

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID L. COSBY and DEPARTMENT OF THE ARMY,
Pueblo, Colo.

*Docket No. 97-200; Submitted on the Record;
Issued October 9, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant has established that his current back condition is causally related to his accepted employment injury.

In the present case, the Office of Workers' Compensation Programs accepted that appellant, a general support worker, sustained a lumbar strain as a result of placing ammunition boxes and cans on pallets and banding them in the performance of duty on September 3, 1992. On February 7, 1994 appellant filed a notice of recurrence of disability alleging that the back condition he sustained on September 3, 1992 had worsened.¹

Following a computerized tomography (CT) scan and a myelogram performed in February 1994, appellant was diagnosed by Dr. Gerald D. Reilly, a Board-certified neurosurgeon, as having a herniated disc at L4-5 with L5 radiculopathy. Appellant underwent a laminectomy at L4-5 on the left, excision of herniated L4-5 disc, exploration of L5-S1 and foraminotomy of L5-S1 on the left on October 31, 1994. Appellant's treating physicians Dr. Gary Parks, Board-certified in internal medicine, and Dr. Reilly submitted reports to the record wherein they opined that appellant's September 3, 1992 employment injury caused a lumbar sprain and injury to his L4-S1 disc, sufficient to cause an eventual rupture of the disc.

The Office thereafter referred appellant to a second opinion physician, Dr. David L. Crosson, a Board-certified orthopedic surgeon. Appellant was examined by Dr. Crosson on April 6, 1994. Following receipt of the second opinion physician's report, the Office determined that a conflict existed in the medical opinion evidence and referred appellant to Dr. Richard Talbott, a Board-certified orthopedic surgeon, for an impartial medical evaluation.

¹ The record indicates that appellant's September 1992 claim form was not forwarded to the Office, therefore, the Office only began development of the claim after the February 7, 1994 notice of recurrence of disability was filed.

The Office denied appellant's claim by decision dated June 15, 1995 on the grounds that the evidence of record did not support a causal relationship between appellant's current condition and his accepted injury. The denial of appellant's claim was affirmed by decision of an Office hearing representative dated July 29, 1996. The Board in reviewing the hearing representative's decision dated July 29, 1996 finds that this decision fully and accurately sets forth the facts of the case as presented in the record. The Board hereby adopts the factual recitation presented in the July 29, 1996 decision.

The Board has duly reviewed the case record and finds that evidence of record supports a finding that appellant's September 2, 1992 employment injury caused a lumbar sprain and temporary aggravation of preexisting degenerative disc disease. The evidence of record also supports a finding that appellant's temporary aggravation of preexisting degenerative disc disease and lumbar sprain ceased by August 2, 1993. Finally, the Board finds that the evidence of record does not establish that appellant's herniated lumbar disc condition was causally related to the September 2, 1992 employment injury.

The Board finds that the Office properly determined that a conflict existed in the medical opinion evidence between appellant's treating physicians, Drs. Parks and Reilly, and the Office's second opinion physician, Dr. Crosson, as to whether appellant's current back condition was causally related to the accepted back injury. The Office therefore properly referred appellant to Dr. Talbott for an impartial medical evaluation.

The Board notes that the Office hearing representative in his decision dated July 29, 1996 found that Dr. Crosson's reports were confusing, conflicting and without probative value with regard to the issue under consideration. The Office hearing representative thus found that no conflict existed in the medical opinion evidence at the time the case was referred to Dr. Talbott. The Office hearing representative concluded that while Dr. Talbott was not an impartial medical specialist, his report was based upon a proper factual background, was well rationalized, and did constitute the weight of the medical evidence.

