

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RAYMOND F. JACARUSO and U.S. POSTAL SERVICE,
POST OFFICE, West Palm Beach, Fla.

*Docket No. 96-1178; Submitted on the Record;
Issued July 15, 1998*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation benefits effective May 27, 1995.

The Board has duly reviewed the evidence of record in this appeal and finds that the Office met its burden of proof in terminating appellant's compensation benefits effective May 27, 1995.

On April 28, 1983 appellant, then a clerk, filed a traumatic injury claim (Form CA-1) assigned number A6-323600 alleging that on April 18, 1983, he injured his left leg when he tripped over a telephone cord.¹

The Office accepted appellant's claim for lumbosacral strain.

On February 25, 1986 appellant filed a claim for continuing compensation on account of disability (Form CA-8) for the period February 7 through March 5, 1986. By decision dated December 11, 1986, the Office found the medical evidence of record insufficient to establish that appellant's disability was caused by the April 18, 1983 employment injury.

In a December 22, 1986 letter, appellant requested an oral hearing before an Office representative. By decision dated February 19, 1987, the Office vacated the December 11, 1986 decision on its own motion and remanded the case for further development of the medical evidence.

¹ Previously, on September 29, 1979, appellant filed a Form CA-1 assigned number A6-0233363 alleging that on that date, he injured his left hip and leg while lifting a heavy box out of a hamper. The Office accepted appellant's claim for lumbosacral strain. Appellant filed a claim on January 22, 1981 alleging that he sustained a recurrence of disability on January 8, 1981. By decision dated April 2, 1981, the Office denied appellant's recurrence claim. In an internal memorandum, dated August 25, 1983, the Office consolidated appellant's claim filed under number A6-0233363 and his claim assigned number A6-323600 to create a master case filed under number A6-323600.

By decision dated March 16, 1987, the Office found the medical evidence of record insufficient to establish that appellant's disability was causally related to the April 18, 1983 employment injury. In a March 30, 1987 letter, appellant requested an oral hearing before an Office representative. In a July 6, 1987 decision, the hearing representative vacated the March 16, 1987 decision and remanded the case for acceptance of a recurrence of disability beginning February 6, 1986 and payment of compensation benefits effective February 7, 1986.

On August 21, 1987, appellant filed Forms CA-8 for the period covering April 10 through July 22, 1987 and August 22, 1987 through an indefinite time. By decision dated December 3, 1987, the Office found the medical evidence of record insufficient to establish a causal relationship between appellant's disability and the April 18, 1983 employment injury.

In a December 10, 1987 letter, appellant requested an oral hearing before an Office representative. By decision dated March 3, 1988, the hearing representative remanded to case to the Office due to a conflict in the medical opinion evidence.

By decision dated November 1, 1989, the Office accepted that appellant's condition on August 22, 1987 was related to his 1979 and 1983 employment injuries.

By decision dated July 27, 1990, the Office reduced appellant's compensation benefits to reflect his wage-earning capacity. In an August 22, 1990 letter, appellant requested an oral hearing before an Office representative.

In an August 12, 1991 decision, the hearing representative vacated the Office's July 27, 1990 decision.

By letter dated July 8, 1993, the Office advised Dr. Edward W. Sandall, a Board-certified orthopedic surgeon and appellant's treating physician, to submit a medical report addressing appellant's current medical condition including, whether appellant had any current employment-related disability. The Office's letter was accompanied by a statement of accepted facts. Dr. Sandall submitted medical notes.

By letter dated October 6, 1994, the Office referred appellant along with a statement of accepted facts and a list of questions to Dr. Bruce M. Fishbane, a Board-certified orthopedic surgeon, for a second opinion examination. By letter of the same date, the Office advised Dr. Fishbane of the referral.

Dr. Fishbane submitted a November 25, 1994 medical report. In a February 16, 1995 letter, the Office advised Dr. Fishbane to clarify his opinion regarding whether appellant had any employment-related residuals. In response, Dr. Fishbane submitted a February 21, 1995 supplemental medical report.

In a notice of proposed termination of compensation dated March 27, 1995, the Office advised appellant that it proposed to terminate his compensation benefits because Dr. Fishbane's opinion revealed that appellant no longer had any disability causally related to the April 18, 1983 employment injury. The Office further advised appellant to submit medical evidence supportive of his continued disability.

By decision dated May 5, 1995, the Office terminated appellant's compensation benefits because the medical evidence of record established that appellant had no disability causally related to the April 18, 1983 employment injury effective May 27, 1995.

In a May 10, 1995 letter, appellant requested an oral hearing before an Office representative. By decision dated January 26, 1996, the hearing representative affirmed the Office's May 5, 1995 decision.

