

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THOMAS CULLETON and U.S. POSTAL SERVICE,
LAWRENCE POST OFFICE, Lawrence, Mass.

*Docket No. 96-642; Submitted on the Record;
Issued June 25, 1998*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's temporary total disability effective July 23, 1995.

On March 6, 1984 appellant, then a 58-year-old mail handler, filed a claim for a lower back condition which he related to lifting parcels out of a bulk mail carrier.¹ In a May 3, 1984 report, Dr. Donald R. Pettit, a Board-certified orthopedic surgeon, indicated that x-rays showed degenerative arthritic changes in the lumbosacral region. He commented that appellant was at an age where he would have intermittent back pain as a result of degenerative changes in his low back. He concluded that appellant had a low back strain which was resolving. He recommended that appellant work at a restrictive level for three to four weeks and then return to his normal work. The Office accepted appellant's claim for an acute lumbosacral back strain. Appellant returned to full-duty work on June 10, 1984, but stopped again on August 27, 1984 and filed a claim for recurrence of disability. He returned to light-duty work on September 6, 1984. In a December 3, 1984 decision, the Office rejected appellant's claim for a recurrence of disability on the grounds that he had not met his burden of proof in establishing that his recurrence of disability was causally related to his employment injury.

In a November 14, 1985 report, Dr. David M. Glazer, a Board-certified orthopedic surgeon selected to give a second opinion by the Office, diagnosed severe degenerative arthritis of the lumbar spine and stated that the March 6, 1984 injury was an aggravation of a preexisting condition. He indicated that the recurrence of August 27, 1984 was again a recurrence of osteoarthritis of the spine aggravated by appellant's activities at work. In an August 20, 1986 decision, the Office vacated its December 4, 1984 decision and accepted appellant's claim that his August 27, 1984 recurrence of disability was related to his March 6, 1984 employment injury. The Office authorized continuation of pay for the period August 27 through September 5, 1984.

¹ An earlier claim for a June 1, 1983 back injury was denied by the Office in a February 4, 1984 decision on the grounds that appellant had not met his burden of proof in submitting sufficient rationalized evidence in support of his claim.

On October 8, 1986 appellant again filed a claim for compensation. He returned to work on January 5, 1987. In a March 30, 1987 decision, the Office denied appellant's claim on the grounds that there was no causal relationship between the injury for which compensation was claimed and factors of appellant's employment. In a November 20, 1987 decision, the Board affirmed the Office's March 30, 1987 decision.²

On July 6, 1987 appellant developed severe back pain while pulling mail for the letter carriers and putting the mail on their benches. The Office accepted appellant's claim for acute back strain. He received continuation of pay for the period July 7 through August 21, 1987. The Office approved leave buy back for the period August 22 through August 28, 1987 and began payment of temporary total disability compensation effective August 29, 1987.³

In a March 4, 1993 report, Dr. George M. Hazel, a Board-certified orthopedic surgeon and appellant's treating physician, stated that appellant had very significant degenerative joint disease and indicated that the episode at work on July 6, 1987 caused further decompensation regarding appellant's back, causing him to leave work. He commented that appellant continued to have significant degenerative joint disease of the lumbar spine and residual impairment. He stated that appellant continued to remain totally disabled as a result of his injury. He noted that there were no other significant medical conditions present. In a March 1, 1994 report, Dr. Hazel again stated that appellant was permanently and totally disabled.

The Office referred appellant, together with the statement of accepted facts and the case record, to Dr. Mordecai E. Berkowitz, a Board-certified orthopedic surgeon, for an examination and second opinion on whether appellant's condition remained causally related to the employment injury. In a May 15, 1995 report, Dr. Berkowitz diagnosed a resolved lumbosacral sprain and preexisting degenerative arthritis of the lumbosacral spine. He stated that the March 6, 1984 and July 6, 1987 incidents represented temporary aggravations of a significant preexisting degenerative condition. He noted that appellant returned to work three days after the March 6, 1984 incident. He commented that the July 6, 1987 incident of pulling mail for the letter carriers was not a significant episode to cause the ongoing complaints for several years. He stated that appellant's findings in his examination were solely due to his preexisting, nonwork-related degenerative arthritis of the spine. He indicated that there were no objective findings and nothing in the history that suggested that there would be residuals of appellant's complaints to the work-related incidents. He commented that these complaints usually resolve anywhere from two week to three months. He reiterated that there was no objective medical evidence of a work-related residual. Dr. Berkowitz stated that appellant was disabled for his job as a mail handler, not because of the employment incidents, but because of the combined effects of his age and the significant preexisting degenerative condition.

