

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of OLIVER JOHNNY IRVIN and DEPARTMENT OF THE ARMY,
ARMY CORPS OF ENGINEERS, Seattle, WA

*Docket No. 98-267; Submitted on the Record;
Issued February 15, 2000*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly rescinded acceptance of appellant's cervical and lumbar subluxations; and (2) whether appellant sustained a recurrence of disability causally related to his August 4, 1992 employment injury.

On August 4, 1992 appellant, then a 48-year-old laborer, sustained injury to his low back and neck while in the performance of duty. His claim was accepted for a back strain and subluxations of the cervical and lumbar spine. Appellant was treated by Dr. Bonnie D. Bliss, a chiropractor, who diagnosed a vertebral subluxation complex with sprain of C1, 2, 5, T2 and L5 based on x-rays of August 5, 1992.¹ Appellant returned to part-time light duty on August 25, 1992 and to full-time light-duty work on October 7, 1992.

On October 27, 1992 the Office referred appellant for examination to Dr. Warren J. Adams, a Board-certified orthopedic surgeon. In a November 25, 1992 report, Dr. Adams reviewed appellant's history of injury and treatment records. He reviewed the August 19, 1992 MRI scan and the August 5, 1992 lumbar x-rays obtained by Dr. Bliss, noting there were no cervical films from Dr. Bliss available for comparison. He noted appellant's complaint of discomfort in the left posterior superior iliac spine and indicated that appellant continued under chiropractic treatment with Dr. Bliss and was performing light-duty work. Dr. Adams noted that appellant did not demonstrate consistent findings on physical examination. He indicated that appellant reported having complete resolution of his cervical area discomfort and that his only complaint was of pain to the left lower extremity. Dr. Adams found, however, that he could not make any objective findings based in the medical records, diagnostic testing, or on physical examination which were sufficient to cause appellant's subjective complaints. He

¹ A magnetic resonance imaging (MRI) scan obtained on August 19, 1992 found no herniation of the cervical disc at any level with slight spur formation at C5-6 and a slightly accentuated lordotic curve. The lumbar scan revealed four vertebral bodies with a fifth transitional vertebral body with a small disc bulge at L4-5.

opined that appellant had no neurological or orthopedic findings due to the accepted injury, which would preclude him from returning to his regular work.

By decision dated December 23, 1992, the Office terminated appellant's compensation, finding that the weight of medical opinion was represented by the report of Dr. Adams and established that appellant had no residual disability causally related to the August 4, 1992 injury.

Appellant requested a hearing before an Office hearing representative and submitted a January 6, 1993 report from Dr. Bliss. She reviewed appellant's history of injury and treatment for lumbar and cervical subluxations, accompanied by lumbar nerve radiculitis. Dr. Bliss noted that appellant's injury was to the soft tissue of the low back, which she said would take longer to heal than bone tissue. Dr. Bliss recommended that appellant continue under chiropractic treatment for another year.

By decision dated June 28, 1993, an Office hearing representative set aside the December 23, 1992 decision. The case was remanded to obtain further opinion from Dr. Adams as to whether appellant continued to have subluxations of the spine and whether further chiropractic care was necessitated due to residuals of the August 4, 1992 injury.

On remand, the Office requested Dr. Adams to provide an opinion on whether appellant continued to have subluxations of the spine. By report dated August 11, 1993, he noted that, during his November 25, 1992 examination, Dr. Adams had obtained cervical and lumbar x-rays of appellant and found the cervical and lumbar spinal alignment to be normal. He opined that appellant did not continue to have any subluxations of the spine causally related to the injury of August 4, 1992.

In an October 5, 1993 decision, the Office terminated appellant's compensation, finding that the reports from Dr. Adams established that all residuals of the employment injury had ceased no later than November 25, 1992. This decision, however, was set aside by an Office hearing representative on February 16, 1995.² The hearing representative found a conflict in medical opinion between Dr. Bliss and Dr. Adams as to whether appellant continued to have subluxations of the spine causally related to the August 4, 1992 injury.

