

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CALVIN LOVETT and U.S. POSTAL SERVICE,
POST OFFICE, Fort Worth, TX

*Docket No. 00-1009; Submitted on the Record;
Issued April 2, 2001*

DECISION and ORDER

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

The issue is whether appellant's condition or disability beyond December 31, 1991 was causally related to his June 14, 1991 employment injury.

This case is on appeal for the third time. The Office of Workers' Compensation Programs accepted that appellant, then a 41-year-old postal clerk, sustained a lumbar strain in the course of his federal duties. After the June 14, 1991 employment injury, appellant returned to full-time regular duty on August 15, 1991; however, he claimed subsequent periods of disability due to the accepted lumbar strain.

By decision dated September 25, 1991, the Office denied appellant's claim for compensation benefits. Appellant requested a hearing before the Branch of Hearings and Review, and by decision dated April 28, 1992 an Office hearing representative affirmed the prior decision. He disagreed with the decision and filed requests for reconsideration. By decisions dated July 14 and September 10, 1992, the Office denied modification of the April 28, 1992 decision. By decision dated May 26, 1993, the Office denied appellant's application for review. On July 1, 1993 appellant requested review by the Board.

The Board issued a decision dated February 13, 1995 in which it determined that the evidence submitted by appellant did not establish disability related to his employment injury.¹ However, the Board found that there was sufficient evidence to require further development of the claim. The case was remanded to the Office for further development.

On remand, the Office referred appellant to Dr. Charles Davis, a Board-certified orthopedist, for a second opinion evaluation. The Office determined that Dr. Davis' May 5, 1995 report contained inconsistencies and did not provide adequate responses to the questions posed regarding appellant's claimed disability. The Office later referred appellant to Dr. Farooq Selod, a Board-certified orthopedic surgeon, who on July 31, 1995 diagnosed lumbosacral strain, degenerative changes or spondylosis of the lumbar spine and opined that appellant had no

¹ Docket No. 93-2038.

residuals of the employment injury. Dr. Seloq later clarified his opinion in a report dated September 21, 1995 that appellant could have had lower back pain for six months that would have kept him from resuming normal activities.

By decision dated October 18, 1995, the Office denied appellant's claim. Appellant subsequently requested a hearing before an Office hearing representative who, by decision dated March 27, 1996, determined that there was a conflict in the medical evidence and remanded the case back to the Office for resolution.

The Office referred appellant to Dr. Javier Arena, an orthopedist, to resolve the conflict. Dr. Arena in a report dated May 22, 1996 indicated that he found no objective evidence to correlate with appellant's symptoms. He reported that appellant had undergone an electromyogram, a magnetic resonance imaging (MRI) scan of the lumbosacral spine and a bone scan which yielded normal results. Dr. Arena opined that appellant displayed no evidence of disability and could return to work. In an addendum report dated June 26, 1996, he diagnosed low back syndrome and indicated that most back injuries require a period of recovery ranging from two to four months. Dr. Arena reiterated that he found absolutely no residual from the June 14, 1991 injury and that appellant could return to work.

By decision dated July 23, 1996, the Office denied compensation beyond December 31, 1991. Appellant requested an oral hearing, which was held July 18, 1997 and submitted additional evidence. By decision dated September 18, 1997, an Office hearing representative affirmed the July 23, 1996 decision. On October 21, 1997 appellant requested reconsideration and by decision dated October 29, 1997 the Office denied appellant's request for modification. He thereafter filed a second appeal with the Board.

On the second appeal, the Board issued a decision dated July 12, 1999 in which it set aside the September 18, 1997 Office denial of compensation.² The Board found that Dr. Arena's opinion was of limited probative value because it lacked sufficient rationale to establish that residuals of appellant's injury resolved within six months. The Board also found that the issue in appellant's case was not limited to lumbar strain, as the evidence suggested that a lumbar disc or possible fracture at L4 might also be attributed to the June 14, 1991 injury. Therefore, the Board determined that the issue in the case was whether appellant's diagnosed condition or disability after December 31, 1999 was causally related to the June 14, 1991 incident and remanded the case to the Office for further development.

On remand, the Office referred appellant to Dr. Daniel Foster, an osteopath, who examined appellant on September 14, 1999. In his report, Dr. Foster discussed appellant's medical history and treatment and summarized his clinical findings and opinion on the cause of appellant's back condition. He reported that appellant complained of chronic low back pain since his 1991 injury and noted that a bone scan was performed which suggested a possible L4 lumbar fracture. Dr. Foster further reported, however, that an electromyogram and MRI of the lumbar spine returned negative findings. He diagnosed lumbar strain/sprain, chronic low back syndrome, with functional deconditioning and psychosocial overlay. Dr. Foster further stated:

² Docket No. 98-462.

“I see no evidence in the medical records of lumbar disc or definitive fracture at the L4 level. The bone scan is not definitive for this fracture. I have reviewed his x-rays and can see no evidence of a vertebral fracture.

“Based on the medical evidence of record and my examination today, in my opinion, if this had been a lumbar strain/sprain, he would not have been disabled past December 31, 1991. However, his treatment has not been directed towards functional recovery, increase in functional capacity or return to work. At this time, he is totally disabled due to his debilitated deconditioning.

“The effects of his June 14, 1991 injury have not ceased as [sic] all. He is totally a dependent passive personality now with severe medical deconditioning.

“I do not believe that the June 14, 1991 [incident] was a worsening of a preexisting injury. There is no evidence, x-rays or other examination records indicating that he had a preexisting back problem.

