U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RAYMOND J. DELEANDRO and U.S. POSTAL SERVICE,
POST OFFICE, Bellmawr, NJ

Docket No. 03-1358; Submitted on the Record;
Issued November 10, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Programs met its burden of proof in terminating compensation for wage loss and medical benefits on November 5, 1993.

In June 1993 (date illegible) appellant, then a 37-year-old clerk, filed an occupational claim alleging that on June 14, 1993 he became aware that he had a sprained, joint tear in the ligament. Appellant stated that he had been working an automated machine, which required mostly standing and walking and that activity put severe pressure on his knee causing it to collapse. Appellant also filed a traumatic injury claim on June 14, 1993, stating that on that date he felt a pop in his right knee while sweeping mail and he sprained his joint, with a tear in the ligament that holds the joint together. At a November 25, 2002 hearing, appellant stated that he began having problems with his knee in 1993, when his office switched from letter sorting machines to complete automation, which involved going from an eight-hour sit-down job to a complete, eight-hour stand-up job. Appellant testified that from April to June 1993, when he started his new job, he started developing discomfort but he persevered with the pain. On June 14, 1993, however, he was working on a bar-code sorter, when he bent down to lower a tray onto a conveyor belt and felt a pop go off in his knee. Appellant stated that he went to the hospital that very night and the next day his orthopedic surgeon said surgery was necessary and on January 24, 1994 appellant underwent surgery consisting of a right tibial osteotomy. Appellant stated that he returned to light-duty work in April 1994 and full-time duty in the early summer and had not had any problem since his return to full duty. On December 30, 1993 the Office accepted appellant's claim for aggravation of osteoarthritis of the right knee.

By decision dated March 3, 1994, the Office determined that appellant's employment-related condition ceased on November 5, 1993. The Office found that the opinion of the impartial medical specialist, Dr. Robert R. Bachman, a Board-certified orthopedic surgeon, that appellant's aggravation of his condition ceased as of November 5, 1993, the date of his

examination, constituted the weight of the evidence.[1] The Office had referred appellant to Dr. Bachman to resolve the conflict in the evidence between appellant's treating physician, Dr. Stuart Dubowitch, an osteopath, and a second opinion physician, Dr. Frank A. Mattei, a Board-certified orthopedic surgeon, regarding whether appellant continued to be disabled from his knee aggravation and surgery. Appellant was paid compensation for total disability through November 5, 1993.

Appellant requested an oral hearing before an Office hearing representative. By decision dated September 6, 1994, the Office hearing representative found that Dr. Mattei did not qualify as a second opinion physician because he had performed a fitness-for-duty examination and, therefore, Dr. Bachman was not an impartial medical specialist but a second opinion physician. The Office hearing representative remanded the case for the Office to refer appellant to an impartial medical specialist to resolve the conflict in the evidence between Drs. Dubowitch and Bachman.

By decision dated January 6, 1995, the Office determined that appellant's employment-related condition ceased on November 5, 1993. The Office found that the opinion of the impartial medical specialist, Dr. Wulfsberg, dated November 29, 1994, to whom the Office had referred appellant to resolve the conflict in the evidence, established that appellant's knee condition was due to a preexisting disability. Appellant requested an oral hearing. By decision dated June 6, 1995, the Office hearing representative found that Dr. Wulfsberg's opinion was not well rationalized and required clarification. The Office hearing representative instructed the Office to obtain a medical report of appellant's surgery in 1991 and any x-rays in 1991 of his right knee and related reports and send them to Dr. Wulfsberg. The Office, therefore, vacated the January 6, 1995 decision and remanded the case for further action.

A series of decisions followed related to appellant's ability to obtain the evidence the Office hearing representative had requested and to obtain additional reports from his treating physician, Dr. Murray Matez, a family practitioner and osteopath, who treated him prior to Dr. Dubowitch. The Office determined that the x-rays were unobtainable and appellant obtained Dr. Matez's reports.

