U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH M. ALTIERI and U.S. POSTAL SERVICE,
POST OFFICE, Conshohocken, PA

Docket No. 99-1679; Submitted on the Record;
Issued September 13, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs has met its burden of proof to justify termination of appellant's compensation benefits effective January 5, 1998.

On October 8, 1996 appellant, then a 43-year-old dispatch mail clerk, was manually loading containers of mail when he felt a pulled muscle in his lower back and pain in his left leg. Appellant stopped work on October 11, 1996 and returned to light-duty status on October 15, 1996. The Office accepted the claim for lumbar strain. Appellant was paid appropriate compensation.

Accompanying his claim, appellant submitted treatment notes from Dr. James N. Nutt, a Board-certified orthopedic surgeon, dated November 7 to December 12, 1996 as well as several duty status reports. Dr. Nutt's treatment notes indicated a diagnosis of lumbar strain and that appellant was to continue on limited-duty status.

Thereafter, appellant submitted various medical records from Dr. Nutt noting that his employment injury remained partially disabling. He indicated appellant was undergoing physical therapy for the diagnosed condition of lumbar strain.[1] A magnetic resonance imaging (MRI) report of the lumbar spine dated December 14, 1996 was submitted and showed no evidence of a disc herniation or an obvious fracture. Dr. Nutt indicated that x-rays of the back showed Grade I spondylolisthesis and spondylolysis at L5. Also submitted was a report from Dr. Evan S. Kovalsky, a Board-certified orthopedic surgeon, who examined appellant at the request of Dr. Nutt. In a February 2, 1997 report, Dr. Kovalsky indicated appellant had a history of a prior employment injury to his back in 1984. He diagnosed appellant with spondylolysis of the L5 and spondylolisthesis, Grade I L5-S1. Dr. Kovalsky found no neuropathy or radiculopathy at this time.

[1] The Office indicated in a letter dated March 27, 1997 that a nurse was assigned to appellant to assist him in his recovery.

On April 17, 1997 the Office referred appellant for a second opinion to Dr. Steven Valentino, an osteopath. The Office provided Dr. Valentino with appellant's medical records, a statement of accepted facts as well as a detailed description of appellant's employment duties.

In a medical report dated April 17, 1997, Dr. Valentino indicated that he reviewed the records provided to him and performed a physical examination of appellant. He noted that appellant stated that he had an injury to his low back in 1984. Dr. Valentino reviewed the diagnostic studies and noted that the MRI dated December 14, 1996 was normal. He also reviewed the x-ray report of December 12, 1996, which revealed a first degree spondylolisthesis at L4-5. Dr. Valentino noted the February 12, 1997 bone scan revealed no gross abnormality. He opined that any spondylolisthesis was not causally related to the employment injury of October 8, 1996 nor did the employment duties cause exacerbation of this condition. Upon physical examination, Dr. Valentino noted that the spine was normal without evidence of spasm. He indicated that testing on examination essentially revealed no abnormalities. Dr. Valentino opined that there were no objective findings related to appellant's complaint of lumbar pain. He determined that appellant was fully recovered from the lumbar strain of October 8, 1996. Dr. Valentino noted appellant's current condition was that of preexistent lumbar spondylolysis with minimal L5-S1 spondylolisthesis which was not related to the employment injury of October 8, 1996. However, he noted that because of the preexistent spondylolysis appellant should be restricted to light duty with limited bending.

In a June 5, 1997 treatment note, Dr. Nutt noted reviewing Dr. Valentino's report and advised that he disagreed with Dr. Valentino regarding whether residuals of the October 8, 1996 injury had resolved fully. Dr. Nutt indicated that appellant could continue working light duty.

The Office determined that a conflict of medical opinion had been established between appellant's attending physician, Dr. Nutt, who continued to give a diagnosis of lumbar strain and Dr. Valentino, the second opinion doctor, who concluded that appellant's employment-related condition had resolved.

To resolve the conflict appellant was originally referred to a referee physician, Dr. Seymour Shlomchik, a Board-certified orthopedic surgeon. However, the Office determined that the referral of appellant to Dr. Shlomchik was an administrative error as he previously served as an orthopedic consultant to the Office.[2] Therefore, the Office referred appellant to Dr. Robert Bachman, a Board-certified orthopedic surgeon, to resolve the conflict in medical opinion evidence.

In a medical report dated September 17, 1997, Dr. Bachman indicated that he reviewed the records provided to him and performed a physical examination of the appellant. He indicated that appellant stated he had an injury to his lumbar region 14 years ago. The physical examination revealed a normal cervical spine and upper extremities. The dorsolumbar spine revealed alignment as normal without palpable muscle spasm. The forward flexion was 70 percent with reversal of lumbar curvature, extension was 25 percent with right and left lateral bending of 25 degrees. The sitting straight leg raising was negative to 90 degrees bilaterally.

[2] The Office did not issue a decision in which it relied on Dr. Shlomchik's.

