U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH R. VARNER and DEPARTMENT OF THE NAVY, MARE ISLAND NAVAL SHIPYARD, Vallejo, Calif.

Docket No. 96-844; Submitted on the Record;
Issued May 20, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, MICHAEL E. GROOM

The issue is whether appellant had any disability after November 11, 1995, the date the Office of Workers' Compensation Programs terminated his compensation benefits, causally related to his December 12, 1986 back sprain injury.

On December 12, 1986 appellant, then a 28-year-old sandblaster, claimed that his "back went out," while shoveling wet sand. The Office accepted appellant's claim for "acute lumbar sprain with subluxation (L5) superimposed on congenital low back condition, permanent aggravation [of] preexisting spondylolysis, [and] bulging disc L5-S1." The Office noted that concurrent disability not due to injury included "congenital lumbarization (extra sixth lumbar vertebra), S1-2 spondylolysis, [and] disc bulge L5-S1."[1]

Appellant stopped work, claimed total disability, was placed on the periodic roll, and received continuing treatment from a chiropractor for a myriad of conditions for over eight years.

By report dated June 3, 1987, Dr. Bala C. Marar, a Board-certified orthopedic surgeon, examined appellant and opined that he could return to light duty as of June 4, 1987. He indicated that the congenital problem of a transitional vertebra at the L5 level and the spondylolysis were incidental findings. Dr. Marar detailed appellant's light-duty restrictions and opined that they would be applicable for four to six weeks.

An August 31, 1987 magnetic resonance imaging (MRI) scan of his lumbar spine was reported as showing a degenerated disc at L4-5, a transitional segment (L6) at L5-S1 with partial bilateral sacralization of the transverse processes and less than a grade 1 spondylolisthesis of L5 on S1 (the congenital anterior 1 cm displacement of L6), unidentifiable clear spondylolytic

[1] The Board notes that with the presence of an L6 vertebra, a claimant does not have an actual L5-S1 disc *per se*, and that the "disc bulge L5-S1" was both accepted as an employment-related condition, even though technically nonexistent in this claimant, and was also noted as being a concurrent disabling condition not due to injury, which is inconsistent.

defects and an unremarkable disc annulus at L5-S1 without evidence of focal bulge or herniation.

Appellant's chiropractor, Dr. Richard M. Norton, however, continued to find him totally disabled and he described appellant's condition as "chronic lumbar strain subluxation of L5 with resulting moderate severe lumbalgia/ joint instability/ splinting spasm/ antalgic posture/ mobility loss/ limping gait (inability to bare weight normally on right leg), radicular syndrome including right rump and leg pain and paresthesia, right and left leg cramps."

In a June 6, 1988 report, Dr. Marar noted that appellant's MRI showed a transitional lumbosacral segment with bilateral partial sacralization of the L5 transverse process which was a congenital abnormality, and no evidence of disc herniation. He indicated that appellant's EMG was within normal limits and noted that appellant complained of constant mild to moderate pain of his lumbar spine, with aches all over his lower limbs, for which he did not take any medication, but which responded to chiropractic manipulations, which relieved some of his problems. Dr. Marar noted that objectively appellant had no abnormal clinical findings and opined that he appeared to have subjective symptoms in excess of objective findings. In a July 11, 1988 addendum, Dr. Marar stated that on an objective basis appellant had recovered from the work injury of December 12, 1986.

By report dated April 4, 1995, Dr. Norton, diagnosed "residual chronic lumbar sprain, radiculitis, lumbosacral joint instability, daily constant acute-like symptoms/findings; moderate to intermittent severe lumbalgia thoracolumbar splinting spasm, thoracolumbar mobility restrictions, guarding, bilateral major right sciatic radiculitis extend to toes with numbness, ache, sudden motor loss, limping antalgic gait vulnerability to everyday common strain." He opined that appellant had been totally disabled for eight years and he ennumerated appellant's activity restrictions. No subluxation was diagnosed, and no objecting physical findings were detailed. However, in a report dated June 6, 1995, Dr. Norton noted a diagnosis of "chronic lumbosacral sprain subluxation." He also noted that appellant had a preexisting congenital defect of lumbarization of the sacrum (one extra vertebra) within which were two areas of bone separation (bilateral spondylolysis) with forward displacement subluxation (antegrade spondylolisthesis) with an L5-6 disc bulge. Dr. Norton stated that appellant was dependent on frequent manipulative procedures which controlled appellant's pain for two to four days, and opined that vocational rehabilitation and job placement would be difficult.

