

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DANIEL C. RODRIQUEZ and DEPARTMENT OF THE ARMY,
ARMY DEPOT, Corpus Christi, TX

*Docket No. 99-1585; Submitted on the Record;
Issued March 15, 2001*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant had any disability after January 6, 1997 causally related to his June 26, 1995 accepted work injury; and (2) whether the Office of Workers' Compensation Programs properly determined appellant's pay rate.

On April 9, 1992 appellant, then a 32-year-old parts and equipment cleaner, filed a traumatic injury claim, alleging that on that date he hurt his back while attempting to load a basket. On June 10, 1992 appellant's claim was accepted for low back sprain. Appellant received continuation of pay and total disability benefits until April 25, 1994, when he returned to work in a light-duty job as a clerk/receptionist without wage loss.

On June 26, 1995 appellant, then a legal office worker, filed a traumatic injury claim after he slipped and fell in the restroom. On August 15, 1995 the claim was accepted for left shoulder contusion.

In a decision dated October 16, 1995, the Office found that the evidence failed to establish that appellant was totally or partially disabled after July 6, 1995, the date he was released to return to work, as a result of his accepted work-related injuries of June 26, 1995.

On October 31, 1995 appellant was seen by Dr. John Masciale, a Board-certified orthopedic surgeon, who concluded that appellant had an exacerbation of chronic lumbar musculoligamentous injury, chronic lumbar deconditioning syndrome with functional overlay and severe right lower extremity equina varus deformity. He opined that appellant "has a chronic deconditioned state, which was exacerbated not only with his fall, but this period of inactivity." Dr. Masciale concluded: "This patient was quite marginal in the workplace to begin with and in my opinion there may be significant psychological barriers with regards to him returning to the workplace." He referred appellant to Dr. Joel Joselevitz, a Board-certified specialist in physical medicine and rehabilitation.

Appellant was separated from the employing establishment on November 2, 1995.

Appellant was first seen by Dr. Joselevitz on November 8, 1995 wherein he found appellant suffering from chronic pain and exacerbation of a previous injury sustained on April 9, 1992 with exacerbation of June 26, 1995 as a result of a fall at work. Dr. Joselevitz recommended that appellant undergo a functional capacity evaluation and pain management program. He continued to treat appellant.

Dr. Masciale also continued to see appellant and in a detailed medical report dated December 4, 1995, stated that appellant had a chronic benign condition with regard to his back with a significant amount of functional overlay as the basis to his pain complaints. He anticipated that over several weeks or perhaps months, appellant could be brought back to a level where he was sufficiently capable of sedentary work, but that he did not anticipate that he would ever be able to return to unrestricted work. Dr. Masciale noted that appellant's back pain affected all aspects of his life. At this time, he noted that appellant was not capable of any type of gainful employment. Dr. Masciale was uncertain as to whether appellant's condition was static. He stated that appellant did need to be functioning in a protective environment and that specifically he needed to refrain from all activities, which would require him to be standing or walking for prolonged periods of time, walking on slippery surfaces, walking on uneven surfaces, repetitively bending or in fact even occasionally bending or stooping to carry out any type of activity. Dr. Masciale concluded that, at that point in time, appellant was temporarily totally disabled.

In a medical report dated April 22, 1996, Dr. Abimael Perez noted that appellant was totally disabled and unable to engage in gainful employment.

At appellant's request a hearing was held on July 30, 1996.

In a decision dated September 25, 1996, the hearing representative set aside the Office's October 16, 1995 decision and remanded this case for further development of the medical evidence.

By letter dated October 30, 1996, the Office referred appellant to Dr. Charles Kennedy, a Board-certified orthopedic surgeon, for a second opinion consultation. In a medical report dated November 13, 1996, Dr. Kennedy found that appellant was "still symptomatic of a back sprain from his June 26, 1995 fall as well as resolving contusions of his left shoulder elbow and greater trochanteric areas which are not the basis for any permanent impairment." He continued:

"[Appellant] exhibited good mental intellect and would be capable of performing any sort of tasks requiring cerebration at a college level. However, he is firmly convinced that he is a hazard to the workplace and is prone to frequent accidents and injuries which would definitely prohibit him from considering returning to the type of work which he was doing. As long as [appellant] maintains this mind set then I must agree with him. There is also this matter of the nonwork-related deformity of the right lower extremity which is partially surgically remedial. It would be in his best interest to seek treatment for that condition in order to provide a more solid basis for ambulation."

