

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ANGELO CHRISTOPOULOS and U.S. POSTAL SERVICE,  
POST OFFICE, Boston, Mass.

Docket No. 90-359; Submitted on the Record; Issued April 6, 1990

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether appellant met his burden of proof in establishing that he sustained an injury in the performance of duty on February 28, 1987.

On February 28, 1987 appellant, then a 25-year-old mail handler, filed a claim alleging that he sustained a lower back strain that date when he bent over to reach for soap and "something popped" in his lower back. Appellant stopped work on the date of injury.<sup>1</sup> On March 5, 1987, appellant also filed a notice of recurrence of disability alleging that on February 28, 1987 he sustained recurrence of an unspecified original injury. The employing establishment stated that appellant worked limited duties following the original injury.<sup>2</sup>

Accompanying the claim, appellant and the employing establishment submitted additional evidence concerning appellant's low back condition. In a November 25, 1986 report, Dr. Ronald F. Kaplan, a Board-certified orthopedic surgeon, stated that appellant was injured at work on November 18, 1986 when he slipped on an elastic band while holding a 20-pound mail tray. Appellant "caught himself mid-way with his back arched." Dr. Kaplan reported a noncontributory past history. On examination appellant had limited trunk range of motion, limited bilateral straight leg raising, and tender paralumbar musculature. Dr. Kaplan diagnosed a lumbosacral sprain related to the November 18, 1986 injury and opined that appellant was totally disabled.

In a January 15, 1987 report, Dr. Kaplan noted appellant's improvement and released him to full duty on January 20, 1987.

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<sup>1</sup> The record indicates that appellant stopped work for portions of certain days.

<sup>2</sup> On November 18, 1986, appellant filed a claim alleging that he sustained a low back strain that date when he slipped while carrying a tray of mail. Appellant stopped work on the date of injury and returned to work on November 20, 1986. On December 11, 1986, appellant filed a notice of recurrence of disability alleging that he sustained a recurrence of disability beginning November 25, 1986 attributable to the November 18, 1986 injury. The Office of Workers' Compensation Programs accepted appellant's claim for a low back strain. Appellant received continuation of pay on November 19, 1986 and from November 25, 1986 to January 7, 1987. Appellant received temporary total disability compensation from January 11 to 19, 1987.

In a January 29, 1987 report, Dr. Kaplan recommended that appellant be placed on full-time light duty.

In a February 11, 1987 work tolerance evaluation, Dr. Kaplan stated that appellant could work five hours daily within the listed restrictions.

In a February 3, 1987 report, Dr. Michael Steven Thompson, a Board-certified orthopedic surgeon and an Office of Workers' Compensation Programs referral physician, noted appellant's employment duties and the history of his November 18, 1986 employment injury. Appellant reported continuing low back symptoms and occasional pain in his right inner thigh. Dr. Thompson reported normal examination and x-ray findings. Dr. Thompson concluded that there were no objective findings or evidence of any preexisting conditions. Dr. Thompson opined that, "by history," appellant may have sustained a temporary lumbosacral strain on November 18, 1986. The doctor stated that appellant should work light duty for six weeks and resume his regular duties thereafter. The doctor reported no orthopedic basis for further treatment.

In a February 23, 1987 attending physician's report, Dr. Kaplan diagnosed a lumbosacral sprain and opined that appellant could work limited duty for five hours daily beginning January 20, 1987.<sup>3</sup>

In a February 28, 1987 radiology report, Dr. Susan A. Stafford, a Board-certified radiologist, noted comparing new lumbar spine x-rays with those taken on November 18, 1986. Dr. Stafford reported an unchanged and normal lumbosacral spine.

In a February 28, 1987 emergency room report, a physician whose name is not discernible stated that appellant had an acute onset of low back pain while "lifting a heavy object this p.m." The doctor listed an impression of a lumbosacral strain.

By compensation order dated April 24, 1987, the Office rejected appellant's claim on the ground that he had not met his burden of proof.

By letter received April 30, 1987, appellant stated that on April 28, 1987, in the early afternoon, he felt something pop in his lower back when he leaned over a sink to wash his hands in an employing establishment rest room. Appellant noted his November 1986 employment injury and contended that his current injury was the same injury.

In a May 14, 1987 report, Dr. Clyde A. Niles, a Board-certified psychiatrist and neurologist, noted appellant's symptoms and stated that nerve conduction studies and an EMG (electromyogram) were normal but did not preclude the possibility of sensory radiculopathy at L3-4.

