

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JAMES R. MOLNAR and U.S. POSTAL SERVICE,  
POST OFFICE, Akron, OH

*Docket No. 98-1687; Submitted on the Record;  
Issued March 14, 2000*

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DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation, including medical benefits, for the accepted condition of lumbar sprain as of March 24, 1997.

On February 4, 1993 appellant, then a 40-year-old mailhandler, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that on February 3, 1993 he sustained a work-related injury to his back while in the performance of duty. The next day appellant was treated by Rapid Response North, Incorporated and released to "light work." In support of his claim, appellant submitted reports from Dr. Norman W. Lefkovitz, a Board-certified neurologist, whom he first saw on February 15, 1993. He opined on February 17, 1993 that appellant had a chronic lumbar strain/sprain as a result of his work-related injury. By note dated February 15, 1993, Dr. Lefkovitz limited appellant to working no more than four hours per day. On February 24, 1993 the Office accepted appellant's claim for lumbar strain/sprain and paid appropriate compensation benefits.

In a report dated July 13, 1994, Dr. Lefkovitz noted that appellant continued to have pronounced low back pain, that he had limitation objectively and loss of range of motion of his lumbar spine to 30 degrees in forward flexion, 5 degrees in extension and 10 degrees in lateral flexion bilaterally. He also noted that a repeat lumbosacral magnetic resonance imaging (MRI) scan obtained on May 25, 1994, demonstrated a right-sided L5-S1 herniated nucleus pulposus with associated edematous nerve root and that appellant remained completely disabled from remunerative employment related to this injury.<sup>1</sup>

The Office referred appellant to Dr. Eva H. Hu-Whittemore, a neurologist, for a second opinion. In a November 7, 1994 report, she opined that appellant suffered from "discogenic

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<sup>1</sup> The Office advised appellant on July 22, 1994 that it had not accepted the diagnosis of herniated disc at L5-S1 as resulting from the February 3, 1993 employment injury.

syndrome” due to degenerative disc in his lumbosacral spine. Based on his medical history, Dr. Hu-Whittemore found that there was “no evidence of residual deficits resulting from his February 3, 1993 work-related injury” and appellant’s “current complaints of low back pain with occasional radiation to the back of the right thigh represent residuals from his original disc injury/surgery.” She stated it was reasonable to conclude that “both the characteristics and intensity of [appellant’s] back condition have returned to its pre-1993 injury state.” Dr. Hu-Whittemore noted that appellant was working in a light-duty capacity and this restriction should be continued until he completed a satisfactory work hardening program.

In response to a January 6, 1995 letter from the Office, wherein it requested a rationalized medical opinion supporting disability, on January 16, 1995 Dr. Lefkovitz again advised that appellant was not able to return to regular duty because of the pain he experienced in his back resulting from the degenerative joint disease. He added that the condition had not returned to its preinjury state.

The Office found a conflict in medical opinion between Drs. Lefkovitz and Hu-Whittemore and referred the case to an impartial medical specialist, Dr. Donald L. Fisher, a Board-certified orthopedic surgeon. In a report dated June 14, 1995, he opined that appellant had a history which was consistent with a chronic lumbosacral strain and that he had no actual MRI scan that was interpreted as degenerative disc disease or degenerative arthritis. Dr. Fisher further noted that he could find no current objective physical findings to support appellant’s subjective complaints of pain, but that judging from appellant’s description of the injury of February 3, 1993, he did not believe that this event significantly contributed to appellant’s previous complaints of pain. He opined that although appellant would always have some component of chronic pain whether or not the February 3, 1993 injury occurred, there was no objective medical evidence that he could not work a modified mailhandler job and that ultimately, appellant should be able to return to a 20-pound maximum lifting restriction. In response to questions from the Office, Dr. Fisher issued an August 28, 1995 opinion, in which he stated that as appellant would initially have a problem with endurance, a reduction of the length of his shift time initially would be prudent. He further opined that there was no medical evidence in appellant’s chart that would suggest that he would not be able to perform his job as modified mailhandler.

On September 8, 1995 the Office issued a notice of proposed termination of compensation, proposing to terminate compensation based on Dr. Fisher’s reports, finding the disability had ceased. In response, appellant submitted an unsigned medical report and supporting tests from a January 25, 1995 visit with Dr. Andrew C. Raynor, a Board-certified internist. He found that appellant suffered from “chronic low back pain, post traumatic and by history is work related.” Dr. Raynor also noted that appellant’s x-ray showed mild degenerative changes in the left spine.

By decision dated October 12, 1995, the Office terminated benefits, finding that the medical evidence supported that appellant’s disability from the injury of February 3, 1993 had ceased.

