as represented by the reports of the impartial medical examiners, established that appellant could return to his

mail at a computer, manually labeling mail, sorting mail, sweeping cases and doing publication notices. His work was repetitive and required physical exertion involving prolonged standing, walking, throwing, reaching and handling of sacks of mail weighing up to 70 pounds.

² Appellant's duties as a modified mark-up clerk included operating an electromechanical operator-paced machine to process mail undeliverable as addressed and operating the keyboard of a computer terminal to enter and extract data to several data bases. The physical demands of the position included sitting for 2 hours continuously and 8 hours intermittently, walking continuously for 1 hour, lifting no more than 15 pounds intermittently for 2 hours, intermittent bending, squatting, climbing, kneeling and twisting for up to 2 hours, pushing and pulling of up to 15 pounds, no repetitive movements of the upper extremities and no exposure to cold, drafts and dampness. Appellant typically keyed for about 20 minutes and walked and stretched for 10 minutes of each half hour. He maintained a production rate of between 450 and 550 pieces per hour, compared to the 650 to 700 pieces he had produced prior to his return to modified duty on October 12, 1993. While keying, approximately five percent of the pieces of mail processed would jam in the machine causing it to malfunction and requiring appellant to reach forward with his right arm to unjam the machine.

³ Appellant's modified job was amended to encompass sitting continuously for 1.25 hours a day, sitting intermittently for 6 to 7 hours a day, and standing continuously standing for up to 50 minutes. All other physical demands remained the same. During keying electromechanized automated mail, the feeder jammed intermittently, requiring appellant to hand feed pieces of mail at periodic intervals.

full-time position as a modified mark-up clerk. In an October 9, 2001 decision, the Office terminated appellant's wage-loss compensation benefits effective October 12, 2001. Appellant continued to be entitled to medical benefits for residuals of his accepted conditions. By letter dated September 28, 2002, appellant requested reconsideration of the Office's October 9, 2001 decision and submitted additional evidence in support of his request. In a decision dated November 1, 2002 and finalized November 4, 2002, the Office reviewed appellant's claim on its merits and found the newly submitted evidence insufficient to warrant modification of the prior decision.

LEGAL PRECEDENT

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.⁴ Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁵ 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.⁶

ANALYSIS

Dr. Long, appellant's treating physician, submitted reports supporting that appellant was totally disabled from his modified duty due to residuals of his accepted conditions. Dr. Long reported his findings on physical examination, including range-of-motion testing and reviewed the results of cervical and lumbar magnetic resonance imaging (MRI) scans performed on November 10, 1998. He noted that the cervical MRI scan demonstrated interbody fusion at C5-6 and C6-7, mild foraminal encroachment at C6-7 bilaterally, not substantially changed since November 1, 1995, similar changes at C5-6 and subtle annulus bulges at higher cervical levels. Lumbar MRI scans performed the same day revealed postsurgical changes at L5-S1 and at L4-5 and central and left paramedian disc bulging at L3-4. Dr. Long diagnosed: cervical spondylosis, symptomatic since late 1988, with C5-6 and C6-7 disc lesions, treated by anterior discectomy and fusion October 12, 1992, mild cervical myelopathy/radiculopathy, recurrent, substantially symptomatic and chronic persistent myofascial trigger points involving neck and shoulder girdle muscles, secondary to appellant's cervical myelopathy and radiculopathy; chronic right rotator cuff tendinitis; and bilateral carpal tunnel syndrome, left greater than right, symptomatic, untreated and complicated by mild ulnar compression neuropathy at the elbows, probably asymptomatic. Dr. Long noted that appellant had slipped and fallen on October 14, 1998 but did not seem to have sustained any major injury as a result. Dr. Long indicated that appellant was restricted to modified work consistent with his previously completed duty status report, Form CA-17. The duty status report, dated December 21, 1995, indicated that appellant could lift

⁴ *Gloria J. Godfrey*, 52 ECAB 486 (2001).

⁵ *Franklin D. Haislah*, 52 ECAB 457 (2001).