The Office obtained the August 5, 1992 x-rays of Dr. Bliss and the November 25, 1992 x-rays taken by Dr. Adams and referred the case to Dr. C. Keith Keyser, a Board-certified radiologist, to resolve the conflict in medical opinion. In an April 14, 1995 report, Dr. Keyser reviewed the statement of accepted facts and Office definition of subluxation. He reviewed the August 5, 1992 x-rays of Dr. Bliss and diagnosed four lumbar vertebral segments with partial lumbarization of S1. He found no gross slippage of one lumbar vertebral body with respect to the next and no gross disc space narrowing. He noted that the lumbar lordosis appeared somewhat exaggerated. Dr. Keyser noted that the oblique view revealed the spinous processes of the lumbar spine to be off-center, corresponding with the Office's definition of subluxation; however, he opined that the processes viewed on the August 5, 1992 x-ray were not acute

² At the hearing, appellant submitted x-rays of July 28, 1993, obtained by Dr. Susan Vlasik, a chiropractic radiologist, which diagnosed subluxations constant between 1992 and 1993.

(traumatic) in origin but would have taken many months to develop. Dr. Keyser also reviewed the November 25, 1992 x-rays of Dr. Adams, noting that they were better penetrated and more clearly and sharply visualized. Dr. Keyser noted there was no apparent change in alignment of the lumbar vertebral segments, noting mild facet joint degenerative changes but no sign of a pars defect or destructive lesion of the bone. Review of the cervical spine demonstrated no gross slippage of one vertebral segment with respect to the next, with degenerative spurring apparent about the C4-5 segment. Dr. Keyser noted there were no comparison views from the August 1992 examination pertaining to the cervical spine.

In a May 5, 1995 decision, the Office found that the report of Dr. Keyser established that appellant had recovered from the effects of the August 4, 1992 employment injury. The Office noted that the subluxation described by Dr. Keyser was noted to be chronic in nature and, therefore, preexisted the August 5, 1992 employment injury.

Appellant requested review by an Office hearing representative. By decision dated October 2, 1995, a second Office hearing representative set aside the May 5, 1995 decision. The hearing representative remanded the case for clarification of Dr. Keyser's opinion as to whether the subluxation shown in the August 5, 1992 x-ray was causally related to the August 4, 1992 employment injury.

On April 10, 1996 appellant submitted a claim for a recurrence of disability commencing July 16, 1993 causally related to his August 4, 1992 employment injury.

In a June 23, 1994 report, Dr. Larry D. Smith, an osteopath, reviewed appellant's history of injury and medical treatment. Dr. Smith set forth his findings on physical examination, noting appellant's complaint of back pain with bilateral leg numbness. Dr. Smith noted that appellant had previously undergone a chemonucleolysis at L5-S1 on October 23, 1984. He reviewed appellant's diagnostic tests, noting that the MRI scan revealed a small disc bulge but did not appear to impinge on the nerve roots or be the cause of appellant's radicular pain. Dr. Smith opined that appellant could work, subject to physical limitations of no heavy lifting over 50 pounds and reduced bending.

In a January 16, 1995 report, Dr. Cynthia Hahn, a neurosurgeon, noted that she examined appellant that date and obtained a history of injury relating back to 1984. Dr. Hahn listed her findings on examination, noting a pelvic tilt due to a foot drop and antalgia. She reviewed appellant's x-rays, noting degenerative disc changes particularly at L4-5 with some calcification seen in the interspace, in the facets at L4-5 and L5-S1, and the L4 vertebral body sacralized and fused to S1. Dr. Hahn noted that spinal stenosis was present on the films. She stated that appellant had an obvious L5 radiculopathy and weakness, which appeared to be a long-standing problem. Dr. Hahn noted that appellant would most likely need surgical intervention. In a February 6, 1995 report, she noted that appellant's MRI scan was read as showing no nerve root compression of the left L5 nerve root. Dr. Hahn noted bilateral recess narrowing with facet hypertrophy and sacralization of L5. Electromyogram studies, however, were reported as showing no evidence of denervating radiculopathy in the L5 or S1 nerve roots. She ordered a computerized axial tomography scan. In a February 20, 1995 report, she reported that further diagnostic confirmed facet hypertrophy and degenerative changes at both L4-5 and L5-S1 with a diffuse bulging disc at L4-5 and lateral left-sided disc rupture at L5-S1. Dr. Hahn recommended

that appellant proceed with a left L5 hemilaminectomy, L5 and S1 foraminotomies and a probable discectomy at L4-5.