Once the Office has accepted a claim and pays compensation, it has the burden of proof of justifying termination or modification of compensation benefits.² 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.³

In the present case, the Office accepted that appellant sustained a lumbosacral strain due to factors of his federal employment. In its proposed notice of termination, the Office advised appellant to submit additional medical evidence supportive of his continued disability. The Office terminated appellant's compensation benefits based on Dr. Fishbane's opinion that appellant no longer had any disability causally related to the April 18, 1983 employment injury. In a November 25, 1994 medical report, Dr. Fishbane provided a history of appellant's 1979 and 1983 employment injuries and medical treatment, and his findings on physical examination. Dr. Fishbane diagnosed probable spinal stenosis with lumbar facet arthritis and early claudication, obesity and bilateral osteoarthritis of the knees. Dr. Fishbane opined that appellant remained totally and permanently disabled from gainful employment and recommended treatment options. Dr. Fishbane further opined that appellant's symptoms represented a lumbar sprain superimposed upon by preexisting lumbar stenosis. Dr. Fishbane stated that any element of a lumbar sprain had long since abated with residuals resulting from appellant's underlying spinal stenosis and facet arthritis. Dr. Fishbane also stated that this represented a permanent aggravation of appellant's underlying irreversible complaint, that the present disability was the result of appellant's lumbar stenosis and not the result of the 1983 employment injury. Dr. Fishbane concluded that the combination of appellant's back complaints and obesity precluded appellant's ability to sit for an adequate duration to be able to return to his mail clerk duties.

In response to the Office's February 16, 1995 letter requesting clarification of his opinion regarding whether appellant had any employment-related residuals, Dr. Fishbane submitted a February 21, 1995. In this report, Dr. Fishbane stated that lumbar stenosis is a progressive arthritic condition of the low back resulting from osteoarthritis and/or a slipped vertebra which generally occurs as an aging process. Dr. Fishbane further stated that appellant's obesity as a comorbidity further provoked lumbar symptomatology. Dr. Fishbane opined that appellant symptoms were unrelated to his compensable injury and were the result of the spontaneous

² *Curtis Hall*, 45 ECAB 316 (1994); *John E. Lemker*, 45 ECAB 258 (1993); *Robert C. Fay*, 39 ECAB 163 (1987).

³ *Jason C. Armstrong*, 40 ECAB 907 (1989).

progressive pathology of lumbar stenosis. Dr. Fishbane noted that although the Office had indicated that the date of injury was 1983, appellant had indicated that the date of injury was 1985 and that he presumed that this was the same event where appellant tripped over a telephone cord. Dr. Fishbane concluded that based upon the history obtained from appellant, but without the benefit of x-ray, magnetic resonance imaging or other diagnostic testing, that his explanation was medically probable. Although Dr. Fishbane did not note the correct year in which appellant sustained an employment-related back condition, he did indicate the proper circumstances under which appellant injured his back. Dr. Fishbane provided medical rationale for his opinion that appellant no longer had any disability causally related to the April 18, 1983 employment injury, therefore, the Board finds that his opinion is sufficient to establish that appellant no longer had any employment-related disability.

In response to the Office's July 8, 1993 letter requesting a medical report regarding whether appellant had any current employment-related disability, Dr. Sandall submitted medical treatment notes dated August 9, 1993 and April 12, 1995 indicating that appellant was not able to work for the employing establishment due his employment-related back condition and obesity. In addition, Dr. Sandall submitted a May 10, 1994 work restriction evaluation form indicating appellant's physical restrictions and that appellant could work four hours per day. Dr. Sandall's treatment notes and work restriction evaluation form failed to provide any medical rationale for appellant's continued disability.

In support of his allegation that he sustained continued disability, appellant submitted the May 9, 1995 medical report of Dr. Craig H. Lichtblau, a Board-certified physiatrist, revealing histories of appellant's September 30, 1979 and April 18, 1983 employment injuries, medical treatment, family, and social life. Dr. Lichtblau indicated his findings on physical examination and a review of medical records. Dr. Lichtblau diagnosed probable spinal stenosis with lumbar facet arthritis and early claudication, morbid obesity and bilateral osteoarthritis of the knees. Dr. Lichtblau opined that appellant was unable to participate in gainful employment due to his morbid obesity and preexisting arthritis. Dr. Lichtblau further opined that the September 30, 1979 employment injury had an indirect result on appellant's current condition and that appellant's resultant lumbosacral strain caused a decrease in his overall functional capacity and led to his significant weight gain. Dr. Lichtblau's report negated the September 30, 1979 employment injury as the "indirect" cause of appellant's continued disability which was caused by appellant's morbid obesity and preexisting arthritis. Further, Dr. Lichtblau's report did not address whether appellant had any continuing disability causally related to the April 18, 1983 employment injury. Therefore, the Board finds that Dr. Lichtblau's report is insufficient to establish that appellant had any continuing disability causally related to the April 18, 1983 employment injury.

The January 26, 1996 and May 5, 1995 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, D.C.
July 15, 1998

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member