“[Appellant] is markedly restricted without the capacity to return to work at this time.... There has been no MRI repeated over the past several years. Also, he should undergo a repeat bone scan and evaluation by a qualified fellow-trained spine surgeon. If [appellant’s] underlying pathology is only lumbar strain/sprain, there would be no reason to expect, with approximately one year of comprehensive multidisciplinary treatment, that he could not be returned to work at his preinjury status....”

On October 7, 1999 the Office advised Dr. Foster that his report outlining appellant’s back condition provided conflicting conclusions regarding the claimed disability. It further posed specific questions to Dr. Foster in order to clarify his medical opinion. The Office specifically asked Dr. Foster if a repeat MRI scan and bone scan were conducted and returned negative findings, would he conclude that appellant’s injury was simply a lumbar strain/sprain and that appellant was not disabled due to his back injury beyond December 1991. The Office also asked if appellant’s injury was simply a lumbar strain/sprain, would Dr. Foster conclude that the deconditioning which restricted his work activity beyond December 1991 was simply due to his own passive-dependent personality or other psychosocial factors. Dr. Foster responded to both questions posed by the Office by indicating “yes” on the October 7, 1999 inquiry letter.

The Office thereafter authorized that a repeat MRI scan and bone scan be performed.

In a report dated November 12, 1999, Dr. Jonathan Bard, a Board-certified radiologist, reported that a bone scan was conducted which showed diffuse abnormal tracer uptake within the L4 vertebral body, which correlates with the site of appellant’s previous injury. In a separate MRI report dated November 12, 1999, Dr. Bard indicated that the diffuse vertebral body uptake at L4 seen on the bone scan was not evident on the current MRI scan. He recommended that additional MRI sequences be performed, including sagittal STIR and post-gadolinium fat-saturated sagittal and axial sequences through L4 for more sensitive evaluation of the bone marrow abnormality.

In an addendum report dated December 3, 1999, Dr. Foster replied that he reviewed the bone scan and MRI reports performed by Dr. Bard and determined that the deconditioning that

restricted appellant's work activity beyond December 1991 was due to psychological factors. He further stated that additional MRI testing as recommended by Dr. Bard was unnecessary.

By decision dated December 15, 1999, the Office denied appellant's claim on the grounds that the weight of the medical evidence established that appellant had no disability for work beyond December 31, 1991 related to the June 14, 1991 injury. The Office determined that the opinion of Dr. Foster, a referee medical examiner, represented the weight of the medical evidence, concerning the nature, extent and duration of appellant's back condition after December 1991. The Office found that, although his initial conclusions were ambiguous, Dr. Foster's report was clear to the extent that there were no objective findings of ongoing back trauma. The Office further found that subsequent tests resolved the issue of whether appellant had an L4 vertebral fracture and that Dr. Foster's final conclusion was consistent with the lack of objective evidence of ongoing injury.

The Board finds that this case is not in posture for a decision.

When the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from the specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original report. When the impartial medical specialist's statement of clarification or elaboration is not forthcoming or if the specialist is unable to clarify or elaborate on the original report or if the specialist's supplemental report is also vague, speculative or lacks rationale, the Office must submit the case record together with a detailed statement of accepted facts to a second impartial specialist for a rationalized medical opinion on the issue in question.³

In this case, the Office found that the weight of the medical evidence rested with Dr. Foster, the impartial medical specialist who determined that appellant had no residuals of the June 14, 1991 employment injury. The Board finds however that Dr. Foster's reports lack clarity and are not sufficiently well rationalized to constitute the weight of the medical opinion evidence. Specifically, Dr. Foster's explanation is insufficient to rule out that appellant has residuals of the lumbar strain or a possible lumbar fracture causally related to the accepted employment injury.

In his original report dated September 14, 1999, Dr. Foster concluded that, if appellant's current condition had been the result of a lumbar strain, he would not have been disabled past December 13, 1991. He further stated that appellant remained totally disabled due to his "debilitated deconditioning." Dr. Foster also stated that the effects of the June 14, 1991 injury had not ceased because appellant was totally a dependent passive personality with severe medical deconditioning. His impression of appellant's current condition, however, does not clearly address whether appellant has residuals of the accepted lumbar strain. Regarding a potential lumbar fracture, Dr. Foster noted that a previous bone scan and MRI scan returned normal results; however, he stated that the tests were performed several years ago and that a new bone scan and evaluation should be conducted. A new bone scan was performed on November 12, 1999, which revealed that appellant had a potential lumbar abnormality at the injury site that could potentially be determined with additional MRI scan sequences. Dr. Foster,

³ See *Nathan L. Harrell*, 41 ECAB 402 (1990).

however, who had previously stated that there was no evidence, x-rays or other examination records indicating that appellant had a previous back problem, reviewed the new test findings and determined that additional MRI scan sequences were unnecessary.

Dr. Foster was unable to sufficiently clarify his original findings in the supplemental report dated December 3, 1999. In this report, he stated that the deconditioning that restricted appellant's work activity beyond December 1991 was due to psychological factors; however, he did not elaborate further on his conclusion. The Board notes that Dr. Foster did indicate that appellant's injury was simply a lumbar strain/sprain and that appellant had no residuals related to the employment injury; however, he only did so by answering "yes" in the margin of questions posed by the Office.

As there remains a question regarding whether appellant has a condition or continues to have residual disability due to the June 14, 1991 employment injury, referral to a second impartial examiner is required.

The December 15, 1999 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Dated, Washington, DC
April 2, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member