By decision dated May 3, 2000, the Office found that appellant's employment-related condition ceased on November 5, 1993. The Office stated that, as the impartial medical specialist, Dr. Wulfsberg's opinion now updated to include a report dated February 22, 2000, constituted the weight of the evidence and established that appellant's condition was due to his nonwork-related football injury and that appellant's surgery was not work related. Appellant requested an oral hearing, which was held on November 8, 2000. By decision dated February 8, 2001, the Office found that Dr. Wulfsberg's opinion was incomplete and unclear and remanded the case for Dr. Wulfsberg to provide an additional report. In a report dated July 24, 2001,

[1] Dr. Bachman's opinion is not in the record as the case had to be constructed after it was lost during the subsequent referral to the impartial medical specialist, Dr. Bruce Wulfsberg, a Board-certified orthopedic surgeon, in 2000. In its decision dated March 30, 2002, the Office noted that it was not able to obtain a copy of Dr. Bachman's report, but the Office chose to proceed with the development of the record, noting that the Office hearing representative in the Office's January 17, 2002 decision described Dr. Bachman's report and appropriate information was submitted to Dr. Howard Zeidman, a Board-certified orthopedic surgeon.

however, Dr. Wulfsberg reiterated his earlier statement that appellant's injury aggravated his symptoms and caused no significant change in his underlying condition. He stated that appellant had a 5 percent disability to the knee, ½ to 1 percent, of which was attributable to the work injury. By decision dated January 17, 2002, the Office found that Dr. Wulfsberg failed to provide an unequivocal statement on causation supported by medical rationale and, therefore, remanded the case for the Office to refer appellant to another impartial medical specialist to resolve the conflict in the evidence between Drs. Dubowitch and Bachman. The Office referred appellant to the impartial medical specialist, Dr. Zeidman. In his report dated March 14, 2002, Dr. Zeidman considered appellant's history of injury, stating that appellant sustained an injury while at work on June 14, 1993 when he felt a "pop" in his right knee. He performed a physical examination and reviewed an x-ray. Dr. Zeidman diagnosed long-standing arthritis and stated that the arthritis was a preexisting problem. He stated:

> "The relationship of the injury of June 14, 1993 is more difficult to clarify. Certainly there is no description by the patient or in the record of a specific injury at that time which would have been an aggravating event. There is some mention that the patient had had a change in his work duties beginning in April of 1993 and the increased workload was a source of some problem between April and June of 1993. This, however, must be attributed to the underlying arthritis and the patient's problem in dealing with the workload rather than any specific industrial event.
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> "The tibial osteotomy of June 1994 was related to the underlying arthritis. Although the events of April through June of 1993 may well have been aggravating, as discussed above, the preexisting arthritis was apparently sufficiently severe based upon Dr. Dubowitch's comments, that, in the course of time, an osteotomy would have been necessary in any event. It is, therefore, related to the progress of the arthritis rather than any specific events in that period of time."

Using the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001), Table 17-10, page 537, Dr. Zeidman opined that appellant had a 30 percent lower extremity impairment. Dr. Zeidman noted that appellant had a mild flexion deformity and a moderate flexion contracture.

By decision dated March 30, 2002, the Office determined that appellant's employment-related condition ceased on November 5, 1993 stating that as the impartial medical specialist, Dr. Zeidman's opinion constitutes the weight of the medical evidence. The Office found that Dr. Zeidman's opinion established that appellant had no residuals of the work injury after November 5, 1993 and that the January 24, 1994 surgical procedure was attributable to the underlying arthritic condition, not the June 14, 1993 employment injury.

By letter dated April 8, 2002, appellant requested an oral hearing before an Office hearing representative, which was held on November 25, 2002. At the hearing, appellant testified that he first hurt his knee playing football in 1974 and had surgery at that time for the knee injury. Appellant stated that he started working for the employing establishment on February 19, 1983. Appellant stated that he had no problems with his knee when he was first

hired but his knee problems began in the early 1990's and led to his surgery in 1991. Appellant's representative noted that Dr. Zeidman mixed up the date of appellant's tibial osteotomy, stating that it was performed in June 1994, when it was performed in January 1994. He stated that the mix-up was significant because if Dr. Zeidman thought the surgery occurred in June 1994, that was a full year following the June 1993 injury when in fact it was six months. The representative also stated that Dr. Zeidman's opinion "begged the question" of whether appellant's June 1993 injury accelerated appellant's need for surgery, given that he stated the events of April through June 1993, may have aggravated appellant's condition but the osteotomy would have been necessary in any event.

By decision dated February 20, 2003, the Office hearing representative affirmed the Office's March 30, 2002 decision.

