

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CALVIN WARD and U.S. POSTAL SERVICE,
POST OFFICE, Cincinnati, OH

*Docket No. 99-2369; Submitted on the Record;
Issued October 25, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation for work-related lumbosacral strain.

The Office accepted that appellant, then a 46-year-old window clerk, sustained a lumbosacral strain with radiation into the right lower extremity on April 9, 1979 while picking up a tray of mail.¹ Appellant stopped work immediately and received compensation beginning July 1, 1979 for appropriate periods of disability. Appellant did not return to work.

In a decision dated December 23, 1980, the Office terminated appellant's benefits effective January 1, 1981 on the grounds that his disability resulting from his accepted injury had ceased in October 1980.

Appellant requested a hearing and by decision dated May 26, 1981, the Office hearing representative found that the Office did not meet its burden of proof in terminating appellant's benefits because of a conflict in the medical opinion evidence.

The hearing representative determined that the termination of appellant's compensation had been based on the opinion of Dr. Edmond Schweitzer, a Board-certified orthopedist, in a report dated July 11, 1980 and the district medical adviser's opinion provided in a memorandum dated November 25, 1980. Dr. Schweitzer reported that, other than some limitation of motion in his back, appellant had no real objective findings to substantiate a permanent claim of disability. He further reported that his partner, Dr. Gregory Fisher, a Board-certified orthopedist, also examined appellant and agreed that appellant's problem was musculoligamentous in nature, which should heal in time. Dr. Schweitzer opined that Dr. Fisher's assessment that appellant

¹ Appellant also sustained two previous injuries to his lower back on November 27, 1968 and June 10, 1976 while performing work duties. The Office accepted both claims.

should be able to return to work in three to four months was “very generous” and that he expected appellant should be able to return to work on October 1, 1980.

Dr. Schweitzer concluded that he saw no physical or radiological signs that would indicate that appellant should have any form of permanent disability and that appellant’s recommended period of disability would give him “ample opportunity” to rehabilitate from the musculoligamentous sprain and resume his duties. The district medical adviser concurred with the opinions offered by Drs. Schweitzer and Fisher.

However, periodic medical reports from appellant’s attending physician, Dr. John Levitas, a Board-certified orthopedist, indicated that appellant continued to be disabled for work as a result of his lumbosacral strain. In an April 16, 1979 report, Dr. Levitas related that on April 9, 1979 while lifting a 30-pound weight at work, appellant felt a sudden pain in his lower back region. He noted that appellant had experienced similar back difficulties at least five previous times, had missed time from work and had sought treatment. Dr. Levitas diagnosed appellant with lumbosacral strain with right lower radiation and advised him to remain off work for approximately six weeks.

In subsequent reports, Dr. Levitas stated that appellant’s total disability continued with consecutive periods of disability listed in three- to eleven-month intervals. In a report dated January 29, 1981, he opined that appellant had not improved at all since he was first seen on April 12, 1979 and that he was unable to engage in any type of gainful employment for an indefinite period. Consequently, the hearing representative directed the Office to reinstate appellant’s compensation benefits retroactive to January 1, 1980 and refer appellant to an impartial orthopedic specialist to resolve the conflict in the medical opinion evidence.

In a decision dated March 11, 1983, the Office terminated appellant’s benefits effective April 20, 1983. The Office relied on medical reports from Dr. Otto Salsbery, a Board-certified orthopedist, selected to act as an impartial medical examiner, dated which concluded that appellant had no disability resulting from a back condition and that appellant was capable of performing the duties of his former position and reports from the Office medical adviser who concurred with Dr. Salsbery’s findings.

Dr. Salsbery, in his December 9, 1982 report, stated that, during the examination, appellant was uncooperative and refused to flex his lumbar spine or submit to x-rays. Dr. Salsbery did determine that appellant complained of pain when his leg was at 90 degrees in a straight leg raising position and that appellant had no pain on the right side. He further determined that appellant had normal motor power.

Dr. Salsbery concluded, “I feel that [appellant] is not really disabled with his back. I can[no]t say if he has any partial disability. With [appellant] working 21 years since the original accident with only occasional pain in his back, which many people have, I feel [appellant] has very little going on in his back. I feel that, if he really had something, he would be willing to demonstrate it during examination.”

In a report dated January 1, 1983, the Office medical adviser indicated that Dr. Salsbery was unable to demonstrate any objective evidence of disability, but noted, however, that the

work restrictions he outlined in an accompanying form did not resolve the issue of whether appellant's work limitations were related to his injury. The Office subsequently requested a supplemental report regarding the causal relationship of any orthopedic disability appellant might have as a result of his accepted injury.

In his supplemental report dated February 18, 1983, Dr. Salsbery reviewed his previous examination of appellant and appellant's job description with the employing establishment and determined that appellant was capable of performing the physical requirements of the window clerk position. He further opined that appellant did not have a disability with regard to his back and that he saw no reason why appellant would be unable to fulfill his position as a window clerk. The Office medical adviser in a February 25, 1983 report, reviewed Dr. Salsbery's original and supplemental report and opined that appellant had a disability that ceased on December 7, 1982 and that he was capable of working as a window clerk.

Based upon the reports of Dr. Salsbery, the impartial medical examiner, and the Office medical adviser, the Office concluded in its March 11, 1983 decision that the medical evidence had established that appellant's disability had ceased and that he was capable of performing the duties of his former position.