At appellant’s request, an oral hearing was held before an Office hearing representative on March 19, 1996, at which time he testified that Dr. Lefkovitz treated him primarily with

medications and that his pain increased when he tried physical therapy. In a decision dated June 7, 1996 and finalized June 17, 1996, the hearing representative set aside the October 12, 1995 decision and directed the Office to update the statement of accepted facts to include all accepted work-related injuries and previous nonwork-related injuries and surgeries.<sup>2</sup> The Office hearing representative also advised the Office to have appellant undergo another MRI scan to obtain another opinion on the findings and to determine the extent and relationship of appellant's herniated disc condition.

In a medical report dated May 22, 1996, Dr. Lefkovitz noted that appellant continued under his medical care for chronic low back pain and that an MRI scan of May 25, 1995 demonstrated an L5-S1 right-sided disc herniation associated with an endematous nerve root.

On August 19, 1996 the Office referred appellant for a second opinion to Dr. Sheldon Kaffen, a Board-certified orthopedic surgeon. On September 13, 1996 he examined appellant and had him undergo a radiologic consultation by Dr. Eric C. Bourekas, a neuroradiologist.<sup>3</sup> In his report dated September 27, 1996 Dr. Kaffen diagnosed "remote herniated intervertebral lumbar disc at L5-S1 on the right. Status post laminectomy and excision of herniated disc. Degenerative disc disease at L5-S1 secondary to the previous surgery. Recurrent herniated intervertebral lumbar disc on the right. Lumbar sprain." He opined:

"It is my opinion that there are no continued residuals of the 1<sup>st</sup> work[-]related injury accepted as L5-S1 radiculopathy nor of the 2<sup>nd</sup> and 3<sup>rd</sup> injuries both accepted as lumbar sprains. [Appellant] no longer has any radicular symptoms to indicate the presence of a radiculopathy and a lumbar sprain which is an injury to the soft tissue which would have healed by this time."

Dr. Kaffen indicated that appellant's current condition was due to the previous injury and surgery performed while appellant was in the U.S. Army.

By medical report dated September 19, 1996, Dr. Lefkovitz noted a lumbosacral MRI scan demonstrated an L5-S1 right-sided disc herniation with associated damaged nerve root. He further noted that appellant returned to work but continued to experience low back and leg pain.<sup>4</sup>

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<sup>2</sup> The record reveals that in 1972, while appellant was in the Army, he had a hemilaminectomy at the L5 level for disc protrusion. The record further reveals that appellant sustained an injury on September 6, 1984 when he was struck in the right leg and foot by a mail cart. The Office accepted this claim for a contusion of the right heel and calf and L5-S1 radiculopathy. Appellant returned to restricted work duties until March 13, 1987, at which time he was terminated from employment. On June 20, 1987 he returned to work with the employing establishment. Appellant sustained another injury at work on September 25, 1991 when a mail cart hit his left ankle and the left side of his back. The Office accepted this claim for a lumbar sprain. Appellant returned to restricted work duties; *see also* R 607 (hearing representative's summary of earlier injuries in her April 7, 1998 decision).

<sup>3</sup> Dr. Bourekas opined that appellant had recurrent herniated nucleus pulposus, on the right L5-S1, which appeared to about the S1 nerve root but does not result in any significant foraminal or spinal stenosis. He also noted mild diffuse bulge of the annulus at L4-5 with facet and ligamentous hypertrophy resulting in mild narrowing of the transverse dimensions of the canal, mild facet degenerative changes at L3-4 and no significant interval change at the L5-S1 disc herniation, when compared with the examination from May 25, 1994.

<sup>4</sup> The record reveals that appellant returned to work on July 15, 1996 for four hours per day in the position of a

To resolve the conflict between the opinions of Drs. Kaffen and Lefkovitz, the Office referred appellant, along with an augmented statement of accepted facts as instructed by the Office hearing representative and the case record, to Dr. Ralph Kovach, a Board-certified orthopedic surgeon, for an independent medical examination. In a medical report dated January 16, 1997, he stated:

“It is my opinion that there is no objective evidence to substantiate [appellant’s] complaints. I did review an MRI [scan] which he brought along with him and this was performed at Mt. Sinai Health Systems. It was performed on September 19, 1996 and makes reference to comparison to a previous MRI [scan] of 1994 which was performed at St. Thomas Medical Center. This shows that there has been a recurrent herniated nucleus pulposus on the left at the L5-S1 level which appears to abut the nerve root but does not result in any compression or spinal stenosis. There is a mild diffuse bulge of L4 or L5, unchanged in two years. There were mild degenerative changes at the facets of L3 and L4.

“By examination, [appellant] shows no evidence of herniated nucleus pulposus causing any radiculopathy and by examination, he has no radiculopathy. My examination shows no evidence of any residuals of any injury to his ankle nor any pain.

“In relation to the work injuries which [appellant] has in the past, he is fully recovered from those injuries and in my opinion, he is capable of returning to his job as a mailhandler. The reason is that [appellant] has no objective findings.

“The work restrictions are due ... specifically to his herniated disk which he sustained in the military. [Appellant] has no further evidence of [any] injury that is work related.