The Board finds that Dr. Crosson's reports were not internally consistent or conflicting and were of probative value. Dr. Crosson explained in his reports dated April 6, 1994 and March 14, 1995 that appellant had a preexisting condition of congenital deformity of L5-S1 with occult spina bifida. Dr. Crosson stated that as a result of the September 3, 1992 injury appellant sprained his back and aggravated his congenital spina bifida. Dr. Crosson stated that as of the time he examined appellant, appellant still had residuals of the back sprain and aggravation of spina bifida. Dr. Crosson opined, however, that he believed appellant had reached maximum medical improvement of these conditions, that appellant no longer required medical treatment, and that appellant could return to his regular work without restriction. Finally, Dr. Crosson noted that the residuals of the conditions he diagnosed had caused appellant to sustain an 11 percent permanent impairment. Dr. Crosson's opinion that appellant had residuals of the employment injury, which caused permanent impairment, but which did not disable appellant or require further medical treatment is not in and of itself inconsistent or invalid. Dr. Crosson's medical opinion in this regard, in this case, is a valid medical opinion and must be accepted as such. As Dr. Crosson did not causally relate appellant's current disabling condition, the herniated disc, to his employment injury, as had appellant's treating physicians, the Office properly

determined that a conflict existed in the medical opinion evidence between appellant's treating physicians and Dr. Crosson which required that appellant be referred to an impartial medical specialist.

Section 8123 of the Federal Employees' Compensation Act provides, "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."²

The Board finds that Dr. Talbott's report, as that of the impartial medical specialist, is entitled to great weight and therefore constitutes the weight of the medical evidence.

Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.³

Dr. Talbott in his report dated May 23, 1995 carefully reviewed appellant's history of injury, as well as his medical history, including the employing establishment's health unit progress notes. Dr. Talbott extensively related his findings upon physical examination. Dr. Talbott thereafter explained that appellant probably had an acute lumbar strain related to overuse at work, with the actual onset of severe pain when he arose from a seated position while attending a "Hispanic Heritage" function on September 3, 1992. Dr. Talbott explained that appellant reached maximum medical improvement by August 2, 1993 as he was seen at the health clinic on that day at which time it was noted that "hip pain okay," but no back complaints were noted. Dr. Talbott stated that appellant was not seen for any back or lower extremity complaints thereafter until January 26, 1994. Dr. Talbott further explained that the September 1992 incident did cause an aggravation of appellant's preexisting degenerative disc disease; however, the aggravation was temporary and ceased on August 2, 1993. Dr. Talbott noted that appellant was in a stable and functional state until the end of 1993, despite the continued presence of the underlying condition. Regarding the herniated disc condition, Dr. Talbott stated that the herniated disc diagnosed in 1994 was a common sequela of degenerative disease and that he suspected the disc herniation would have occurred even without the 1992 work injury. Finally, Dr. Talbott explained that appellant's surgical treatment of the herniated disc condition was appropriate for the condition and that appellant was unable to currently perform his regular work. Dr. Talbott opined that the surgical procedure and appellant's current disability were caused by the preexisting degenerative disc disease and were not related to the work injury. As Dr. Talbott's opinions were based on a proper factual and medical background and were well rationalized, they must be given special weight.⁴

The Board notes that on appeal appellant's representative alleges that the hearing representative misinterpreted factual and legal arguments presented. The Board has reviewed

² 5 U.S.C. § 8123.

³ *Harrison Combs, Jr.*, 45 ECAB 716 (1994).

⁴ *Id.*

the hearing representative's July 29, 1996 decision and the Board concurs with and adopts the hearing representative's findings regarding the arguments made by appellant's counsel, with the exception previously stated. The Board finds that the Office properly determined that a conflict did exist in the medical opinion evidence which required referral of the case record to Dr. Talbott for an impartial medical evaluation. The Board also notes that the record does not reflect that the Office has accepted temporary aggravation of degenerative disc disease, ceasing August 2, 1993. This diagnosis, temporary aggravation of degenerative disc disease ceasing August 2, 1993, was supported by Dr. Talbott's report and shall be accepted by the Office as caused by appellant's September 3, 1992 employment injury.

The Board therefore affirms the decision of the Office of Workers' Compensation Programs dated July 29, 1996 as modified.

Dated, Washington, D.C.
October 9, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member