On June 19, 1995 the Office referred appellant for a second opinion evaluation to Dr. Joseph R. Mariotti, a Board-certified orthopedic surgeon, with a statement of accepted facts and questions to be answered.

By report dated July 12, 1995, Dr. Mariotti examined appellant and opined that he had profoundly unrealistic chronic severe low back pain. He opined that appellant employed a significant amount of magnification and/or fabrication, which accounted for appellant's almost unbelievable painful disability. Dr. Mariotti opined that appellant did have a preexisting anatomic condition, which probably had been symptomatically aggravated, but explained that there was no pathologic explanation for his present high level of disability. Dr. Mariotti noted that appellant complained of pain everywhere, including extreme back pain over his entire back from his buttocks to his neck, headaches, intermittent sharp pain in his right buttock and into his right leg and foot, and that his back "pops." Dr. Mariotti opined that some of appellant's

complaints were unbelievable, such as his six years of extreme back pain, his numb feet when he sits down and that his constipation resolved with chiropractic manipulation. He noted that examination of appellant's dorsal and lumbosacral spine was unbelievable, with his huffing and puffing and inability to straighten up and that palpation of his back revealed superficial tenderness everywhere from his neck, over his shoulders, over his upper and mid-back, over his low back and buttocks. Dr. Mariotti noted that supine straight leg raising more than a few degrees elicited agonizing pain with extreme grimacing, but that when he distracted appellant in a sitting position by pretending to examine his knees, appellant was able to straighten both legs completely without any complaint of back pain, even when reaching forward, which was grossly inconsistent. Dr. Mariotti diagnosed "entire back and leg pain, etiology unclear, preexisting spondylolysis with mild spondylolisthesis, transitional lumbosacral vertebra and degenerative disc disease at L4-5 and probably profound amount of symptom magnification versus symptom fabrication, probably both." Dr. Mariotti noted that appellant's MRI and CT scans demonstrated preexisting anatomic abnormalities but no evidence to account for his present level of allegedly profound disability. He answered the Office's questions, noting that there were no objective findings of either strain or pain, that he was unable to find any objective findings of a subluxation and that there were no objective findings to support permanent aggravation of preexisting spondylolysis or a bulging L5-S1 disc, but noted that there were an immense amount of inappropriate responses to his examination suggesting that appellant's subjective pain was not as severe as he alleged. Dr. Mariotti noted that there was no explanation for appellant's alleged level of pain and that, although one could consider that appellant's spondylolysis contributed to his symptoms, this disorder could also be totally asymptomatic. Dr. Mariotti opined that, although appellant claimed total disability for work, there was no objective evidence to support it and he noted that appellant's preexisting spondylolysis had not been permanently aggravated, and that there were no material changes of the "permanent aggravation," other than appellant's ongoing complaints of pain. He opined that appellant could return to work eight hours per day at a job in which he could alternately sit and stand.

On August 10, 1995 the Office issued appellant a notice of proposed termination of compensation finding that Dr. Mariotti's well-rationalized report constituted the weight of the medical evidence in establishing that appellant no longer was disabled due to his accepted condition. The Office pointed out that appellant's chiropractor's report included a lengthy litany of conditions, several not accepted by the Office, and concluded that appellant remained totally disabled, but failed to include any objective evidence confirming that the accepted conditions continued, such that its probative value was diminished.

Appellant submitted an August 30, 1995 chiropractic report, from Dr. Richard W. King, a chiropractor, which noted that it was being written solely on the basis of a records review and indicated that there was an obvious hostility between Dr. Mariotti and appellant. He opined that Dr. Mariotti's report was more a personal attack than an objective observation. Dr. King reviewed and commented upon appellant's x-rays and CT scan, but failed to diagnose any subluxations. He opined that appellant's "disc injury" on December 12, 1986 would not be severe enough injury to cause appellant's "permanent disability," but opined that, due to the obvious hostility shown appellant by Dr. Mariotti, an independent medical examination was warranted.

In a September 6, 1995 report, Dr. Norton, reiterated the contents of his previous report and opined that appellant's disability was continuous. He described appellant's condition as "significant chronic lumbar sprain with associated radiculopathy." No subluxation was noted.

The Office decided that another second opinion was required, and it referred appellant to Dr. Santi Rao, a Board-certified orthopedic surgeon.

