U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JEFFORY L. JOHNSRUD and U.S. POSTAL SERVICE,
POST OFFICE, Albert Lea, MN

Docket No. 02-980; Submitted on the Record;
Issued February 21, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant's disability causally related to his July 31, 1997 employment injury ended by May 23, 1999.

On August 1, 1997 appellant, then a 41-year-old letter carrier, filed a claim for a traumatic injury to the hamstring of his left leg sustained on July 31, 1997 when stepping out of a truck.

The Office of Workers' Compensation Programs accepted that appellant sustained a lumbosacral sprain and a sacroiliac sprain. He stopped work on August 1, 1997 and returned to part-time limited duty on September 15, 1997. Appellant received continuation of pay during this absence from work.

On October 6, 1997 appellant underwent a left fifth lumbar partial hemilaminectomy, removal of an extruded disc and sacroiliac foraminotomy, performed by Dr. W. Richard Marsh, a Board-certified neurosurgeon. The Office accepted that this surgery was causally related to appellant's July 31, 1997 employment injury.

Appellant returned to part-time limited duty on December 15, 1997 and increased his hours and duties until he was performing his regular position as a letter carrier full time on April 7, 1998. From June 5 to 27, 1998 appellant worked portions of days, using sick leave to account for eight hours. He stopped work on June 29, 1998 and returned to part-time limited duty on December 7, 1998 answering telephones. The Office determined that appellant was entitled to compensation during these absences from work.

On November 30, 1998 the Office referred appellant, his medical records and a statement of accepted facts to Dr. K. Stephen Kazi, a Board-certified orthopedic surgeon, for a second opinion evaluation of his condition and his ability to work. In a report dated December 14, 1998, he set forth appellant's history and reviewed the prior medical evidence, which did not include lumbar x-rays from 1992 or the surgery report from October 6, 1997. Dr. Kazi described

appellant's July 31, 1997 injury as: "Minor trauma to the lumbosacral spine from a slip on gravel. This caused a permanent aggravation of the underlying degenerative disc disease at L5-S1 with a probable herniation on the left side. Pain went down the left leg and was mistaken for a hamstring pull." Dr. Kazi described his findings on physical examination, which included negative Waddell's signs, a normal sensory examination of the lower extremities and no motor deficit in the legs. He stated that appellant's score on the pain disability index showed "an extremely high level of perceived disability. This indicates extreme symptom magnification." Dr. Kazi concluded:

> "Based upon review of the entire medical file as well as the findings, it is my opinion to a reasonable degree of medical probability that Mr. Johnsrud had preexisting degenerative disc disease of the lumbosacral spine prior to the relatively minor trauma of July 31, 1997. There was significant deterioration of the nucleus pulposus due to an aging process resulting in loss of the water content and change in the biochemistry of the nucleus pulposus leading to the subsequent rupture of the annulus. The surgery resulted in a good outcome with complete resolution of the radicular pain the left lower extremity. The subsequent pain syndrome described by [appellant] in May 1998 is nonphysiologic and not supported by any objective findings. The distribution of pain as described by [appellant] involving the entire lower back and both the front as well as back of the lower extremities all the way down to the calves without any objective manifestations of radiculopathy or myelopathy or imaging findings of spinal stenosis or other pathology is indicative of symptom magnification and does not have any objective basis. My examination did not reveal any mechanical pain in the lower back; nor did it reveal any evidence of radiculopathy or myelopathy. I do not recommend a lumbosacral fusion at this time."
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> "The current condition is a result of the degenerative disc disease which was preexisting. The chronic pain syndrome is not supported by any objective findings and not a result of the original work injury. The original work injury resulted in a herniation at L5-S1 on the left, which was treated surgically with a good result. There is no objective evidence to indicate persisting radiculopathy or recurrent herniation."

Appellant again stopped work on December 15, 1998 and the Office resumed payment of compensation for temporary total disability.

On February 18, 1999 the Office issued a notice of proposed termination of compensation on the basis that appellant's employment-related conditions had ceased.

Appellant submitted medical reports from Dr. Edward Shaman, a general practitioner, including a March 31, 1999 report stating that he complained of persistent low back pain and stated that he could not work. Dr. Shaman diagnosed chronic low back pain and somatic disorder.

By decision dated May 19, 1999, the Office terminated appellant's compensation, including medical benefits, effective May 23, 1999 on the basis that Dr. Kazi's opinion represented the weight of the medical evidence.

Appellant requested a hearing, which was held on January 5, 2000. He did not appear. His wife testified that he had recently undergone back surgery.