⁶ *Id.*

5 pounds continuously and 10 pounds intermittently for 8 hours a day and, strictly on an intermittent basis, could: sit for 1/2 hour, 6 hours a day; stand for 1/2 hour, 1/2 hour per day; walk for 1/2 hour, 1 to 2 hours a day; bend or stoop for 10 to 15 minutes, 1/2 hour per day; twist for 5 to 10 minutes, 1/2 hour per day; pull or push 5 pounds for 1 hour per day; and perform simple grasping for 1 hour per day. In addition, appellant could not climb, kneel, perform fine manipulation, reach above the shoulder, drive a vehicle or operate machinery. Appellant was further restricted to working in an environment with a minimum temperature of 72 degrees, a maximum humidity of 50 percent and no exposure to fumes or dust. Finally, Dr. Long annotated the form to state that appellant should be exposed to air movement of a maximum velocity of five feet per minute and should not perform any constant or frequent repetitive upper extremity work. In a work capacity evaluation form dated December 12, 1998, Dr. Long stated that appellant could work for eight hours a day, within the restrictions set forth on his December 21, 1995 duty status report.

On January 8, 1999 appellant was examined by Dr. Coulter, the Office referral physician. The Office provided Dr. Coulter with a statement of accepted facts, the medical evidence of record and a list of issues to be addressed. Dr. Coulter noted that appellant's history with respect to his employment injuries, performed a complete physical examination, including range-of-motion testing, and reviewed the diagnostic test results. He listed his diagnoses as: preexisting, previously symptomatic cervical spondylosis at multiple levels, most marked at and treated surgically at C5-6 and C6-7 cervical intervals; fibromyalgia diagnosed by previous rheumatology consultants; and right rotator cuff tendinitis. Dr. Coulter further elaborated on his findings, stating:

“There is no current indication of ratable carpal tunnel syndrome or major upper extremity neuropathy such as ulnar entrapment at the elbow on clinical neurological examination, nor is there indication to repeat the electromyography or major nerve conduction studies.

“The question as to whether any of his current disability is the result of work-related fibromyalgia is not within the expertise of neurological surgery. The opinion of a rheumatologist currently may be helpful to determine if any work-related disability is the result of disseminated or general inflammatory disease. Appropriate laboratory studies should be obtained by the rheumatologist to verify if the condition is active or has subsided.

“The claimant does have permanent impairment in the form of ankylosis or loss of ranges of motion of the right shoulder joint and the cervical spine as delineated in the neurological and physical examination at this time....

“...The claimant is partially disabled from employment duties at the present time. He is capable of eight hours of light work where he may sit and stand at will, without repetitive reaching, pulling, pushing and reaching above right shoulder level. He is right-handed.

“I do not believe that [the claimant] is employable at the limited[-]duty position, which he returned to in October 1993 and October 1995. That position required

repetitive reaching and pulling with the upper extremities, which would be expected to aggravate his right rotator cuff tend[i]nitis and slowly healing cervical spine surgery....”

With respect to appellant’s work restrictions, Dr. Coulter completed a work capacity evaluation, Form OWCP-5, noting that appellant could work for eight hours within the restrictions listed in his narrative report and further specifying that appellant could perform repetitive reaching for less than one hour a day and could not perform any repetitive reaching above the shoulder.

By letter dated February 13, 1999, the Office informed Dr. Coulter that appellant’s modified job, as described in the statement of accepted facts, did not require appellant to perform repetitive tasks and again asked the physician to review the job description and clarify whether appellant could perform the position. In a supplemental report dated March 8, 1999, Dr. Coulter explained that his prior opinion, that appellant could not perform his modified duty, had been based on an ergonomic consultant’s evaluation of appellant’s job. Dr. Coulter stated that, based on the job description provided in the statement of accepted facts, appellant could in fact perform his limited-duty mark-up clerk position.