By letter to Dr. Kennedy dated November 26, 1996, the Office took exception to some of Dr. Kennedy's statements. The Office stated that there appeared to be no objective or clinical basis for appellant's subjective complaints of pain or inability to do work and requested his opinion based on medical documentation as to what if any residuals appellant was exhibiting at the present time to justify how he was unable to perform even the simplest of clerical duties.

Dr. Kennedy responded to the concerns of the Office in a December 16, 1996 medical report wherein he indicated that a functional capacity evaluation was performed. Dr. Kennedy contended that this showed that appellant was physically capable of performing all of his clerical duties to include lifting no more than 10 pounds.¹ He also noted a low sitting tolerance and stated that appellant should be allowed to move about at will. Dr. Kennedy also noted that there might be some psychological factors that might interfere with his productivity.

In a decision dated January 6, 1997, the Office denied disability after July 6, 1995, on the basis that the medical evidence did not support that appellant had any injury-related disability after that date.

A hearing was held, at appellant's request, on September 9, 1997. Appellant testified that his treating physician was Dr. Joselevitz, to whom he was referred by Dr. Masciale, that he had not returned to work since the July 6 or June 26, 1995, injury that he never had any problems with his back prior to the 1992 injury but since then, he has been back to the doctor almost every week.

In a medical report dated September 18, 1997, Dr. Joselevitz noted that appellant was unable to return to his previous work duties as a result of the June 26, 1995 injury. He further noted that appellant might benefit from vocational retraining.

By decision dated November 12, 1997, the hearing representative modified the Office's decision to reflect that appellant's disability from work as a result of the accepted injuries terminated no later than January 6, 1997. He noted that the weight of the medical opinion rested with Dr. Kennedy and supported that appellant did not have a continuing disability as a result of the accepted injuries, from performing the duties of the job that he held prior to the injury of June 26, 1995. However, insofar as the prior decision found that the injury-related disability had terminated on July 6, 1995 that decision was modified, as the hearing representative determined that the medical evidence of record did not establish that appellant's injury-related disability had ended by July 6, 1995.

In a medical report dated March 10, 1998, Dr. Masciale noted that appellant would have a chronic persistent problem with his lower back and could from time to time experience

¹ Specifically, Dr. Kennedy stated that appellant's isometric strength testing showed a push out, pull in, left lift, arm lift and high near lift all in the light category allowing him to perform these maneuvers with 11 to 20 pounds occasionally, 1 to 10 pounds frequently and negligible weights constantly. He noted frequent lifting capacity placed him in a sedentary level allowing him to pick up more than 1 to 10 pounds from the floor. Dr. Kennedy noted that his hand strength evaluation showed a dominant left hand and average strength on both sides measured only approximately one-quarter of the normal strength for the population figures of his age group.

exacerbations. He noted that he would defer to the opinion of Dr. Joselevitz with regard to appellant's work limitations.

Meanwhile, by letter dated June 11, 1998, appellant contested his pay rate. By letter dated September 17, 1998, the Office noted that it had determined that appellant had been paid an incorrect pay rate from July 6, 1995 to January 6, 1997. They noted that during that period appellant was paid at the rate as of the date of the original injury of April 9, 1992, but that appellant should have been paid at the June 26, 1995 rate, *i.e.*, the date of the second injury. The Office noted that appellant was earning \$531.38 per week on June 26, 1995 as opposed to \$445.60 per week on April 9, 1992. In a decision dated October 2, 1998, the Office found that appellant was due an extra \$3,311.73, the difference between the amount of money he was due and the amount of money already paid for all dates of disability between April 9, 1992 and the date of the decision.

Appellant then contended that he was due further additional compensation from October 4, 1992 through January 6, 1997. In a decision dated October 2, 1998, the Office explained that appellant suffered a new injury on June 26, 1995, that he did not establish a recurrent pay rate prior to this; however, as of June 26, 1995, the date of the second injury, he was eligible for a new pay rate as he had been paid an amount that was incorrect from July 6, 1995 to January 6, 1997 and he received an additional \$3,311.73 in compensation.

On October 24, 1998 appellant requested reconsideration regarding his pay rate. Appellant also requested further compensation from January 8, 1998 through the time of his reconsideration request.