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

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits. 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.[2] The Office's burden of proof includes the necessity of furnishing rationalized medical evidence based on a proper factual and medical background.[3]

Section 8123(a) of the Federal Employees' Compensation Act provides that, if there is a 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] Where a case is referred to an impartial medical specialist with the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[5] When the Office secures an opinion form an impartial medical specialist and the opinion of 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.[6]

It is well established that when a factor of employment aggravates, accelerates or otherwise combines with a preexisting nonoccupational pathology, the employee is entitled to compensation.[7] Further, it is not necessary to prove a significant contribution of employment factors to a condition for the purpose of establishing causal relationship.

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[2] *Wallace B. Page*, 46 ECAB 227, 229-30 (1994); *Jason C. Armstrong*, 40 ECAB 907, 916 (1989).

[3] *Larry Warner*, 43 ECAB 1027, 1032 (1992); *see Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

[4] *Henry W. Sheperd, III*, 48 ECAB 382, 385 n.6 (1997); *Wen Ling Chang*, 48 ECAB 272, 273-74 (1997).

[5] *Gwendolyn Merriweather*, 50 ECAB 411, 414 (1999).

[6] *See Terrance R. Stath*, 45 ECAB 412, 420 (1994).

[7] *Chris Wells*, 52 ECAB 445 n.2 (2001); *Kathleen Fava*, 49 ECAB 519, 524 (1998).

In this case, the Office referred appellant to the impartial medical specialist, Dr. Zeidman, to resolve the conflict in the evidence between Drs. Dubowitch and Bachman. In his March 14, 2002 report, Dr. Zeidman noted at the beginning of the report that appellant sustained an injury to his right knee while at work on June 14, 1993 when he felt a "pop" in his knee but in the body of the report stated that the relationship of the injury of June 14, 1993 to appellant's preexisting arthritis was difficult to clarify because there was no description by appellant or the record of a specific injury at the time, which would have been an aggravating event. Further, Dr. Zeidman stated the record indicated that there was an increase in appellant's workload in between April and June 1993, which "was a source of some problem" which must be attributed to the underlying arthritis and the patient's problem in dealing with the workload rather than "any specific industrial event." He concluded the tibial osteotomy of June 1994 was related to the underlying arthritis. Dr. Zeidman stated: "[a]lthough the events of April through June 1993 may well have been aggravating … in the course of time, an osteotomy would have been necessary in any event." Dr. Zeidman concluded appellant's condition was, therefore, related to the arthritis rather than any specific events in that period of time. He stated that appellant had a 30 percent impairment to his lower extremity pursuant to the A.M.A., *Guides* (5th ed. 2001).

Dr. Zeidman's report was not factually accurate or consistent because he noted that appellant had a "pop" in his knee on June 14, 1993 but then stated there was no significant incident. The amended statement of accepted facts did not mention the June 14, 1993 "popping" incident to appellant's right knee although appellant described the incident in his claim for a traumatic injury dated June 14, 1993 and described it at the November 25, 2002 hearing. Dr. Zeidman also suggested appellant's increased workload "may" have aggravated appellant's condition. His use of the word "may" is ambiguous and equivocal and Dr. Zeidman did not indicate whether any such aggravation would have been permanent or temporary. Further, if appellant's increased workload aggravated the underlying arthritis, the resulting disability or any related surgery would be compensable for the period of the aggravation.[8] Finally, Dr. Zeidman stated that the osteotomy would have been necessary eventually but does not indicate whether the June 14, 1993 incident or appellant's increased workload accelerated appellant's need for the osteotomy, in which case it would be compensable. He did not indicate whether appellant's June 14, 1993 incident or appellant's increased workload contributed at all to the schedule injury. Moreover, Dr. Zeidman did not actually state that appellant's work-related condition had ceased or state the date it had ceased. Dr. Zeidman's statements on causation are confusing, unclear and ambiguous and his opinion is not well rationalized. His opinion does not support a finding of termination. Since the conflict in the evidence is unresolved, the Office failed to meet its burden of proof in terminating appellant's compensation for medical benefits and wage loss.

[8] *See William Taylor*, 50 ECAB 234, 238 (1999); *Raymond W. Behrens*, 50 ECAB 221, 222 (1999); *Elizabeth Stanislav*, 49 ECAB 540, 541 (1998).

The February 20, 2003 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC
November 10, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member