² Docket No. 87-1752 (issued November 20, 1987)

³ In an October 12, 1989 decision, the Office found that appellant had received a \$238.01 overpayment in compensation because payments had not been withheld from his compensation payments. The Office further found that waiver of recovery of the overpayment was not warranted. In a May 8, 1990 decision, the Board set aside the Office's decision because the Office had given appellant two different explanations on how the overpayment occurred. The Board stated that, as it could not determine how the Office calculated the overpayment. The Board therefore set aside the Office's decision and remanded the case for further development. Docket No. 90-533 (issued May 8, 1990)

In a June 12, 1995 letter, the Office proposed to terminate appellant's compensation on the grounds that the disability resulting from appellant's work had ceased as shown by Dr. Berkowitz' report. The Office gave appellant an opportunity to submit additional evidence or argument if he disagreed with the proposed action.

In a July 12, 1995 letter, appellant's attorney disagreed with the Office's proposed action. He stated that Dr. Berkowitz had been presented with questions and requested to perform an evaluation and submit a rationalized opinion but Dr. Hazel had never been presented with questions and had not been asked to review Dr. Berkowitz' report. The attorney also contended that Dr. Berkowitz' opinion was based on a cursory physical examination. He claimed that Dr. Berkowitz had no knowledge of the July 6, 1987 incident even though he had discussed it in his report. He stated that Dr. Hazel disagreed with Dr. Berkowitz' report but had been unable to reply until recently.

In a July 14, 1995 decision, the Office terminated appellant's compensation effective July 23, 1995 on the grounds that the weight of the medical evidence showed that the work-related residuals of his employment injuries had ceased.

In a July 10, 1995 report, received by the Office on August 4, 1995, Dr. Hazel stated that appellant had degenerative arthritis of his back that was present in 1987. He commented that the injury at work caused an aggravation of the arthritic condition and caused a physical decompensation of the structure of the lumbar spine to the extent that he had never been able to return to work. He concluded that but for the July 6, 1987 employment injury appellant's back would never have decompensated and he would have returned to work. He noted he had seen appellant for eight years. He stated that to attempt to determine what appellant's condition would have been had he not had the injuries in question required speculation that was impossible for anyone to determine. He added that to be able to apportion how much of appellant's disability was due to the underlying degenerative arthritis also required a speculation that was impossible to arrive at with accuracy.

In an August 11, 1995 letter, appellant's attorney requested reconsideration. In an October 27, 1995 merit decision, the Office denied appellant's request for modification of the July 14, 1995 decision.

The Board finds that the case is not in posture for decision due to a conflict in the medical evidence.

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.⁴

The Office based its decision to terminate appellant's compensation on Dr. Berkowitz' report. Dr. Berkowitz indicated that appellant's employment injuries, particularly the July 6, 1987 injury, would have caused a lumbosacral strain that would have resolved within two weeks

⁴ *Jason C. Armstrong*, 40 ECAB 907 (1989)

to three months. He stated that there was no objective evidence to show that the July 6, 1987 employment injury caused any work-related residuals. He attributed appellant's disability solely to his preexisting degenerative arthritis of the lumbosacral spine. Dr. Hazel stated in his report that appellant had very significant degenerative joint disease and indicated that the July 6, 1987 employment injury caused a physical decompensation of appellant's degenerative arthritis that caused him to be disabled thereafter. He reported that appellant continued to have significant degenerative joint disease of the lumbar spine and continued to remain totally disabled for work. He stated that, but for the July 6, 1987 employment injury, appellant's back condition would never have decompensated and he would have been able to return to work. The reports of Dr. Hazel and Dr. Berkowitz therefore have created a conflict in the medial evidence. Because a conflict exist, the Office has not met its burden of proof in terminating appellant's compensation.

The decisions of the Office of Workers' Compensation Programs dated October 27 and July 14, 1995 are hereby reversed.

Dated, Washington, D.C.
June 25, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member