Appellant submitted additional medical evidence.[1] In a report dated September 1, 1999, Dr. Manuel R. Pinto, a Board-certified orthopedic surgeon, stated:

> "The discograms were reviewed.[2] These are excellent studies in the sense that the control discs (normal discs) L2-3 and L3-4, were rated at 0/10. That certainly is a perfectly normal response for normal discs. However, the two abnormal discs including L4-5 and L5-S1 were extremely painful and rated at 7/10 and 9/10, respectively. The symptoms at both levels were very concordant with reproduction of low back as well as the buttock and lower extremity symptoms. Both discs were torn morphologically."
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> "Apparently, there are issues pertaining to causation. I asked [appellant] if the surgery that he had on October 6, 1997 had been done under workers' compensation. He stated: 'yes.' My position is that if that surgery was done then his current symptoms still stem from that same work-related injury and any need for additional surgical treatment is still under workers' comp[ensation].
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> "[Appellant] gave me a history of tripping when he was attacked by a dog on April 10, 1997. That precipitated some low back discomfort but those symptoms were very mild and he was able to work full-time without restrictions. Subsequently on July 7, 1997[3] he sustained a fall at work and that precipitated the severe symptoms that persisted and led to the need for surgery on October 6, 1997. Unfortunately, the surgery did not help me. It is clear now that the reason the surgery did not help is because his symptoms were not only related to the herniation but also were related to symptomatic internal disc derangement at two levels (L4-5 and L5-S1). It is, therefore, my opinion that indeed his current symptoms still stem from his work injury of July 1, 1997 and that the need for additional treatment is still related to that work injury."

[1] Some of the medical reports submitted by appellant addressed the condition of his cervical spine, which one report related to an April 1997 dog attack. Whether such a relationship exists is not within the scope of the present decision by the Board, which addresses only the effects of appellant's July 31, 1997 employment injury.

[2] These were performed on August 16, 1999.

[3] This report and his other September 1, 1999 report, reflect an incorrect date of appellant's employment injury, which Dr. Pinto corrected in subsequent reports.

In another report dated September 1, 1999, Dr. Pinto indicated that appellant could not work, recommended a fusion from L4 to the sacrum and stated:

> "I believe that his current condition is still the result of his original work injury. [Appellant] sustained a fall at work on July 1, 1997, which precipitated his severe pain and the symptoms have really not changed since then even though he underwent surgery for a herniated disc. The discograms are actually quite helpful in understanding why [appellant] has continued to have symptoms. Even though the surgery addressed the herniation, [appellant] continued to have symptoms because of the symptomatic tearing of the discs at two levels including L4-5 and L5-S1."

By decision dated April 21, 2000, an Office hearing representative found that further development of the evidence was necessary, but that the evidence submitted at the hearing was insufficient to require reinstatement of compensation benefits. Noting that Dr. Kazi stated that appellant's July 31, 1997 employment injury caused a permanent aggravation of his degenerative disc disease, the Office hearing representative directed the Office to obtain a supplemental report from Dr. Kazi clarifying whether appellant's work restrictions and a lumbar fusion performed on December 16, 1999 were related to his July 31, 1997 injury.

By letter dated June 14, 2000, the Office requested clarification from Dr. Kazi on these issues. In response, Dr. Kazi stated:

> "The restrictions were for chronic degenerative disc disease present prior to July 31, 1997 and first diagnosed in 1992.
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> "Surgery was performed for L4-5 and L5-S1 levels. This is a chronic progressive deterioration, which in my opinion is not due to the relatively minor injury of July 31, 1997 but represents an aging process of the discs. The L5-S1 level was first diagnosed in 1992 per medical records. The minor slip of July 31, 1997 caused an aggravation of the chronic condition at L5-S1, requiring surgery. The underlying disease process remained and progressively worsened, also to involve L4-5 level. The second surgery December 16, 1999 in my opinion, was for the chronic condition of degenerative disc disease which subsequently also involved L4-5 with no causal relationship to the minor injury of July 31, 1997."

By decision dated July 24, 2000, the Office found that the weight of the medical evidence established that appellant's injury-related disability ceased by May 23, 1999.

By letter dated April 9, 2001, appellant requested reconsideration and submitted additional medical evidence. In a report dated December 16, 1999, Dr. Pinto stated that appellant was five and one-half weeks post anterior/posterior fusion from L4 to the sacrum.[4] Dr. Pinto concluded that appellant's "final injury on July 31, 1997 caused the most significant aggravation of symptoms and they became permanent and severe enough to the point where he could not work. I believe the surgery performed in the lumbar spine is related to the work

[4] Appellant underwent a cervical spine fusion on the same day.

injuries described above." In a report dated February 1, 2001, Dr. Pinto noted that appellant had some low back discomfort in 1992 for which he saw a chiropractor, that his symptoms resolved within a week and that he did not have any further problems until April 10, 1997 when he was attacked by a dog at work. Dr. Pinto described appellant's July 31, 1997 employment injury and his October 6, 1997 surgery, which "helped his lower extremity pain and back pain. It was not until he resumed his normal activities as a mail carrier (and started carrying and delivering mail) that he developed recurrent low back and leg pain." Dr. Pinto stated:

> "There are apparently some significant issues at stake regarding causation. It is my opinion that the back pain episode of 1992 is totally irrelevant in [appellant's] current clinical picture. It is obvious that he did well after just one week of treatment. He did not have any trouble whatsoever for five years until he was injured at work. [Appellant] has sustained two work injuries, both resulting in increased symptoms."