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<sup>3</sup> By claim for continuing compensation on account of disability dated March 7, 1987, appellant claimed compensation for 30 hours from February 24 to March 7, 1987. By compensation order dated March 17, 1987, the Office rejected appellant's claim for the claimed compensation on the ground that the weight of the medical evidence established that residual employment-related disability had ceased.

In a report received June 15, 1987, Dr. Kaplan stated that on February 17, March 4 and March 16, 1987 appellant was restricted to working light duty for five hours daily. On March 26, 1987, Dr. Kaplan released appellant to work light duty eight hours daily as tolerated. Dr. Kaplan noted that a May 14, 1987 EMG and nerve conduction testing were "unrevealing." The doctor stated that a computerized tomography (CT) scan revealed mild degenerative changes with minimal narrowing of the neural foramina at L5-S1 but was "probably not significant." On June 11, 1987, Dr. Kaplan noted advising appellant to perform light duty, with no twisting, where he could sit down as necessary.

In a September 1, 1987 disability certificate, Dr. Alfredas Krisiukenas, a psychiatrist, reported that appellant was totally disabled from September 1 to 2, 1987 due to "recurrent back pain."

By report dated January 27, 1988, Dr. Kathryn Aberle, an anesthesiologist, reported that appellant was "well until November 1986" when he slipped while lifting a 20-pound tray of mail and arched his back to catch his fall resulting in "severe low back pain radiating into his left leg." Dr. Aberle stated that in February 1987 appellant "injured his back once again while reaching for a bar of soap at a sink at work." Appellant's current condition was improved although he complained of "severe aching" right low back pain. On examination, appellant had forward flexion to 50 degrees and extension to five degrees, both with low back pain. Dr. Aberle noted finding a "very tender trigger point" on appellant's right posterior/superior iliac spine. Dr. Aberle stated that a CT scan showed a mild disc bulge and degenerative disc disease at L5-S1. The doctor concluded that appellant had discogenic low back pain without evidence of radiculopathy.

By letter received March 25, 1988, appellant requested reconsideration and submitted a report from a physician's assistant and a November 24, 1987 report from Dr. Stephanie Harbury in support of his request. Dr. Harbury reported appellant's history of low back pain since his November 1986 work injury, noting that a CT scan revealed a mild disc bulge and degenerative changes at L5-S1, and stated that she administered an epidural steroid injection for pain relief.

By compensation order dated April 22, 1988, the Office denied modification of its April 24, 1987 decision on the ground that insufficient evidence was submitted. In an accompanying memorandum, the Office stated that on February 28, 1987 appellant leaned over a sink at work, reached for soap, and felt a "pop" in his back. The Office also noted that the reports of Drs. Niles, Aberle, and Harbury contained little support for causal relationship between appellant's condition and his employment. The Office stated that since there was no evidence of a herniated disc and because of "other relatively normal findings, the diagnosis of discogenic low back pain appears unsubstantiated."

By letter dated September 7, 1988, appellant requested reconsideration and submitted another report from a physician's assistant.

By compensation order dated February 24, 1989, the Office denied modification of its April 24, 1989 decision on the ground that insufficient evidence was submitted. In an accompanying memorandum, the Office stated that the physician's assistant did not provide an adequate diagnosis.

By report dated March 16, 1989, Dr. Stephen J. Lipson, a Board-certified orthopedic surgeon, stated that appellant had discogenic low back pain beginning after a November 1986 work injury and a February 1987 "exacerbation." The doctor stated that appellant was currently performing partial light-duty work and some full-duty work. On examination, the spine was nontender except "at the left PSIS." Forward flexion was to 70 degrees with discomfort while extension was to 15 degrees with lateral bends "more easily done to the left." Dr. Lipson recommended that appellant become better conditioned.

In an April 17, 1989 letter, the Office advised appellant that he had submitted insufficient evidence.

In a May 16, 1989 report, Dr. Lipson described appellant's history and the cause of his condition as follows:

"[Appellant] is an employee at the [employing establishment] and was injured at work [in] November 1986. At that time the patient states that he was working on a machine when he slipped on an elastic band. He twisted his back and had the immediate onset of excruciatingly severe lower back pain radiating to his left leg.... He had no prior history of back pain. He was told that he had a muscle sprain and was essentially treated with aspirin and bed rest. He subsequently underwent physical therapy when better. He was out-of-work for a short period of time. He got better although not 100 percent better. On February 28, 1987, the patient again leaned over at work to get a bar of soap and had the onset of very severe back pain again into the left leg and thigh. When we saw him in subsequent care, he was given the diagnosis of degenerative disc disease.