By letters dated June 2 and September 7, 2000, the Office asked Dr. Long to provide a detailed narrative medical report describing appellant’s current condition and ability to work. In response, Dr. Long submitted copies of his recent medical reports dated May 8, July 6 and September 13, 2000, in which he listed his findings on physical examination, including range-of-motion testing. In a letter also dated September 13, 2000, Dr. Long stated that appellant continued to have symptoms of cervical spondylosis with cervical myelopathy and cervical radiculopathy and limitations of cervical, lumbar and shoulder motion. Dr. Long stated that appellant’s current diagnoses were: cervical spondylosis, symptomatic since late 1988, with C5-6 and C6-7 disc lesions, with interbody fusions on October 12, 1992 cervical myelopathy/radiculopathy, persisting and symptomatic and muscular neck and shoulder girdle pain, secondary to his cervical myelopathy and radiculopathy; chronic right rotator cuff tendinitis; bilateral carpal tunnel syndrome, left greater than right, symptomatic, untreated and complicated by mild ulnar compression neuropathy at the elbows, intermittently symptomatic. Dr. Long also noted that appellant had been involved in a motor vehicle accident on March 1, 1999 resulting in provocation of neck and back pain, resolved, lumbar disc pain greater at L4-5 than at L3-4 and L5-S1 and was status post laser decompression of L3-4, L4-5 and L5-S1, performed on December 2, 1999. Finally, Dr. Long noted an additional diagnosis of carpal tunnel syndrome. He concluded that appellant’s diagnoses were work related and that his condition remained essentially the same as that, for which he had been followed for years. On an accompanying work capacity evaluation, Form OWCP-5, also dated September 13, 2000, Dr. Long indicated that appellant could sit for one hour, walk for one hour and reach for less than one hour, but could perform no other functions. He indicated that appellant was totally disabled and stated that his condition was not treatable and would not improve with time.

Section 8123(a) of the Federal Employees' Compensation Act,⁷ provides, "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." In this case, in accordance with the Act, the Office found that a conflict in medical opinion to exist between Dr. Coulter, the Office referral physician, who found that appellant was capable of working eight hours a day in his regular position as a modified mark-up clerk and appellant's treating physician, Dr. Long, who found that appellant remained totally disabled for all work. Therefore, the Office referred appellant for an impartial medical evaluation by Dr. Ricketts, a Board-certified orthopedic surgeon, and Dr. Marks, a Board-certified neurologist.

In a report dated July 2, 2001, Drs. Ricketts and Marks reviewed appellant's history of injury, the statement of accepted facts and the medical evidence of record and performed a physical examination, including full range-of-motion testing and neurological examination. The physicians listed their diagnoses as: status post L5-S1 laminectomy/discectomy, not industrially related; status post L3-4, L4-5 laminectomy/discectomy, not industrially related; status post L3-4, L4-5, L5-S1 laser disc procedures, not industrially related; cervical spondylosis, predating any work activities on a more probable than not basis; cervical strain, administratively accepted with permanent aggravation of the preexisting cervical condition; status post anterior cervical fusion, C5-6, C6-7, apparently accepted as work related; gastroesophageal reflux, not industrially related; diverticulitis, not industrially related; and apparent depression and chronic anxiety of uncertain relationship to the industrial injury. The physicians emphasized that they found "no evidence of fibromyalgia, carpal tunnel syndrome, nor rotator cuff tend[i]nitis or other shoulder dysfunction." With respect to whether appellant was capable of performing the duties of a modified mark-up clerk, as described in the statement of accepted facts, the physicians responded:

"It is our opinion that [appellant] is probably not capable of performing all the duties of a [m]ark-up clerk position, due to repetitive use of arms and hands required. However, based upon the ergonomic review provided, it appears that he would be very nearly capable of performing this activity."

With respect to whether appellant was capable of performing other sedentary, full-time work, the physicians stated:

"It is our opinion that he is clearly capable of performing in a sedentary work position on a full[-]time basis. We find no objective orthopaedic nor neurological abnormalities on examination, nor findings in review of medical records and radiographic studies, which would preclude this type of work."