By report dated September 29, 1995, Dr. Rao found appellant to be well muscled and to be able to sit, stand and walk without evidence of distress except for his multiple complaints of disabling back pain. Dr. Rao noted no significant evidence of restriction of motion, lack of fluid motion, trouble changing posture, or physical restrictions. He indicated that appellant's physical movements, while changing his gown evinced no disabling restrictions and noted that appellant's motion observed during these actions was not consistent with that demonstrated on physical examination of range of motion of the back. Dr. Rao indicated that appellant's complaints of hypesthesia diffusely along the entire right thigh, leg and foot were anatomically inconsistent between sensory, motor and reflex examination. He noted that appellant's evident eagerness to impress upon him a severe amount of pain and disability were quite noticeable. Dr. Rao examined appellant's cervical spine and upper extremities and determined that he had no problem and had normal range of motion. His back examination revealed that appellant's back range of motion observed while changing clothes was clearly greater than that demonstrated when examined and that it was not consistent with that observed upon examination. Dr. Rao noted a well-muscled back without spasm or external injury, but he indicated that appellant complained of pain during the examination. He noted no evidence of abnormal curvature, and indicated that, after a suggestive comment was made by him, appellant complained of specific radicular pain down the right lower limb to the first toe in response to a simulated test with a light touch to a lower lumbar lipoma.[2] Dr. Rao also noted that, following another suggestive comment by him to appellant, appellant complained of radicular pain to the first toe produced by very limited passive contralateral hip rotation. He summarized, noting that appellant's back range of motion was inconsistent between tested active range of motion upon examination, and the motion observed while appellant changed clothes, that on examination forward flexion and extension were marked by appellant guarding his back using his hands on the examination table and on his thighs and extending up or climbing up his thighs very slowly, which was not the case when he was not being examined. He noted that appellant's straight leg raising was to 90 degrees in the sitting position without complaints, but was only to 60 degrees on the left and 50 degrees on the right in the supine position with complaints of severe radicular pain. All other nerve tension signs were noted as being negative. Lower extremity examination revealed no problems with appellant's hips, knees, ankles, or range of motion, and neurological examination results were noted as being normal. Dr. Rao noted that lumbar spine x-rays showed no evidence of instability, that CT scans showed a minimal diffuse disc bulge at the transitional vertebra with preexisting spondylolysis, and that previous films demonstrated six lumbar vertebrae with lumbarization of S1 and probable spondylolysis of L5 with a suggestion of a minimal spondylolisthesis of the transitional vertebra. He diagnosed chronic low back pain and preexisting spondylolysis at the transitional segment with a minimal very early grade 1 spondylolisthesis, and opined that appellant's subjective symptoms were far in excess of his objective findings. Dr. Rao opined that it was quite possible that appellant did sustain a lumbar

[2] A benign fatty tumor.

strain on December 12, 1986, but opined that the course of events had been inappropriate. Dr. Rao opined that appellant's prolonged course of treatment for a relatively minor episode, his inability to work at an appropriate level, the claims of personal and functional disability which were not matched by evaluation and examination and the tendency to disability behavior, as well as inconsistent examination findings and inappropriate examination responses, suggested that there was a significant discrepancy between the actual amount of disability present, if any and that which appellant claimed. He opined that appellant might have some level of lower back discomfort, which might be based on "lighting up" of a previously asymptomatic preexisting spondylolysis and minimal spondylolisthesis at the transitional lumbosacral segment, but that the minimal nature of the original injury and diagnosis together with the prolonged course of treatment suggested that there was no significant ongoing basis for appellant's subjective level of complaints. Dr. Rao noted: "Considering the symptom magnification, fabrication, positive simulation tests, accessory activity and disability behavior, as well as the past diagnosis and prolonged treatment, I feel that ongoing treatment and further investigations are medically inappropriate." He opined that appellant had reached maximum medical recovery and was capable of returning to work on a full time regular basis, but should be precluded from very heavy lifting, and frequent pushing, pulling, bending or squatting.

By decision dated October 18, 1995, the Office terminated appellant's compensation effective November 11, 1995 finding that the weight of the medical evidence clearly established that appellant had no objective findings of ongoing disability due to his December 12, 1986 work injury. The Office noted that Dr. Rao agreed with Dr. Mariotti, provided a well-rationalized report, opined that appellant could return to work, and opined that appellant needed no further medical treatment. The Office noted that neither physician found any objective evidence of pain, strain, subluxation, permanent aggravation of preexisting spondylolysis or bulging disc at L5-S1. The Office noted that Dr. King's report was of limited, if any, probative value as he only reviewed the records.

The Board finds that appellant had no disability after November 11, 1995, the date the Office terminated his compensation benefits, causally related to his December 12, 1986 back sprain injury.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[3] 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] In this case, the Office met its burden of proof through the well-rationalized reports of Drs. Mariotti and Rao.