The lower extremity examination and neurological examination were within normal limits. Dr. Bachman determined that appellant had a preexisting condition of spondylolisthesis at L5-S1 Grade I. He opined that the current complaints were related to the preexisting spondylolisthesis at L5-S1 and unrelated to the employment-related injury of October 8, 1996. Dr. Bachman noted that the accepted lumbar strain would have resolved within two months. He further noted that there was no aggravation of the lumbar spondylolysis and spondylolisthesis due to the October 8, 1996 injury. Dr. Bachman concluded that there was no ongoing disability or impairment medically connected to the history of the employment injury of October 8, 1996. He opined that all continuing work restrictions were due to appellant's preexisting conditions.

On November 28, 1997 the Office issued a notice of proposed termination of compensation on the grounds that Dr. Bachman's report dated September 15, 1997 established no continuing disability as a result of the October 8, 1996 employment injury. The Office provided 30 days in which appellant could respond to this notice.

By letter dated December 16, 1997, appellant submitted a statement as well as medical evidence in response to the proposed termination of benefits. The medical records submitted consisted of progress notes from Dr. Nutt dated November 1996 to September 1997, many of which were previously of record which noted appellant's status.

By decision dated January 5, 1998, the Office terminated appellant's benefits effective January 5, 1998 on the grounds the weight of the medical evidence established that appellant had no continuing disability resulting from her October 8, 1996 employment injury.

By letter dated January 19, 1998, appellant requested a hearing which was held on September 23, 1998. Appellant testified that he sustained an initial injury to his back in 1984, the claim was accepted by the Office and he received appropriate compensation.[3] Appellant returned to full duty after one year. Appellant described the circumstances surrounding the incident of October 8, 1996 and indicated that he was on limited duty through April 1998, but currently worked only 16 hours per week. Appellant indicated he stopped work on June 15, 1998 for a two-month period due to a stress problem. The hearing representative advised appellant of the type of medical evidence needed and allowed 30 days for the submission of such evidence.

Appellant subsequently submitted x-ray reports of his lumbar spine dated March 7, 1984, a statement from Dr. Kovalsky dated October 7, 1997, as well as statement from Dr. Nutt dated December 17, 1997. The x-ray revealed no osseous or articulate abnormality with straightening of the lumbar lordosis suggestive of muscle spasm. The x-ray also indicated a shortening of the left lower extremity which produced a slight dextro scoliosis of the lumbar spine. The note from Dr. Kovalsky stated that appellant had preexisting spondylolysis at L5-S1 present prior to the October 8, 1996 injury, however, he concluded that there was no evidence of spondylolisthesis

[3] The earlier claim is not before the Board on this appeal.

until after the October 8, 1996 injury. Dr. Nutt's note indicated appellant developed spondylolysis and spondylolisthesis some time after 1984.[4]

By decision dated December 17, 1998, the Office hearing representative affirmed the prior decision on the grounds that the medical evidence did not establish a continuing employment-related condition.

The Board finds that the Office has met its burden of proof to terminate benefits effective January 5, 1998.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[5] After it has determined that an employee has a 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.[6]

In this case, the Office accepted that appellant sustained a lumbar strain on October 8, 1996 and paid appropriate compensation. The Office referred appellant for a second opinion to Dr. Valentino. The Office reviewed the medical evidence and determined that a conflict existed in the medical evidence between appellant's attending physician, Dr. Nutt, who disagreed with Dr. Valentino and that of his concerning whether appellant had any continuing work-related condition. Consequently, the Office referred appellant to Dr. Bachman to resolve the conflict.

Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.[7]

The Board finds that, under the circumstances of this case, the opinion of Dr. Bachman is sufficiently well rationalized and based upon a proper factual background such that it is entitled to special weight and establish that appellant's work-related condition has ceased.

Dr. Bachman reviewed appellant's history, reported findings, and noted that appellant sustained an injury to the lumbar region 14 years ago. Dr. Bachman's physical examination revealed no abnormalities neurologically, or of the cervical spine, upper extremities, lower extremities or dorsolumbar spine. He determined appellant had a preexisting condition of the spondylolisthesis at L5-S1 which was not caused or aggravated by the employment injury. Dr. Bachman concluded that appellant's current complaints were related to the preexisting

[4] Appellant filed an Equal Employment Opportunity Commission complaint against the employing establishment because it disallowed appellant 40 hours of permanent light-duty work. Appellant submitted excerpts from the complaint which referenced appellant's employment-related injury.

[5] *Harold S. McGough,* 36 ECAB 332 (1984).

[6] *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

[7] *Aubrey Belnavis*, 37 ECAB 206 (1985).

spondylolisthesis at L5-S1 and unrelated to the employment-related injury of October 8, 1996. He concluded that appellant had no ongoing disability or condition due to his work-related condition. Dr. Bachman opined that the accepted work injury likely resolved within two months.

After the Office properly terminated compensation benefits, the burden of proof was on appellant to show any continuing entitlement.[8] However, medical evidence submitted by appellant after termination of benefits either did not specifically address how any continuing condition was due to the October 8, 1996 work injury or duplicated evidence previously considered by the Office.

For these reasons, the Office met its burden of proof in terminating appellant's compensation benefits.

The decision of the Office of Workers' Compensation Programs dated December 17, 1998 is hereby affirmed.

Dated, Washington, DC
September 13, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member

[8] *See Beverly J. Duffey*, 48 ECAB 569 (1997).