In a July 2, 2001 work capacity evaluation, Form OWCP-5, the physicians stated that there was no reason appellant could not work eight hours a day and indicated that, within that eight-hour day, appellant was capable of the following level of activity: sitting 4 hours; walking 4 hours; standing 2 hours; reaching 4 hours; occasional reaching above the shoulder, twisting for 1/2 hour; operating a motor vehicle for 4 hours; performing intermittent repetitive movements of

⁷ 5 U.S.C. §§ 8101-8193, 8123(a).

the wrists and elbows; pushing and pulling 15 pounds for 8 hours and lifting 15 pounds for 4 hours. The physicians further stated that appellant needed to be able to change position as needed and could not hold a continuous downward gaze.

By letter dated August 7, 2001, the Office requested that the impartial medical examiners further explain why appellant was incapable of performing his usual modified mark-up clerk position, given the relative lack of clinical findings and to explain whether the restrictions were merely based on subjective complaints or were provided to prevent future injury.

In a response dated August 7, 2001, Dr. Ricketts stated:

“The restrictions recommended regarding [appellant’s] work activities were based upon evidence in the medical records of shoulder tend[i]nitis, as well as carpal tunnel syndrome, both conditions now appearing to have resolved since he discontinued work. It is our opinion that should he return to the type of work which appears to have created these diagnoses, that they will likely return. Thus, the restrictions are recommended in order to prevent further injury or recurrence of these two diagnoses.

“Additionally, his cervical condition is also one which would likely be aggravated by repetitive use of his arms, particularly with significant force being required repetitively.”

It is well established that when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.⁸ Regarding whether the Office met its burden of proof to terminate appellant’s compensation benefits, however, the Board finds that the opinions of Drs. Ricketts and Marks, are insufficient to meet the Office’s burden of proof, as they support a finding that appellant is incapable of returning to his modified mark-up clerk position due to residuals of his accepted employment injuries. The Board notes that with respect to appellant’s accepted fibromyalgia, carpal tunnel syndrome and right shoulder tendinitis, the impartial medical examiners found that these conditions had resolved, and clarified that any restrictions pertaining to these diagnoses were strictly prophylactic and intended to prevent future injury or recurrence. The Board has held that disability compensation is payable only for an employment injury which causes disability for work; a fear of future injury is not compensable nor is a fear of a recurrence of disability.⁹ The Board notes, however, that with respect to appellant’s accepted cervical conditions, the impartial medical examiners did not find that this condition had resolved and explained in their supplemental report that appellant’s cervical condition would likely be aggravated by the repetitive use of his arms and hands required by the position. As the physicians did not find that appellant’s accepted cervical conditions had resolved and as they specifically stated that appellant could not return to his modified mark-up clerk position as it would aggravate his

⁸ *Gloria J. Godfrey*, 52 ECAB 486 (2001).

⁹ See *Manuel Gill*, 52 ECAB 282 (2001); *Virginia Dorsett*, 50 ECAB 478 (1999); *James B. Christenson*, 47 ECAB 775 (1996).

current cervical condition, this restriction cannot be said to be merely prophylactic or intended to prevent future injury. While the description of appellant's modified mark-up clerk position provides that no repetitive movements of the upper extremities are required, as the impartial medical examiners incorporated the complete, correct job description into their July 2, 2001 report and further stated that their opinions were based on the description of the mark-up clerk's position as set forth in the statement of accepted facts, the Board finds that the physicians were aware of appellant's duties and found them to be beyond appellant's capabilities.

As Drs. Ricketts and Marks stated that appellant was not capable of performing his usual modified mark-up clerk duties due to residuals of his accepted cervical condition, the Board finds that their reports are insufficient to meet the Office's burden of proof to terminate appellant's wage-loss compensation benefits.

CONCLUSION

The Board finds that the Office failed to meet its burden of proof to terminate appellant's wage-loss compensation benefits effective October 12, 2001. As the Office's termination was improper, the Board need not address whether appellant met his burden of proof, following the Office's termination of compensation, to establish that he had any continuing employment-related disability after October 12, 2001.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 1, 2002 and finalized November 4, 2002 is reversed.

Issued: March 1, 2004
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member