By letter dated January 6, 1999, appellant also requested reconsideration for extended compensation from January 8, 1997 through January 6, 1999, the date of the letter. In support of his request, appellant submitted numerous medical reports, by Dr. Joselevitz, dated from October 21, 1997 to January 6, 1999, wherein he noted his treatments of appellant for low back pain and myofascial pain syndrome, including numerous lumbar regional nerve blocks and medication. In a medical report dated October 15, 1998, Dr. Joselevitz noted, "Unfortunately he continues to be disabled. He cannot perform the job duties of legal office helper."

In a decision dated January 22, 1999, the Office denied modification of the October 2, 1998 decision, regarding appellant's pay rate in that appellant had not submitted sufficient evidence. The Office determined that for the injury of April 9, 1992, appellant would have been entitled to compensation benefits based on \$11.14 an hour, or \$445.60 a week. The Office noted that appellant went into a leave without pay status on June 24, 1992, returned to work on April 25, 1994 and took intermittent time through January 11, 1995. The Office found no evidence that appellant was entitled to a recurrent pay rate from June 24, 1992 through June 25, 1995.

In a decision dated January 25, 1999, the Office denied modification of the November 12, 1997 decision, because it found that the evidence submitted in support of the reconsideration request was insufficient. Therefore, the Office denied modification of the prior decision terminating benefits after January 6, 1997.

The Board finds that the Office properly terminated appellant's compensation benefits effective January 6, 1997.

Once the Office accepts a claim it has the burden of justifying modification or termination of compensation. After it has been determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability has ceased or is no longer related to the employment injury.²

In this case, the Office properly found that the weight of the medical evidence rested with the opinions of Dr. Kennedy, who determined that appellant did not have a continuing disability as a result of the accepted injuries. Although the initial opinion of Dr. Kennedy was unclear, the Office requested a clarification and in his second opinion, Dr. Kennedy found that appellant was physically capable of performing all of his clerical duties. He arrived at his conclusion after obtaining additional information in his evaluation and reviewing the job description of the position which appellant held prior to his injury of June 26, 1995. Dr. Kennedy, accordingly, provided a well-reasoned and rationalized opinion.

Appellant's physician's opinions were not well rationalized. Although Dr. Joselevitz provided numerous opinions and treated appellant extensively, he offered no rationale for his conclusion that appellant was totally disabled. Dr. Joselevitz did not explain why appellant could not perform the job duties of a legal office helper or why the cause of this alleged disability was appellant's accepted work-related injury.

In his December 4, 1994 opinion, Dr. Masciale anticipated that appellant would eventually be brought back to a level where he was sufficiently capable of sedentary work, but that Dr. Masciale did not anticipate that he would be able to return to unrestricted work. In his most recent opinion dated March 10, 1998, Dr. Masciale stated that appellant would have chronic persistent problems with his back and may experience exacerbations. However, with regard to appellant's disability, Dr. Masciale provided no opinion of his own, noting that he instead would defer to Dr. Joselevitz. The Board finds that as none of appellant's treating physicians provided a well-rationalized opinion that appellant was disabled after January 6, 1997 due to his accepted work injury and Dr. Kennedy provided a well-reasoned opinion that appellant was capable of returning to his preinjury work, the Office properly terminated appellant's benefits as of January 6, 1997.

The Board further finds that the Office properly determined appellant's pay rate for compensation.

Under the Federal Employees' Compensation Act, compensation is based on an employee's monthly pay, which is defined under 5 U.S.C. § 8101(4) as the rate of pay at the time of injury, or the rate of pay at the time disability begins, or the rate of pay at the time compensable disability recurs if it recurs more than six months after an employee resumes full-time employment with the United States, which ever is greatest.

² *Patrick P. Curran*, 47 ECAB 247, 251 (1995); *Edwin L. Lester*, 34 ECAB 1807 (1983).

In the case at hand, appellant was originally paid based on his weekly pay rate of \$445.60, his salary as of April 9, 1992, the date of the first injury. Appellant returned to work on April 25, 1994, without loss of salary. Appellant was eligible for a new pay rate when he suffered the new injury on June 26, 1995 based on his salary at that time, *i.e.*, \$531.38 per week. The Office noted that, from July 6, 1995 through January 6, 1997, appellant was incorrectly paid the pay rate at the time of the original injury, April 9, 1992 and accordingly, issued a check for \$3,311.73, which represented the difference. There is no indication in the record that appellant was entitled to be paid a higher rate prior to the July 6, 1995 injury.

The decisions of the Office of Workers' Compensation Programs dated January 25 and 22, 1999 and October 2, 1998 are hereby affirmed.

Dated, Washington, DC
March 15, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member