

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, CA

*Docket No. 03-311; Submitted on the Record;
Issued May 8, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant's disability causally related to his October 19, 1978 employment injury ended by September 27, 1999.

This case has previously been on appeal before the Board. By decision and order dated December 17, 1998, which is incorporated into this decision by reference, the Board found that the Office of Workers' Compensation Programs had not met its burden of proof to terminate appellant's compensation effective August 3, 1996, as there was "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

On March 23, 1999 the Office referred appellant, the case record and a statement of accepted facts to Dr. Donald W. Seymour, a Board-certified orthopedic surgeon, to resolve the conflict of medical opinion.

In a report dated April 29, 1999, Dr. Seymour set forth appellant's history, complaints and findings on examination. After extensively reviewing the prior medical evidence, Dr. Seymour diagnosed, "Mild posterior left-sided L5-S1 disc protrusion, slightly indenting the anterior aspect of the thecal sac, by CT [computerized tomography] scan, per report of William Mathews, M.D., August 12, 1996 (CT scan report not available for review)." Dr. Seymour concluded:

"This diagnosis is made on the basis of prior diagnostic studies (in particular the most recent CT scan of the lumbar spine, obtained by Dr. Mathews in July 1996), current x-rays and the objective findings on examination this date.

¹ Docket No. 96-2493 (issued December 17, 1998).

“On the basis of the submitted medical records, the first MRI [magnetic resonance imaging] or CT scan evidence of lumbar degenerative disc disease was not made until December 8, 1983, when Fred Sondheimer, M.D., performed a CT scan showing minimal bulging of the annulus at L3-4 and L5-S1. This condition, in and of itself, does not, with any degree of medical probability, result in symptoms.

“What can be stated with medical probability, is that the mild disc protrusion noted at L5-S1 in 1996 was first seen in a repeat CT scan on April 2, 1985. Dr. Sondheimer noted in his report of that date that the protrusion of the lumbosacral disc was noted since the last study of December 1983. Therefore, the diagnosis of degenerative disc disease is not connected to the work injury of October 19, 1978, by either direct cause, aggravation, precipitation or acceleration.

“It is my opinion that although the patient may have sustained a lumbosacral strain and sprain at the time of injury (October 19, 1978), this condition should have resolved within a few months. As it is now over two decades since the patient’s motor vehicle accident, with no further injuries sustained, a diagnosis of lumbosacral sprain can not be supported with any reasonable medical probability. The findings of the most recent CT scan provide the most accurate diagnosis with respect to this patient’s back condition.

“The patient’s subjective complaints and objective findings are as noted above. The subjective complaints markedly outweigh the objective findings.”

* * *

“At the present time, given the patient’s current level of disability with regard to his current diagnosis, I would preclude him from very heavy lifting, with a restriction from lifting in excess of 75 pounds. There is no evidence in the submitted medical records that these restrictions are attributable to any preexisting condition or the result of the work injury of October 19, 1978. There are no injury-related factors of disability, with respect to the reported work injury of October 19, 1978.

“On the basis of the patient’s job activities, as described in the [s]tatement of [a]ccepted [f]acts, I feel that from an orthopedic perspective, he would be capable of resuming his usual employment, as the activities required appear to be congenial with the limitations noted above.”

On August 19, 1999 the Office issued a notice of proposed termination of compensation on the basis that the weight of the medical evidence established that his alleged ongoing disability for his regular work was not proximately caused by the accepted injury of October 19, 1978.

By decision dated September 27, 1999, the Office terminated appellant’s compensation on the basis that his disability related to his October 19, 1978 employment injury had ended.

By letter dated September 29, 1999, appellant requested a hearing. At a hearing held on April 25, 2000 his attorney contended that appellant's compensation was terminated without due process of law, that Dr. Seymour's opinion should not be considered because the Office asked him a leading question and that Dr. Seymour was not qualified to perform an impartial medical evaluation because he was retired from actual orthopedic surgery and because there was no evidence that he was qualified as a spine specialist.

By decision dated September 12, 2000, an Office hearing representative found that there was no merit to the arguments appellant's attorney made at the hearing and that the report of Dr. Seymour, the impartial specialist resolving a conflict of medical opinion, "carries the weight of the medical evidence because it contains a rationalized opinion negating residual disability based upon a complete and thorough examination of the claimant and all available medical evidence."