Appellant disagreed with the March 11, 1983 decision and requested an oral hearing, which was held August 18, 1983. At the hearing, appellant testified that he had experienced continuing disability as a result of his employment injury of April 9, 1979 and submitted a medical report in support of his claim from Dr. Levitas. He opined in the May 17, 1983 report that, based on appellant's age, duration of symptomatology, lack of improvement to date and physical findings, appellant's condition rendered him completely unfit for employment, which could be expected to persist indefinitely.

By decision dated February 6, 1984, the hearing representative found that the medical evidence established that appellant was not disabled from work as a result of his accepted injury and, therefore, affirmed the Office's March 11, 1983 decision. The Office found that the weight of the medical evidence represented by reports of Drs. Schweitzer, Fisher and Salsbery established that appellant was not disabled for work as a result of his accepted injury.

In a letter received June 26, 1996, appellant requested reconsideration of the February 6, 1984 decision and submitted a narrative statement along with a magnetic resonance imaging (MRI) scan and an electromyography (EMG) report dated May 8, 1996. Appellant's MRI revealed a short segment of moderate levoconvex scoliosis centered in the lower lumbar spine with moderate lumbar spondylosis from L3-4 through L5-S1, resulting in an acquired spinal canal stenosis. It further revealed a small paramedian focal disc herniation at the L4-5 level and bilateral narrowing of the neural foramina at the lower three levels, most prominent at levels L4-5. The EMG report noted bilateral paraspinal changes compatible with stenosis, central disc and multi-foraminal encroachment.

Appellant also submitted a medical report dated April 4, 1996 from Dr. Steven Wunder, a physician certified in physical medicine and rehabilitation, who related appellant's history of chronic back pain and previous employment injuries. Dr. Wunder diagnosed chronic,

nonspecific back pain. He did not indicate whether appellant was disabled from work as a result of his accepted work injury of April 9, 1979.

By decision dated July 10, 1996, the Office found that the evidence submitted on reconsideration was insufficient to warrant a merit review of the February 6, 1984 decision.

Appellant then appealed to the Board for review of the Office's July 10, 1996 decision. In a decision dated August 14, 1998, the Board held that the Office improperly refused to reopen appellant's claim for merit review, as the notice of the one-year time limitation for requesting reconsideration was insufficient. The Board, therefore, set aside the July 10, 1996 decision and remanded the case to the Office.

By decision dated September 11, 1998, the Office denied modification of its prior decision following a merit review of the record.

The Board finds that the Office met its burden of proof in terminating appellant's compensation for his work-related lumbosacral strain.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.² 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.³

In this case, there was a conflict in the medical opinion evidence between Dr. Levitas and Drs. Schweitzer and Fisher as to whether appellant's disability related to the accepted lumbosacral strain injury had ceased. In numerous treatment notes, Dr. Levitas indicated that appellant had continuing complaints of pain in his lower back region. He diagnosed lumbosacral strain with right lower radiation and opined that appellant was disabled from work. Conversely, Dr. Schweitzer found that appellant had no physical or radiological signs to substantiate a permanent claim of disability and reported that his partner, Dr. Fisher, who also examined appellant, agreed that appellant sustained a musculoligamentous sprain that should heal in approximately three to four months.

Section 8123(a) of the Federal Employees' Compensation Act provides that, "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."⁴

² *Harold McGough*, 36 ECAB 332 (1984).

³ *Jason C. Armstrong*, 40 ECAB 907 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1929).

⁴ 5 U.S.C. § 8123.

Given the conflict in the medical evidence, the Office properly referred appellant to an impartial physician for a medical evaluation. Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently reasoned upon a proper factual background, must be given special weight.⁵

In a report dated December 9, 1982, Dr. Salsbery opined that there was no objective medical evidence from which to conclude that appellant had any continuing disability related to appellant's accepted lumbosacral strain. Dr. Salsbery also reported that appellant complained of some leg pain but that appellant had no pain on the right side and had normal motor power. He noted that appellant had only occasional pain in his back over the past 21 years of work and that, if a disabling back condition were present, it would have been demonstrated on examination.

In a supplemental report dated February 18, 1983, Dr. Salsbery opined after reviewing appellant's previous examination and his job description that appellant had no disability with regard to his back and that he was capable of performing the physical requirements of the window clerk position. The Office medical adviser in a February 25, 1983 report reviewed Dr. Salsbery's original and supplemental report and opined that appellant's disability had ceased on December 7, 1982 and that he was capable of working as a window clerk.

The Board considers the reports of Dr. Salsbery to be thorough and well rationalized, supported by the normal objective evidence and based on accurate medical and factual history. The Board, therefore, finds Dr. Salsbery's opinion entitled to special weight.

Appellant submitted a report from Dr. Levitas dated May 17, 1983, subsequent to Dr. Salsbery's original and supplemental report, which stated that, based on appellant's age, duration of symptomatology, lack of improvement to date and physical findings, appellant was unfit for employment. This report is insufficient to overcome the weight accorded Dr. Salsbery's report or to create a new conflict with it as Dr. Levitas was on one side of the conflict that Dr. Salsbery was selected to resolve.⁶

Consequently, because the reports of Dr. Levitas are not sufficiently reasoned to overcome the opinion of the impartial medical specialist, the Board concludes that the Office met its burden of proof in terminating appellant's compensation benefits.

⁵ *Roger Dingess*, 47 ECAB 123 (1995).

⁶ *See Dorothy Sidwell*, 41 ECAB 857, 874 (1990).

The decision of the Office of Workers' Compensation Programs dated September 11, 1998 is affirmed.

Dated, Washington, DC
October 25, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member