U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LARRY SIEKER and U.S. POSTAL SERVICE,
ST. LOUIS BULK MAIL CENTER, Hazelwood, MO

Docket No. 98-1881; Submitted on the Record;
Issued May 3, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation.

On April 27, 1994 appellant, then a 34-year-old mailhandler, was tossing bags of mail from the roller table when he developed back pain. He stopped working on April 29, 1994. Appellant received continuation of pay for the period April 30 through June 13, 1994. The Office accepted his claim for lumbosacral strain and aggravation of degenerative disc disease and paid temporary total disability for the period June 14 through August 28, 1994. Appellant worked light duty intermittently until October 13, 1994 when he was released to unrestricted full duty. He had intermittent recurrences of disability between June 13 and July 29, 1995 for which he received compensation for the hours he did not work. Appellant returned to full duty from November 28 through December 6, 1995 and then returned to limited duty. He stopped working on February 7, 1996 and filed a claim for recurrence of disability effective February 14, 1996. The Office once again paid compensation for temporary total disability effective February 17, 1996. Appellant worked limited duty on May 15 and May 16, 1996 but stopped work thereafter. The Office paid temporary total disability compensation after he stopped working. In a May 21, 1997 decision, the Office terminated appellant's compensation effective the date of the decision on the grounds that the weight of the medical evidence failed to establish any objective findings to support continued light duty or that he required any further medical treatment due to the April 27, 1994 employment injury.

The Board finds that the Office properly terminated appellant's compensation effective May 21, 1997.

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]

In a May 13, 1994 report, Dr. Barry Feinberg, a Board-certified anesthesiologist, noted that appellant had low back pain which radiated into his left hip, left lateral thigh and left lateral calf. He noted that appellant also had bilateral groin pain. Dr. Feinberg stated that a computerized tomography (CT) scan showed degenerative disease and bulging disc disease at L4-5 and L5-S1. He diagnosed degenerative disc disease, low back syndrome and lumbar radiculopathy. In a July 13, 1994 report, Dr. Feinberg stated that appellant's examination had shown signs of L4-5 and L5-S1 radiculopathies and signs of secondary myofascial pain syndrome as a result of his disc disease. He related appellant's condition to the April 27, 1994 employment injury.

In a July 25, 1994 report, Dr. Donald H. Brancato, Board-certified orthopedic surgeon, performing a fitness-for-duty examination, stated that he was uncertain to the extent of the validity of appellant's complaint due to the diffuse nature of the complaint and pain with any movement involving the legs. He indicated that pinprick testing was only slightly diminished in the perineal area to the left side but was otherwise intact. Dr. Brancato commented that, from an objective standpoint, there was no obvious reason to limit appellant's work activities. He noted that a magnetic resonance imaging (MRI) scan was not really revealing. Dr. Brancato indicated that appellant might have a slight disc bulge in the posterior portion of L4-5 and possibly in L5-S1.

The Office referred appellant to Dr. Donald McPhaul, a Board-certified physiatrist, for an examination and second opinion. In an August 16, 1994 report, he diagnosed lumbosacral strain, degenerative disc disease at L4-5 and L5-S1 and probable symptom magnification. He stated that it appeared appellant's symptoms were related to the employment injury. Dr. McPhaul commented that he could not confirm that the degenerative disc disease was not present. He indicated that, from appellant's description of the onset of symptoms, it appeared his pain was primarily due to a lumbar strain rather than to the degenerative disc disease. Dr. McPhaul stated that appellant's findings on physical examination were not consistent with his complaints. He noted that appellant's posture, guarded movements and overall reaction to examination appeared to be exaggerated. Dr. McPhaul commented that, if appellant had the amount of pain and stiffness he alleged, he would not be able to work. He opined that there was symptom magnification present and that, if the organic problem could be separated from appellant's reaction to pain, he might be able to determine appellant's functional capacity. Dr. McPhaul concluded that appellant was completely disabled based on his subjective complaints but the complaints were not consistent with his objective findings.