“It is my opinion that [his] condition is solely related to the injury which he sustained in the military and/or the off-duty accident. Work-related injuries at this time have completely resolved....”

On February 21, 1997 the Office issued a notice of proposed termination of compensation, noting that all employment-related residuals and disability have resolved. The Office allotted appellant 30 days within which to submit medical evidence supporting continuing employment-related disability. He did not respond with the time allotted.

By decision dated March 24, 1997, the Office terminated all compensation, including payment of medical benefits, effective that date resulting from the February 3, 1993 injury.

At appellant’s request, a hearing was held on January 21, 1998. At this hearing, appellant testified that he last worked for the employing establishment on April 18, 1997, that he

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modified mailhandler. He began working four hours per day which was to “gradual[ly] increase to eight hours per day.”

stopped work because the employing establishment decided that he was fit for full duty as a mailhandler, that there was no light-duty work available, that Dr. Kovach had a very negative attitude, that Dr. Kovach told him that it was impossible to tell at this point what was causing appellant's pain because of all the injuries he had sustained since then and that MRI scans were not going to "answer any of his problems."

By decision dated April 7, 1998 and finalized April 8, 1998, the hearing representative affirmed the Office's decision dated March 24, 1997, finding that the weight of the medical opinion continued to rest with the report of Dr. Kovach and established that the residuals of appellant's employment injury have ceased.

The Board finds that the Office met its burden of proof in terminating appellant's compensation benefits effective March 24, 1997.

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination or modification of compensation benefits.<sup>5</sup> The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.<sup>6</sup> The Office's burden includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>7</sup>

After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that he had an employment-related disability, which continued after termination of compensation benefits.<sup>8</sup>

In the instant case, Dr. Lefkowitz, was of the opinion that appellant's continued low back pain was related to the employment injury of February 3, 1993. In response to the Office's request for a second opinion, Dr. Kaffen opined that there were no continued residuals from appellant's work-related lumbar sprains, as a lumbar sprain would have resolved by this time.

Where there exists a conflict of medical opinion, the case is referred to an impartial medical specialist for the purpose of resolving the conflict. If the opinion of the impartial medical specialist is sufficiently well rationalized and based upon a proper factual background, it must be given special weight.<sup>9</sup>

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<sup>5</sup> *Raymond W. Behrens*, 50 ECAB \_\_\_\_ (Docket No. 97-1289, issued January 14, 1999).

<sup>6</sup> *Carl D. Johnson*, 46 ECAB 804, 809 (1995).

<sup>7</sup> *Raymond W. Behrens*, *supra* note 6.

<sup>8</sup> *Talmadge Miller*, 47 ECAB 673, 679 (1996); *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

<sup>9</sup> *Irene M. Williams*, 47 ECAB 619, 622 (1996); *Roger Dingess*, 47 ECAB 123, 126 (1995); *Carl Epstein*, 38 ECAB 539 (1987).

Because of the conflict in medical opinion between Drs. Lefkovitz and Kaffen and pursuant to section 8123(a) of the Federal Employee's Compensation Act, the Office referred appellant to a third physician for an impartial medical examination.<sup>10</sup> Dr. Kovach examined appellant on January 16, 1997. He provided an accurate and comprehensive review of appellant's medical work and history and on the basis of this review and his examination, found that there was no objective evidence to substantiate appellant's complaints. Dr. Kovach concluded that appellant had fully recovered from his work injuries and was capable of resuming his duties as a mailhandler. Specifically, Dr. Kovach found no evidence of herniated nucleus pulposus causing any radiculopathy and that by examination, he had no radiculopathy. He continued, "In relation to the work injuries which [appellant] has in the past, he is fully recovered from these injuries and in my opinion, he is capable of returning to his job as a mailhandler." Dr. Kovach concluded, "It is my opinion that [appellant's] condition is solely related to the injury, which he sustained in the military and/or the off-duty auto accident. Work-related injuries at this time have completely resolved." He attributed appellant's work restrictions to his service-connected herniated disc.

The Board finds that Dr. Kovach's opinion is well rationalized and is based on a proper medical and factual background and must therefore be accorded special weight on the issue of whether appellant had any residuals or disability resulting from the accepted lumbar sprain as the result of the February 3, 1993 employment injury. As the weight of the medical opinion evidence on this issue, the report justifies the Office's termination of appellant's compensation benefits effective March 24, 1997.

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<sup>10</sup> Section 8123(a) of the Act provides that, "[I]f there is disagreement between the physician making the examination for the United States and the physician for employee, the Secretary shall appoint a third physician who shall make an examination." 5 U.S.C. § 8123(a).

The decision of the hearing representative of the Office Workers' Compensation Programs dated April 7, 1998 and finalized April 8, 1998, is hereby affirmed.

Dated, Washington, D.C.  
March 14, 2000

George E. Rivers  
Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member