By decision dated June 18, 2001, the Office found that the additional evidence was not sufficient to warrant modification of its prior decision, as Dr. Pinto did not account for appellant's degenerative disc disease or provide an explanation of why appellant's condition was related to his employment injury rather than the degenerative disc disease.

By letter dated August 15, 2001, appellant requested reconsideration and submitted a report dated July 17, 2001 from Dr. Pinto, who stated that he had reviewed an Office claims examiner's most recent decision. He stated:

> "I really do n[o]t quite understand [the claims examiner's] final comment, as she states that Dr. Kazi actually states that the slip of July 31, 1997 caused an aggravation of a chronic condition requiring surgery. So, basically what he is saying is that, indeed, the work injury of July 31, 1997 was the reason why [appellant] had a flare-up of back pain that eventually required surgical treatment. That is basically what I said. I understand that [appellant] had a degenerative disc and that was certainly an underlying finding; however, he did not have symptoms until he had the injury in 1997, so I believe both Dr. Kazi and myself are stating the same thing; that [appellant] had an aggravation of preexisting condition. That preexisting condition was not causing symptoms and only became symptomatic after the accident. Now, the question whether or not the injury sustained was a minor injury, that is all very relative. The problem is that any injury, minor or significant, can cause flare-ups of back pain. I hope this addresses his issues. I still feel pretty strongly that, if [appellant] did not have any medical documentation of any ongoing symptoms caused by the degenerative disc, then it is just a finding in an [magnetic resonance imaging] or an x-ray or a [computerized tomography] scan. The moment a patient becomes symptomatic after an injury, then the injury is the cause of the patient's symptoms; therefore, the cause for the need of the treatment. I believe that is the case with [appellant]."

By decision dated November 19, 2001, the Office found that the additional evidence was insufficient to warrant modification of its prior decisions, as Dr. Pinto "failed to describe the

material change that has occurred to alter the course of the underlying disease along with detailed reasoning to support his conclusion."

The Board finds that the Office has not established that appellant's disability and need for medical treatment causally related to his July 31, 1997 employment injury ended by May 23, 1999.

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.[5] The Office also bears the burden of proof to terminate medical benefits. To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further treatment.[6]

The Office relied on the reports of Dr. Kazi, a Board-certified orthopedic surgeon, to whom it referred appellant for a second opinion evaluation, as the basis of its finding that appellant's injury-related disability had ceased. Although he stated in his December 14, 1998 report that appellant's "current condition is a result of the degenerative disc disease which was preexisting," he also stated in this report that appellant's July 31, 1997 employment injury, "caused a permanent aggravation of the underlying degenerative disc disease at L5-S1." Pursuant to a hearing representative's decision, the Office obtained a supplemental report from Dr. Kazi, which stated that appellant's work restrictions set forth in his December 14, 1998 report were "for chronic degenerative disc disease present prior to July 31, 1997 and first diagnosed in 1992" and that his 1999 lumbar fusion was not due to the July 31, 1997 injury, but rather to the "aging process of the discs" and the progressive worsening of the underlying disease process. In neither report did Dr. Kazi reconcile his statement that appellant's condition was due to the preexisting degenerative disc disease and not his employment injury with his statement that the preexisting degenerative disc disease was permanently aggravated by the employment injury, nor did Dr. Kazi disavow his statement that appellant's employment injury caused a permanent aggravation of his underlying degenerative disc disease.

Dr. Kazi also did not provide a basis for his statement that chronic degenerative disc disease was first diagnosed in 1992. The case record contains no medical reports from 1992 and Dr. Kazi acknowledged that x-rays from 1992 were not available for his review. The only doctor who appears to have reviewed the 1992 x-rays was Dr. Fred Smith, an osteopath, who stated in an August 7, 1997 report, that appellant had "x-ray evidence of narrowing of the L5-S1 area which has progressed since films taken back in 1992." This does not show that appellant had chronic degenerative disc disease diagnosed in 1992, as maintained by Dr. Kazi.

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

[6] *Furman G. Peake*, 41 ECAB 361 (1990).

For the reasons stated above, the reports of Dr. Kazi are not sufficient to establish that appellant's disability and need for medical treatment causally related to his July 31, 1997 employment injury ceased by May 23, 1999.

The November 19 and June 18, 2001 decisions of the Office of Workers' Compensation Programs are reversed.

Dated, Washington, DC
February 21, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member