"It is our feeling that both episodes were clearly related causally to his activities at work. The second episode was still part of the original problem and not what we would call a second injury at all. As I am certain that you know, that approximately one to two years after an acute back episode, one can have recurrences which are considered part of the original natural history."

Dr. Lipson recommended that appellant be enrolled in a conditioning program to reduce the likelihood of recurrences.

In a May 25, 1989 letter, appellant's representative requested reconsideration.

By compensation order dated September 22, 1989, the Office denied modification of its April 24, 1987 decision on the ground that insufficient evidence was submitted. In an accompanying memorandum, the Office stated in relevant part as follows:

"The evidence submitted to support the application is a medical report from Dr. Lipson dated May 16, 1989. Dr. Lipson gives a diagnosis of discogenic low back

pain and degenerative disc disease. These conditions are not diagnos[e]s but symptoms. This evidence lacks probative value and is insufficient to establish claimant's burden of proof."

The Office did not further discuss or analyze the evidence submitted by appellant in support of his reconsideration request.

The Board finds that the case is not in posture for a decision as the Office's September 22, 1989 decision did not adequately set forth the basis for denial of appellant's claim and the Board is, therefore, unable to render an informed decision on appellant's case.

In determining whether a claimant has discharged his or her burden of proof and is entitled to compensation benefits, the Office is required by statute and regulations to make findings of facts and make an award for or against payment of compensation.<sup>4</sup> Section 10.130 of the Title 20 of the Code of Federal Regulations provides in pertinent part that the final decision of the Office "shall contain findings of fact and a statement of reasons."<sup>5</sup>

In its memorandum accompanying its September 22, 1989 compensation order the Office stated that Dr. Lipson, in his May 16, 1989 report, gave a "diagnosis of discogenic low back pain and degenerative disc disease." The Office concluded that these were "symptoms" and not diagnoses, and stated that appellant had not met his burden of proof. It appears, therefore, that the Office based its claim rejection on the alleged failure of Dr. Lipson to provide a diagnosis. However, this is an insufficient basis on which to reject appellant's claim for two reasons. First, Dr. Lipson's diagnosis of degenerative disc disease can be construed as a diagnosis.<sup>6</sup> Also, the Office stated that Dr. Lipson's May 16, 1989 report diagnosed discogenic low back pain and that this was also not a diagnosis. However, Dr. Lipson made no such diagnosis in his May 16, 1989 report. Consequently, the basis of the Office's decision denying modification of its prior decision is factually inaccurate. Second, the Office did not provide any other reasoning explaining why appellant did not meet his burden of proof nor did it identify the specific elements of appellant's claim that were not accepted.<sup>7</sup> For example, assuming that the Office disputed the element of causal relation,<sup>8</sup> there was no discussion concerning why Dr. Lipson's opinion on the causal relationship between appellant's condition and his employment may or may not have been deficient. Additionally, basing a claim rejection only on a purported lack of a diagnosis could result in confusion and lengthening of the claims process by causing a claimant to believe that a claim would be accepted upon submission of a medical report with a different diagnosis.

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<sup>4</sup> 5 U.S.C. § 8124(a). See *Elaine Pendleton*, 40 ECAB \_\_ (Docket No. 89-982, issued July 31, 1989).

<sup>5</sup> 20 C.F.R. § 10.130. See *Elaine Pendleton*, note 4, *supra*.

<sup>6</sup> *Dorland's Pocket Medical Dictionary*, p. 200 (23rd ed. 1982), states that a diagnosis is a "determination of the nature of a case of a disease."

<sup>7</sup> See *Elaine Pendleton*, note 4, *supra*.

<sup>8</sup> See 20 C.F.R. § 10.110(a).

Consequently, the case must be remanded to the Office for further development, if necessary, and a *de novo* decision which shall include findings of fact and a clear, precise, and accurate basis for denial of appellant's claim in accordance with the Office's regulations and Board precedent as discussed in *Elaine Pendleton*.<sup>9</sup>

The September 22, 1989 Office of Workers' Compensation Programs decision is set aside and the case remanded for further action consistent with this decision.

Dated, Washington, D.C.  
April 6, 1990

George E. Rivers  
Member

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

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<sup>9</sup> See note 4, *supra*.