By letter dated June 29, 2001, appellant requested reconsideration and submitted additional medical evidence. In a report dated November 14, 2000, Dr. William E. Mathews, a neurosurgeon, stated that he had previously seen appellant "in 1978 for low back pain as the result of a work-related injury," "again on July 15, 1996, for a reevaluation of his continuing back difficulties," and in "July 1999, he was seen for the same problem and it was my opinion that his low back pain was related to the October 1978 injury." After describing appellant's October 19, 1978 employment injury and his findings on examination, Dr. Mathews stated: "It is my impression from reviewing his prior CT scans and examining the patient that he probably has an L5-S1 disc protrusion progressing to degeneration and spondylolisthesis as a result of the work-related injury on October 19, 1978." In a report dated December 13, 2000, Dr. Mathews stated:

"It has always been my very definite impression that the work-related incident of October 19, 1978, was the direct cause of his L5-S1 disc injury. This was earlier demonstrated on the December 8, 1983 CT scan that revealed disc degeneration at that level. On April 2, 1985 a more advanced CT scan was performed, using metrizamide contrast. This revealed the L5-S1 disc protrusion to the left. Therefore, the initial scan in 1983 did demonstrate the injury but the more sophisticated scan made the diagnosis of a disc protrusion more definite and this was definitely a work-related injury to the L5-S1 disc level."

By decision dated July 5, 2002, the Office found that the new medical evidence was not sufficient to warrant modification of the prior decision.

The Board finds that the weight of the medical evidence establishes that appellant's disability causally related to his October 19, 1978 employment injury ended by September 27, 1999.

On the prior appeal, the Board found that the Office had not met its burden of proof to terminate appellant's compensation because of a conflict of medical opinion between appellant's attending physician and the Office's referral physician on the question of whether appellant's disability related to his October 19, 1978 employment injury had ended.

To resolve this conflict of medical opinion, the Office, pursuant to section 8123(a) of the Federal Employees' Compensation Act,² referred appellant, the case record and a statement of accepted facts to Dr. Seymour, a Board-certified orthopedic surgeon. In a report dated April 29, 1999, Dr. Seymour concluded that the lumbosacral sprain and strain appellant sustained on October 19, 1978 had resolved and that his degenerative disc disease was not related to his October 19, 1978 employment injury. He provided rationale for these opinions, stating that a diagnosis of lumbosacral sprain could not be supported over two decades after the injury, which should have resolved within a few months. Dr. Seymour also explained that the mild disc protrusion seen on an April 2, 1985 CT scan was not related to appellant's October 19, 1978 employment injury, given that a December 8, 1983 CT scan showed only minimal bulging. He also concluded that appellant was not disabled for the job he held when injured.

In situations where there are opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.³ As found by the Board on the prior appeal, there was a conflict of medical opinion. The report of Dr. Seymour resolved this conflict and is entitled to special weight, as it was well rationalized and based upon a proper factual background.

There is no evidence that Dr. Seymour, a Board-certified orthopedic surgeon, was not qualified to examine appellant's back, or that this physician was selected in a manner other than the rotation list used by the Office. The Board does not consider the question posed to Dr. Seymour and objected to by appellant's attorney leading, as this question -- "Does he still have a disability for his usual employment because of a medical condition caused by the accident of Oct[ober] 19, 1978?" -- does not suggest or imply a particular answer.⁴

The reports of Dr. Mathews that appellant submitted with his June 29, 2001 request for reconsideration are not sufficient to overcome the great weight accorded the report of the impartial medical specialist or to create a new conflict of medical opinion. Although Dr. Mathews stated for the first time that appellant's October 19, 1978 employment injury was "the direct cause of his L5-S1 disc injury," he did not provide any rationale for this opinion. Dr. Mathews does not explain what he saw in the 1983 CT scan that would "demonstrate the injury," or provide any other explanation of why he believes the October 19, 1978 employment injury caused a disc injury or appellant's continuing disability.

² 5 U.S.C. § 8123(a) states in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

³ *James P. Roberts*, 31 ECAB 1010 (1980).

⁴ *See Carl D. Johnson*, 46 ECAB 804 (1995).

The July 5, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
May 8, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member