Both Drs. Mariotti and Rao provided extensive, detailed and well-rationalized reports finding no objective evidence of the presence of the accepted employment conditions, and no objective evidence of ongoing disability related to appellant's December 12, 1986 lifting injuries. Both also noted appellant's symptom magnification/fabrication, his continuing

[3] *Corlisia L. Sims (Smith)*, 46 ECAB 172 (1994); *Harold S. McGough*, 36 ECAB 332 (1984).

[4] *See Gary R. Sieber*, 46 ECAB 215 (1994); *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

disability behavior, and his inconsistent examination results. Both physicians opined that appellant could return to full-time employment on a regular basis. The Board notes that these 1995 opinions are additionally consistent with the 1987 opinion of Dr. Marar, also a Board-certified orthopedic surgeon, who opined that appellant's congenital transitional vertebra and the accompanying spondylolysis were incidental findings and that appellant could return to work to a light-duty assignment at that time. As all three of these physicians, are medical doctors specializing in orthopedics with Board certification, the Board notes that their opinions are of great probative value, as the subject addressed is within their unique areas of medical expertise.[5]

The only evidence supporting appellant's claims of continuing disability was provided by his chiropractor. Section 8101(2) of the Federal Employees' Compensation Act[6] provides that the term "physician," as used therein, "includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist, and subject to regulation by the Secretary."[7]

Without diagnosing a subluxation from x-ray, a chiropractor is not a "physician" under the Act and his opinion on causal relationship does not constitute competent medical evidence.[8] The Board notes that as Dr. King did not examine appellant, did not obtain x-rays and did not diagnose a subluxation as demonstrated by x-ray to exist, he is not considered to be a physician under the Act and his opinion does not constitute competent medical evidence. Therefore, his report has no probative value whatsoever and need not be considered.

Dr. Norton does in some of his reports diagnose chronic lumbar strain subluxation of L5. The Board notes, however, that multiple other diagnoses are also given, most all of which have not been accepted by the Office as having been employment related. The unaccepted diagnoses given include moderate severe lumbalgia/ joint instability/ splinting spasm/ antalgic posture/ mobility loss/ limping gait (inability to bare weight normally on right leg), radicular syndrome including right rump and leg pain and paresthesia, and right and left leg cramps. Any disability due even in part to any of these unaccepted diagnoses would not be compensable under the Act, and would not be the basis for continuing compensation.

In his June 6, 1995 report, Dr. Norton did diagnose a "chronic lumbosacral sprain subluxation" and also noted that appellant had a preexisting congenital defect of lumbarization, but failed to differentiate between the vertebral level involved in the supposed chronic lumbosacral sprain subluxation and the level of the preexisting congenital forward displacement subluxation with which appellant was born. This diminished the probative value of his report. Further, although opining that appellant was dependent upon manual manipulation for pain

[5] *Mary S. Brock*, 40 ECAB 461 (1989) (Opinions of physicians who have training and knowledge in a specialized medical field have greater probative value concerning medical questions peculiar to that field than the opinions of other physicians).

[6] 5 U.S.C. § 8101(2).

[7] *See* 20 C.F.R. § 10.400(e) (defining reimbursable chiropractic services); *see also Jack B. Wood*, 40 ECAB 95 (1988).

[8] *See generally Theresa K. McKenna*, 30 ECAB 702 (1979).

control and that rehabilitation would be difficult, Dr. Norton failed to present any objective evidence of continuing disability. Consequently, this report does not support that appellant had any ongoing objective disability due to his December 12, 1986 injury.

In his September 6, 1995 report, Dr. Norton merely reiterated the contents of his previous report and opined that appellant's disability was continuous. No objective indices of disability were identified. He described appellant's condition as "significant chronic lumbar sprain with associated radiculopathy." No subluxation was noted. Consequently this report also fails to support that appellant had any ongoing objective disability due to his December 12, 1986 injury.

As no further medical evidence has been submitted by appellant demonstrating that as of October 18, 1995 appellant had any ongoing or continuing objective disability due to his December 12, 1986 employment injury, the weight of the medical evidence is constituted by the two complete and well-rationalized reports of Drs. Mariotti and Rao, who both found that appellant had no objective evidence of disability and no objective evidence of the existence of the previously accepted conditions and who opined that appellant could return to work on a full time basis as a draftsman.

As the weight of the medical evidence establishes that appellant no longer has objective evidence of his accepted employment conditions, has no ongoing objective disability due to his accepted conditions, and can return to work full time as a draftsman, the Office properly terminated his compensation benefits.

Accordingly, the decision of the Office of Workers' Compensation Programs dated October 18, 1995 is hereby affirmed.

Dated, Washington, D.C.
May 20, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member