

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

R.O., Appellant	)	
	)	
and	)	<b>Docket No. 06-1594</b>
	)	<b>Issued: December 29, 2006</b>
U.S. POSTAL SERVICE, POST OFFICE,	)	
Cincinnati, OH, Employer	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On June 21, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' January 19, 2005 merit decision denying his recurrence of disability claim and the March 1, 2006 decision denying his request for further review of the merits of his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over these decisions.

**ISSUES**

The issue are: (1) whether appellant has established that he sustained a recurrence of disability on or after August 9, 2000 due to his August 30, 1999 employment injury; and (2) whether the Office properly denied appellant's request for further review of the merits of his claim.

**FACTUAL HISTORY**

This case has previously been before the Board. In a prior appeal, the Board determined that the case was not in posture for decision regarding whether appellant sustained a recurrence

of disability on or after August 9, 2000 due to his August 30, 1999 employment injury. The case was remanded to the Office for further development.<sup>1</sup> The Board noted that Dr. Mark Bibler, an attending Board-certified internist, provided reports which attributed appellant's August 9, 2000 recurrence of disability to his August 30, 1999 employment injury. The Board found that Dr. Bibler's reports did not contain sufficient medical rationale to discharge appellant's burden of proof that he sustained an employment-related recurrence of disability on or after August 9, 2000, but that they constituted substantial evidence in support of appellant's claim and raised a unrefuted inference of causal relationship sufficient to require further development of the case record. The Board directed the Office to issue a *de novo* decision after conducting appropriate development.<sup>2</sup>

Appellant submitted several reports of Dr. Bibler which were evaluated by the Board prior to issuing its September 24, 2004 decision. In a September 5, 2001 report, Dr. Bibler opined that appellant "had made an excellent functional recovery from" the July 30, 1999 surgery and that there were no significant problems "until the episode which occurred at work on August 30, 1999." He stated that "this is likely a new problem and not simply a recrudescence of his prior problem."

In a September 27, 2002 report, Dr. Bibler stated that it appeared that appellant sustained an annular disc tear at L5-S1 when he fell on August 30, 1999. He noted:

This disc tear has likely been the cause of the symptoms he has experienced over the ensuing three years. Of note, this tear did not show up on standard MRI scan but only recently became apparent when he underwent a dis[c]ogram by Dr. Chow. I do not believe that this tear was present at the time of [appellant]'s original back surgery in July 1999 and is likely a direct consequence of the fall he sustained at work on August 30, 1999."

In an August 26, 2003 report, Dr. Bibler stated that he definitely believed that appellant sustained an annular disc tear at L5-S1 when he fell on August 30, 1999 at work. He stated:

This dis[c] tear has definitely been the cause of his symptoms that he has experienced over the ensuing three years. This tear was not present on standard MRI scan but only recent became apparent when he underwent a formal

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<sup>1</sup> Docket No. 04-981 (issued September 24, 2004). On August 30, 1999 appellant, a 42-year-old supervisor of operations, filed a traumatic injury claim alleging that he injured his lower back when he fell out of his chair on that date. The results of September 14, 1999 magnetic resonance imaging (MRI) scan testing showed minimal noncompression and right parasagittal disc bulging at L3-4 and L4-5 and the Office accepted appellant's claim for a lumbosacral strain. Appellant previously underwent a nonwork-related laminectomy at L5-S1 on July 30, 1999 and he returned to work after that surgery on August 23, 1999. Appellant filed a claim alleging that he sustained a recurrence of disability on August 9, 2000 due to his August 30, 1999 employment injury.

<sup>2</sup> Appellant also submitted a number of reports of other attending physicians, including Dr. Howard J. Schertzinger, a Board-certified internist; Dr. David W. Chow, a Board-certified physiatrist; Dr. John M. Tew, Jr., a Board-certified neurosurgeon; and Dr. Mark J. Goodard, a Board-certified physiatrist. The Board found that these reports were of limited probative value regarding the main issue of the present case because they did not provide a rationalized medical opinion relating appellant's back condition on or after August 9, 2000 to the August 30, 1999 employment injury.

dis[c]ogram. This tear was not present at the time of [appellant]'s original back surgery in [July] 1999 and was a direct consequence of the fall he sustained at work on [August] 30[,] 1999."<sup>3</sup>

Following remand, the Office referred appellant and the case record to Dr. Richard T. Sheridan, a Board-certified orthopedic surgeon, for an examination and opinion regarding whether he sustained a recurrence of disability on or after August 9, 2000 due to his August 30, 1999 employment injury.

In a report dated January 10, 2005, Dr. Sheridan provided a description of the results of appellant's diagnostic testing since 1999 and noted that he currently reported experiencing constant low back pain, frequent intermittent pain in his right leg, and occasional pain in his left leg. He noted that on examination appellant exhibited no points of tenderness in the lumbar spine and that he had some limitation of lumbar motion upon flexion, extension, and rotation to either side with all motions accompanied by grunting and groaning. Dr. Sheridan indicated that there was no detectable muscle spasm in the lumbar spine and that he had no positive signs or corroborative stretch tests for sciatica. He stated that appellant did not have any thigh or calf atrophy, that he had symmetric reflexes at the knees and ankles, and that he had no evidence of muscle weakness in the legs. Dr. Sheridan indicated that appellant exhibited hypoesthesia in the right leg but that it was nondermatomal in nature. He concluded that there were no objective findings to indicate that the August 30, 1999 employment injury, or any preexisting back conditions, were still active and causing symptoms. Dr. Sheridan indicated that appellant did not have partial or total disability and stated, "There are no findings to indicate that the work stoppage of August 9, 2000 (and continuing) was due to the August 30, 1999 fall from a chair rather than from the underlying condition."