In a report of May 4, 1995, Dr. Hahn noted that she had not seen appellant since the February 20, 1995 evaluation and addressed questions posed by appellant's attorney. She noted that she did not have a copy of the August 19, 1992 MRI scan to compare with the January 26, 1995 results and could not give an opinion on any difference between the studies. Dr. Hahn stated that appellant had related a history of an initial back injury in 1984 and indicated that the August 4, 1992 injury was an aggravation of his preexisting injury.

On June 16, 1995 Dr. Merle Janes stated his disagreement with Dr. Hahn's opinion in a letter to appellant's attorney. He opined that appellant's back pain was arising from damaged zygoapophyseal joints and recommended treatment by injection of the joints prior to any surgery. Dr. Janes reviewed the reports from several diagnostic tests and noted appellant's radiological condition had worsened, with a worsening of his facet arthritis between 1989 and 1994. He stated this change "could have been accelerated by the injury." Dr. Janes noted that appellant had a preexisting L5-S1 disc, treated in 1984 by a subtotal discectomy and stated it was highly unlikely the 1992 employment injury did no damage to appellant's back condition.

On remand, the Office requested Dr. Keyser to provide a supplemental opinion on the causal relationship of any subluxation to appellant's accepted injury. In a report dated August 21, 1996, Dr. Keyser again reviewed the x-rays and noted his findings. With regard to causal relationship, Dr. Keyser noted that all of the findings seen on the earlier chiropractic films appeared "chronic in nature, that is, at least several months in existence if not actually years."

By decision dated October 16, 1996, the Office noted that the findings made by Dr. Keyser from the August 5, 1992 x-rays had preexisted the August 4, 1992 employment injury as the physician addressed the chronic nature of the spinal findings, noting that they existed months to years prior to the date the films were taken. The Office found that appellant's subluxations were not caused by the August 4, 1992 injury. The Office also found that appellant did not establish a recurrence of disability causally related to the August 4, 1992 employment injury.

Appellant requested a hearing which was held on June 25, 1997. By decision dated September 8, 1997, the hearing representative affirmed the October 16, 1996 decision.

The Board finds that the Office met its burden of proof to rescind acceptance of appellant's subluxations condition.

The Board has upheld the Office's authority to reopen a claim at any time under the review authority provided by section 8128(a) of the Federal Employees' Compensation Act.³ Where supported by the evidence, the Office may set aside or modify a prior decision and issue a new decision.⁴ The Board has noted, however, that the power to annul an award is not an

³ 5 U.S.C. § 8128(a).

⁴ *Eli Jacobs*, 32 ECAB 1147 (1981).

arbitrary one and that the Office has the burden to justify its action by establishing that its prior acceptance was erroneous through new or different evidence, legal argument and/or rationale.⁵

In the present case, the Office accepted that appellant sustained injury on August 4, 1992. Based on August 5, 1992 x-rays obtained by Dr. Bliss, a chiropractor, the Office accepted that appellant sustained subluxations of the cervical and lumbar spine.⁶ The Office referred appellant to Dr. Adams, a Board-certified orthopedic surgeon, who obtained November 25, 1992 x-rays of appellant's lumbar and cervical spine and found no subluxations of the spine. Based on this conflict of medical opinion, the Office properly referred the x-ray reports of record to Dr. Keyser, a Board-certified radiologist, for his review and evaluation. He provided several reports, in which he set forth his findings on review of the x-rays of August 5 and November 25, 1992. Dr. Keyser found that the lumbar x-rays of Dr. Bliss demonstrated off-center spinous processes, which corresponded with the Office's definition of subluxation.⁷ Dr. Keyser concluded, however, that the spinal changes visualized on x-ray were not acute, or traumatic, in origin but would have taken many months to develop. Based on his reports, the Office rescinded its acceptance of the subluxations as causally related to appellant's August 4, 1992 employment injury. The Board has held that where there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist to resolve the conflict in medical opinion.⁸ As the opinions and x-ray reports of Drs. Bliss and Adams were in disagreement, the Office properly referred the x-rays for evaluation by an impartial medical specialist. It is well established that where a case is referred to an impartial medical specialist, the opinion of such specialist must be given special weight when sufficiently well rationalized and based upon a proper factual background of the case.⁹ The Board finds that the weight of medical opinion is represented by the reports of Dr. Keyser, a Board-certified radiologist selected as the impartial medical specialist. His reports contain a thorough evaluation of the x-rays obtained in this case. While he noted a lumbar subluxation from the August 5, 1992 x-ray of Dr. Bliss, he explained that the condition was not of an acute origin as the subluxation visualized would take months to develop. Based on his reports, the Office properly found that appellant's August 4, 1992 employment injury did not cause the subluxation diagnosed by Dr. Bliss.

