

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANDREW WHITAKER and U.S. POSTAL SERVICE,
DETACHED MAIL DISTRIBUTION UNIT, San Francisco, Calif.

*Docket No. 96-2493; Submitted on the Record;
Issued December 17, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant's disability causally related to his October 19, 1978 employment injury ended by August 3, 1996.

The Office of Workers' Compensation Programs accepted that appellant sustained a lumbosacral sprain in an employment-related motor vehicle accident on October 19, 1978. Appellant returned to work in a limited-duty position on November 13, 1978, and thereafter intermittently worked until February 25, 1981, when he last stopped work. The Office paid appellant during these absences from work and began payment of compensation for temporary total disability beginning February 26, 1981.

Following a referral for a second opinion examination, the Office issued a notice of proposed termination of compensation on June 3, 1996 on the basis that he no longer suffered from residuals of his October 19, 1978 employment injury. By decision dated July 31, 1996, the Office terminated appellant's compensation effective August 3, 1996.

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.¹

The Board finds that the Office has not met its burden of proof, as there is presently a conflict of medical opinion on the question of whether appellant's disability related to his October 19, 1978 employment injury has ended.

¹ *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

The Office based its termination of appellant's compensation on a January 22, 1996 report from Dr. Alan Moritz, a Board-certified orthopedic surgeon to whom the Office referred appellant for a second opinion examination on December 14, 1995. In the January 22, 1996 report, Dr. Moritz reviewed the prior medical evidence and appellant's history and complaints. Dr. Moritz described appellant's findings on physical examination, and commented on these findings:

“[Appellant’s] presentation in response to portions of the examination I performed in this office are nonorthopedic, and while indeed he may have an element of low back discomfort, to consider with a straight face and no apparent anguish his ongoing and chronic/constant discomfort to be a seven out of ten in intensity, and he arrived at his level after very careful consideration, and further, to have pain that occasionally or frequently becomes severe or a nine out of ten in intensity and not requiring medication is inaccurate. His responses to very light touch over the lumbar spine, that is, withdrawing and complaining of severe pain and also anguishing as he attempts to arise from the supine position, are absolutely nonorthopedic. His inability to overcome one-finger resistance to the obviously adequate thigh musculature is contrived and the severe discomfort produced by hip flexion on either side as well as limited straight leg raising in the supine position as compared to the relatively normal motion when sitting are absolutely inconsistent, nonorthopedic, and place the condition in the hysterical category.”

Dr. Moritz diagnosed psychosomatic back pain, and degenerative disc disease at L5-S1 by report, and stated, in response to the Office's questions:

“He likely did sustain a strain/sprain in the flexion/extension injury on October 19, 1978, perhaps even aggravated same in the 1979 slip-and-fall accident at work.² It is even possible that he produced some injury at the lumbosacral disc space. There is no evidence of radicular neurologic injury at the lumbosacral disc space. There is no evidence of radicular neurologic abnormality on physical examination, but there is strong evidence of psychological overlay. The physical results of the injuries he sustained in the October 19, 1978 motor vehicle accident likely resolved over a number of months and because of inappropriate care and inadequate counseling, he allowed the condition to dominate his thinking and activities and became crippled by his situation. Within three to four months of the subject accident it would have been appropriate to involve him in some vigorous rehabilitative program and back to work commuting to and from San Francisco, stretching and stopping very infrequently if his back warranted. Because of abnormalities noted on magnetic resonance imaging (MRI) study at the lumbosacral junction, it would have been inappropriate for him to involve himself in vigorous activities, repetitive stooping and bending, and carrying objects weighing greater than 50 pounds and that

² The Office found, by decision dated March 10, 1981, that appellant had not established that the alleged October 18, 1979 employment injury occurred as alleged.

would have caused some limitation in his work duties. The cause of the degenerative disc at the lumbosacral junction obviously is unclear, and I cannot say that it was caused by the subject accident. The records I reviewed in this office showed that in [appellant's] prework testing in 1977 he had significant low back pain with repetitive bending, lifting, twisting, et cetera, and was identified by the examiner as showing 'symptom magnification.' The cause of same was lumbosacral discomfort confirming that he had significant problems in the low back predating the subject accident. It is more likely than not that the subject accident, thus, actually aggravated preexisting problems, whether they be musculoligamentous or an early degenerative disc.

"[Appellant's] ongoing disabilities with respect to his back are nonexistent. His disabilities with respect to his psychological handling of his degenerative disc at the lumbosacral junction is another matter, and I would defer this to a professional in that area. I can advise, however, that in evaluating situations such as this orthopedically over the last 25 years, I can state with confidence that the primary cause of his ongoing impairment relates to his responses to his condition rather than the condition itself."

* * *

"My prognosis is grim in that individuals having such well-established interpretations of their own disability are difficult, if not nearly impossible to turn around after a decade and a half. At the same time, [appellant] has not received appropriate counseling to date, and it might be that with proper direction some benefits can be derived. He does not have an orthopedic condition that causes him disability at this time, but unfortunately has been allowed to think so over much too long a period of time."

In contrast to Dr. Moritz's January 22, 1996 opinion that appellant's disability related to his October 19, 1978 injury had ended, appellant's attending physician, Dr. Eric Bugna, a Board-certified orthopedic surgeon, indicated in a December 21, 1995 report that appellant continued to be disabled for work, while acknowledging that "the amount of pain which was provoked by even simple palpation was substantially greater than that which I would expect to see in a patient with [appellant's] difficulty." Although Dr. Bugna did not address causal relation in his December 21, 1995 report, in a May 30, 1990 report, Dr. Bugna did so: "Although [appellant] has experienced greater symptomatology which might be expected following the injury sustained in October 1978, absent evidence of other trauma, etc., it would appear that his present difficulty is due to that injury." This opinion is consistent with that of an earlier Office referral physician, Dr. John L. Chase, a Board-certified orthopedic surgeon, who stated in an April 2, 1990 report: "I believe the patient continues to suffer residuals of the injury of October 19, 1978. This opinion is based on the CT [computerized tomography] scan and myelographic findings in 1985, possible history of positive electromyographic tests in the past, and the patient's physical examination at this time."

The reports of Drs. Bugna and Moritz are of roughly equivalent probative value. Dr. Bugna has offered little support for his conclusion that appellant has continuing disability

causally related to his October 19, 1978 employment injury. On the other hand, Dr. Moritz has relied on an inaccurate history that appellant underwent a functional capacity evaluation on December 12, 1977, prior to his employment injury, and that this evaluation confirmed that he had significant low back problems before his employment injury. This functional capacity evaluation in fact took place on December 12, 1988. The reports from Drs. Bugna and Moritz suffer from defects, described above, that reduce their probative value, but these reports are clearly in conflict on the determinative issue of whether appellant's disability related to his October 19, 1978 employment injury has ended.

The decision of the Office of Workers' Compensation Programs dated July 31, 1996 is reversed.

Dated, Washington, D.C.
December 17, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member