In subsequent progress reports, Dr. Feinberg described appellant's fluctuating degree of pain. He also diagnosed secondary fibromyositis and myofascial pain syndrome involving the low back. In a March 1, 1996 report, Dr. Kavita Erickson, a Board-certified radiologist, indicated that an MRI scan showed interval progression of disc herniation at L5-S1. She noted

[1] *Jason C. Armstrong*, 40 ECAB 907 (1989).

that the disc herniation was in close proximity to the S1 nerve root but definite nerve root impingement was not shown on the MRI scan.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. John Gragnani, a Board-certified physiatrist, for an examination and second opinion. In a June 17, 1996 report, he stated that appellant's sensory examination revealed no evidence of any complaint of decreased sensation in the L3-S1 dermatomes on either leg. Dr. Gragnani found no particular loss of strength in either leg, although appellant showed poor voluntary effort. He indicated appellant had no evidence of paraspinal spasm in the lower thoracic or lumbar areas. Dr. Gragnani noted appellant complained of tenderness along the lumbar spine down to S1 and in the left greater sciatic notch area but no other area of pain focalization. He reviewed the May 7, 1994 and March 1, 1996 MRI scans and commented that the studies revealed minimal disc bulging at L5-S1, no real disc bulge of any kind at L4-5 or any other level. Dr. Gragnani diagnosed complaint of low back and left leg pain by history, nonphysiologic and nonanatomical pain distribution and mild, early degenerative disc changes at the L5-S1 level. He commented that appellant's complaints of pain were far out of proportion to what he found in examination. Dr. Gragnani indicated that there was nothing in appellant's back related to the employment injury that would cause concern. He stated that appellant's only preexisting condition was the mild disc desiccation at the L5-S1 which was a normal aging finding. Dr. Gragnani concluded that appellant did not have any condition that he had been able to ascertain. He indicated appellant had only subjective pain complaints related to the employment injury and nothing more. Dr. Gragnani recommended that appellant undergo MRI and CT scans. In a June 20, 1996 report, he indicated that the MRI and CT scans, when compared to the prior MRI scans, showed only a mild degenerative change at the L5-S1 disc with a small central disc protrusion. Dr. Gragnani noted that the disc did not appear to impinge on any of the adjacent nerve roots and was not the cause of appellant's problems. He commented that the changes were consistent with a natural process of mild degeneration with no evidence of nerve root compromise or compression. Dr. Gragnani stated that there was nothing in the scan to substantiate any causal relationship between appellant's employment injury and the findings of the scan. He added that appellant's complaints in reference to the distribution of pain, description of discomfort and history did not correspond to the L5-S1 disc. Dr. Gragnani concluded that he did not find any specific abnormalities, either by clinical history, neurologic examination or radiographic evidence to support a specific injury related to appellant's employment. He stated that appellant had no physical restrictions.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. David B. Robson, a Board-certified orthopedic surgeon, to resolve a conflict in the medical evidence between Drs. Feinberg and Gragnani. In a January 8, 1997 report, Dr. Robson stated that appellant's neurological examination of the legs, including motor, sensory and deep tendon reflexes, was normal. He indicated that appellant's MRI scans showed mild degenerative disc disease and a mild disc bulge at L5-S1, lateralizing to the left, which was not a surgical lesion. Dr. Robson stated that appellant's symptoms were out of proportion to what he expected from someone who strained his back. He commented that appellant had no dermatomal pattern to his pain complaints. Dr. Robson concluded that appellant had no objective evidence that he would have any work restrictions. He also saw no further need for any therapy or treatment as appellant had exhausted, on several occasions, multiple treatment modalities for lumbar strain

and a bulging disc. In situations where there exists opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[2] In this case, Dr. Robson acted as an impartial medical specialist to resolve a conflict. He was provided with an accurate statement of accepted facts. Dr. Robson's report was well rationalized in that he pointed out appellant's examination was essentially normal with only mild degenerative disc disease and therefore appellant had no objective basis for any current work restrictions. His report is therefore entitled to special weight and, in the circumstances of this case, represents the weight of the medical evidence.[3]

In a March 4, 1997 report, Dr. Feinberg indicated that he had referred appellant for an electromyogram (EMG). He stated that the EMG was consistent with bilateral L5 radiculopathy. Dr. Feinberg, however, did not submit a copy of the EMG report. He also did not discuss whether the findings were causally related to the employment injury and, if so, how. Dr. Feinberg's report therefore has little probative value and is insufficient to contradict the report of Dr. Robson.

The decision of the Office of Workers' Compensation Programs, dated May 21, 1997, is hereby affirmed.

Dated, Washington, D.C.
May 3, 2000

Michael J. Walsh
Chairman

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

[2] *James P. Roberts*, 31 ECAB 1010 (1980)

[3] In an April 17, 1997 letter, the Office informed appellant of its proposal to terminate his compensation. In an April 28, 1997 letter, appellant's attorney requested a hearing before an Office hearing representative. The Office issued its decision terminating appellant's compensation effective May 21, 1997. Appellant's request for a hearing, therefore was premature as the request was made prior to the issuance of the final decision. As appellant did not request a hearing within 30 days after the May 21, 1997 decision, he is not entitled to a hearing.