By decision dated January 19, 2005, the Office determined that appellant did not meet his burden of proof to establish that he sustained a recurrence of disability on or after August 9, 2000 due to his August 30, 1999 employment injury. The Office found that the report of Dr. Sheridan showed that appellant did not sustain an employment-related recurrence of disability and determined that the report was sufficiently well rationalized to constitute the weight of the medical evidence with regard to this matter.

Appellant requested reconsideration of his claim and submitted a report of a January 5, 2006 functional capacity evaluation.

By decision dated March 1, 2006, the Office denied appellant's request for further review of the merits of his claim.

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<sup>3</sup> With regard to the fluctuation of appellant's symptoms between March and August 2000, Dr. Bibler stated, "As you may know, fluctuation in the degree of low back pain is very common and cannot be accounted for in most circumstances by specific circumstances. In other words, I am unable to give you a direct answer as to what caused his pain to fluctuate other than that is the nature of the problem."

## LEGAL PRECEDENT

An individual who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which compensation is claimed is causally related to the accepted injury.<sup>4</sup> This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical rationale.<sup>5</sup> Where no such rationale is present, medical evidence is of diminished probative value.<sup>6</sup> An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's claimed condition became apparent during a period of employment nor his belief that his condition was aggravated by his employment is sufficient to establish causal relationship.<sup>7</sup>

Section 8123(a) of the Act provides in pertinent part: "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."<sup>8</sup> When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.<sup>9</sup>

## ANALYSIS

The Office accepted that appellant sustained a lumbosacral strain due to falling out of a chair at work on August 30, 1999. Appellant filed a claim alleging that he sustained a recurrence of disability on August 9, 2000 due to his August 30, 1999 employment injury.

The Board finds that there is a conflict in the medical evidence between Dr. Bibler, appellant's attending Board-certified internist, and Dr. Sheridan, a Board-certified orthopedic surgeon who served as an Office referral physician.

Dr. Bibler provided an opinion that appellant sustained a recurrence of disability on or after August 9, 2000 due to his August 30, 1999 employment injury. In September 27, 2002 and August 26, 2003 reports, Dr. Bibler stated that he believed that appellant sustained an annular disc tear at L5-S1 when he fell on August 30, 1999. He noted that this disc tear had likely been the cause of the symptoms he experienced over the ensuing years. Dr. Bibler stated that the tear did not show up on standard MRI scan testing but only became apparent when he underwent a

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<sup>4</sup> *Charles H. Tomaszewski*, 39 ECAB 461, 467 (1988); *Dominic M. DeScala*, 37 ECAB 369, 372 (1986).

<sup>5</sup> *Mary S. Brock*, 40 ECAB 461, 471-72 (1989); *Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

<sup>6</sup> *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

<sup>7</sup> See *Walter D. Morehead*, 31 ECAB 188, 194-95 (1986).

<sup>8</sup> 5 U.S.C. § 8123(a).

<sup>9</sup> *William C. Bush*, 40 ECAB 1064, 1075 (1989).

formal discogram. He posited that this tear was not present at the time of appellant's original back surgery in July 1999 and was a direct consequence of the fall he sustained at work on August 30, 1999.

In contrast, Dr. Sheridan provided an opinion that appellant did not sustain a recurrence of disability on or after August 9, 2000 due to his August 30, 1999 employment injury. In his January 10, 2005 report, Dr. Sheridan indicated that on examination of the back and legs appellant exhibited essentially normal results of sensory, strength, range of motion, and reflex testing. He stated that appellant showed hypoesthesia in the right leg but that it was non-dermatomal in nature. Dr. Sheridan concluded that there were no objective findings to indicate that the August 30, 1999 employment injury was still active and causing symptoms and stated, "There are no findings to indicate that the work stoppage of August 9, 2000 (and continuing) was due to the August 30, 1999 fall from a chair rather than from the underlying condition."

Consequently, the case must be referred to an impartial medical specialist to resolve the conflict in the medical opinion evidence between Dr. Bibler and Dr. Sheridan regarding whether appellant sustained a recurrence of disability on or after August 9, 2000 due to his August 30, 1999 employment injury. On remand the Office should refer appellant, along with the case file and the statement of accepted facts, to an appropriate specialist for an impartial medical evaluation and report including a rationalized opinion on this matter. After such further development as the Office deems necessary, the Office should issue an appropriate decision regarding appellant's claim.<sup>10</sup>

### **CONCLUSION**

The Board finds that the case is not in posture for decision regarding whether appellant sustained a recurrence of disability on or after August 9, 2000 due to his August 30, 1999 employment injury. The case shall be remanded to the Office for referral to an impartial medical specialist regarding this matter.

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<sup>10</sup> Given the Board's disposition of the merit issue of the present case, it is not necessary to consider the nonmerit issue.

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' January 19, 2005 decision is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: December 29, 2006  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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