The Board also finds that appellant has not established that he sustained a recurrence of disability on or after July 16, 1993 causally related to his August 4, 1992 employment injury.

⁵ See *Shelby J. Rycroft*, 44 ECAB 795 (1993); *Bruce Wright*, 43 ECAB 284 (1991); *Alphonso Walker*, 42 ECAB 129 (1991).

⁶ The Office's federal regulations provide that a chiropractor may interpret his or her own x-rays to the extent as any other physician as defined under the Act. 20 C.F.R. § 10.400(e).

⁷ Subluxation is defined to mean an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae anatomically which must be demonstrable on any x-ray film to individuals trained in the reading of x-rays. 20 C.F.R. § 10.400(e).

⁸ See *Gertrude T. Zakrajsek (Frank S. Zakrajsek)*, 47 ECAB 770 (1996); 5 U.S.C. § 8123(a).

⁹ See *Roger Dingress*, 47 ECAB 123 (1995); *James P. Roberts*, 31 ECAB 1010 (1980).

Where an employee claims a recurrence of disability due to an accepted employment-related injury, he or she has the burden of establishing by the weight of the substantial, reliable and probative medical evidence that the disability is causally related to the accepted injury. This burden includes the necessity of furnishing evidence from a physician who, on the basis of a complete and accurate factual and medical background, concludes that the condition and disability is causally related to the employment injury and supports that conclusion with sound medical reasoning.¹⁰

In the present case, appellant submitted a claim on April 10, 1996 contending that he sustained a recurrence of disability commencing July 16, 1993 causally related to the August 4, 1992 employment injury. The Board finds, however, that the medical evidence submitted by appellant is not sufficient to establish his claim.

Dr. Smith's June 23, 1994 report, reviewed appellant's history of injury and noted his complaint of bilateral leg numbness. He noted that appellant had undergone a chemonucleolysis at L5-S1 in 1984. He also noted that an MRI scan revealed a small disc bulge but stated that it did not appear to impinge on the nerve roots. This report is not sufficient to establish that appellant had a recurrence of totally disability for work as of July 1993. Dr. Smith did not address whether appellant was disabled as of July 1993, noting only that he was limited to no heavy lifting of over 50 pounds. Therefore, the report of Dr. Smith is of diminished probative value.

Dr. Hahn examined appellant and also noted a history of injury back to 1984. She listed her findings on physical examination and discussed degenerative disc changes of the lumbar spine, for which appellant would require surgical intervention. While she noted in a May 4, 1995 letter to appellant's counsel that the August 4, 1992 injury was constituted an aggravation of appellant's preexisting back condition, Dr. Hahn provided no rationale explaining how the accepted 1992 injury caused or contributed to the degenerative changes of the spine discussed in her reports. While appellant contends the 1992 injury aggravated his degenerative disease, she noted that she did not have copies of the 1992 MRI scan to compare with that obtained in 1995 and could not address any difference between the studies. Further Dr. Hahn did not explain whether appellant was totally disabled for work as of July 1993 due to residuals of the 1992 employment injury. For this reason, her reports are of diminished probative value.

Dr. Janes expressed his disagreement with Dr. Hahn in a letter to appellant's attorney, stating that appellant's back pain was due to damage to the zygoapophyseal joints and recommended treatment consisting of injections. He opined that appellant's facet arthritis could have been accelerated by the 1992 employment injury. Dr. Janes did not address appellant's disability or capacity for employment as of July 1993, the period of the recurrence of disability claim. Nor did he provide any medical explanation for his stated conclusion that the 1992 injury could have accelerated the facet arthritis process. Dr. Janes opinion is speculative in nature and of diminished probative value. For this reason, the Office properly found that appellant failed to establish a recurrence of disability commencing July 1993 causally related to the August 4, 1992 employment injury.

¹⁰ *Jose Hernandez*, 47 ECAB 288 (1996).

The September 8, 1997 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.
February 15, 2000

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member