

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALVIN DURHAM and SMITHSONIAN INSTITUTION,
NATURAL HISTORY BUILDING, Washington, D.C.

*Docket No. 96-1918; Submitted on the Record;
Issued January 8, 1999*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits as of March 30, 1996.

On December 5, 1993 appellant, a 41-year-old custodial worker, sustained an injury to his lower back when he slipped and fell through the ceiling. Appellant filed a Form CA-1 claim for benefits based on traumatic injury on December 14, 1993, seeking continuation of pay. Appellant stopped working on the date of injury and was released to return to light-duty work by his treating physician, Dr. Rida N. Azer, a Board-certified orthopedic surgeon, on January 14, 1994.

In a progress note dated January 14, 1994, Dr. Azer stated that appellant told him he felt improvement in his condition since his previous visit of December 23, 1993, and that his range of motion had improved in the cervical and lumbar spine region. Dr. Azer also noted that diagnostic tests performed on appellant recorded mostly normal results. He concluded that appellant could perform light duties, and instructed appellant to avoid unprotected heights, bending, stooping, kneeling, pushing, pulling and lifting heavy objects.

Appellant underwent a magnetic resonance imaging (MRI) scan on April 21, 1994, which Dr. Azer, in his progress note of April 22, 1994, interpreted as showing a rupture of the L5-S1 disc and a bulging disc at L4-5. Dr. Azer referred appellant to a neurosurgeon, Dr. Earl C. Mills, to facilitate the treatment of appellant's back condition. Dr. Mills examined appellant on June 20, 1994, and stated in a report dated June 20, 1994 that appellant had chronic low back pain syndrome with bilateral lower extremity radiculopathy. In addition, Dr. Mills found that the MRI indicated a herniation of the lumbar disc at the L4-5 and L5-S1 levels. Dr. Mills noted that appellant told him that he performed light-duty work for two hours and sedentary work for six hours at his job with the employing establishment, and concluded that although appellant was able to tolerate sedentary light-duty work with performance of his back exercises and medication

for pain control, he was still totally disabled for his regular work duties. He also noted no prior history of back problems.

In a progress note dated May 17, 1995, Dr. Azer stated appellant's condition, treatment and residuals were all caused by his employment injury on December 5, 1993. He noted that appellant had experienced symptomatic improvement but his symptoms had recurred. Dr. Azer emphasized, however, that the condition and diagnosis were the same and were caused by his injury of December 5, 1993.

In a letter dated May 19, 1995, the Office advised appellant that his claim had been accepted for multiple contusions, cervical and lumbar sprains, and contusion to his right knee and right upper arm. The Office informed appellant that he was required by law to return to work as soon as he recovered from the effects of his injury, or as soon as his employer identified a job suitable to his medical limitations. The Office requested that appellant submit a detailed narrative medical report from his treating physician, including a history of the injury, objective findings and tests, supporting diagnoses, and an opinion regarding the relationship of any continuing disability to the accepted injury.

In a progress note dated June 14, 1995, Dr. Azer stated that appellant still had pain in the lumbar spine region, with tenderness between L4, L5, and S1 and satisfactory range of motion. Dr. Azer indicated that appellant could perform light duties, and could continue working part time four hours per day at the same restrictions he outlined in his January 14, 1994 progress note.¹

The Office referred appellant for a second opinion examination on June 15, 1995 with Dr. Louis E. Levitt, a Board-certified orthopedic surgeon, who stated in a medical report dated June 15, 1995 that although appellant's physical examination was really quite normal and there was little evidence of any active pathology, he continued to report being disabled by persisting back pain and right leg dysesthesias that followed the December 5, 1993 employment injury. He also stated that there was evidence by an MRI scan that appellant might have underlying disc disease in the lumbar spine contributing to his lumbar distress, that the pathology identified by the MRI scan was of clinical significance, and that appellant's current complaints of back pain were causally related to the December 5, 1993 employment injury. Dr. Levitt further stated that appellant basically had a normal examination, with no evidence of active lumbar radiculopathy. He commented:

“There is no subjective report of a discrete lumbar radiculopathy and the electrical diagnostic studies are all normal.... I believe he has reached maximum medical improvement following injuries sustained at work on December 5, 1993. I am of the opinion that [appellant] has the capacity to return to work immediately. I would suggest permanent restrictions on lifting not to exceed 50 pounds. I would suggest as well that he avoid working in awkward positions and performing frequent bending tasks. Within those parameters, [appellant] has the capacity to

¹ Dr. Azer essentially reiterated these findings in a progress note dated July 24, 1995 and commented that appellant was “neurologically status quo.”

work on a full-time basis eight hours a day. If his current job does not allow work with the noted restrictions above, then some type of vocational rehabilitation will be required to return [appellant] to the work force.”

By letter dated December 7, 1995, the Office asked Dr. Levitt whether appellant still had residuals of the December 5, 1993 employment injury. The Office also asked Dr. Levitt whether appellant was capable of performing his regular job as described in the enclosed statement of accepted facts.

In response to the Office’s December 7, 1995 letter, Dr. Levitt submitted a medical report dated January 11, 1996 in which he stated that:

“At the time of my examination, [appellant] did not appear to have any active pathology and consequently did not have any identifiable residuals of his original work injury. [Appellant’s] complaints were principally subjectively based, and there were no physical findings that supported his complaints. What made [appellant’s] assessment somewhat difficult was an MRI scan which appeared to have a significant disc abnormality that clinically correlated with [appellant’s] reported distress. When I saw the patient in June 1995, I thought he could return to work with the restrictions noted, those restrictions being specifically lifting not to exceed 50 [pounds] and he should avoid frequent bending and working in awkward postures. When I performed the second opinion evaluation on [appellant], I was aware of his work responsibilities as indicated in the statement of accepted facts. Certainly, based on my restrictions placed on [appellant], he could handle the lifting and bending demands of his job as a custodian, but I do not believe that if he were to perform tasks, such as moving heavy ladders, moving heavy industrial equipment and climbing on scaffolding, that there would be some increased risk of [appellant] having additional back pain and once again missing time from gainful employment.”

Dr. Levitt further stated that overactivity, such as the tasks indicated on his job description, might increase the risk of provoking his quiescent disc disease once again into a symptomatic state, and it was for this reason that he recommended the permanent limitations listed above. He opined that it appeared appellant was unable to perform his regular work responsibilities despite the normal examination he conducted on June 15, 1995, and noted that appellant was not disabled by any means and had the capacity to engage in gainful employment; however, Dr. Levitt indicated that there may be some alteration in his job activities to accommodate his back disease.

Dr. Levitt concluded that the need for that accommodation was causally connected to his original work trauma on December 5, 1993.

On February 22, 1996 the Office issued a notice of proposed termination of compensation to appellant. In the memorandum accompanying the notice of proposed termination, the Office stated that the weight of the medical evidence rested with the well-rationalized medical reports of Dr. Levitt, which were based on a complete and accurate factual history, indicating that appellant no longer suffered residual disability from his accepted,

employment-related conditions. The Office stated that Dr. Levitt indicated appellant had an underlying disc disease that was currently asymptomatic, and that he was able to work with restrictions to avoid exacerbations of the disease.

Appellant did not respond to the Office's February 22, 1996 proposed termination notice within 30 days.

By decision dated March 27, 1996, the Office terminated appellant's compensation, effective March 30, 1996, finding that the reports of Dr. Levitt constituted the weight of medical opinion.

In a letter dated April 30, 1996, appellant requested reconsideration of the Office's March 27, 1996 termination decision. Accompanying the request was a April 30, 1996 progress note from Dr. Azer, in which he reiterated his earlier findings and conclusions.

In a decision dated May 14, 1996, the Office denied modification of its March 27, 1996 termination decision.

In a letter dated May 20, 1996, appellant requested reconsideration of the Office's May 14, 1996 decision. Accompanying the request was a May 17, 1996 progress note from Dr. Azer, in which he reiterated his earlier findings and conclusions, a May 17, 1996 treatment note from Dr. Azer, and a May 20, 1996 prescription note from Dr. Mills.

In a decision dated June 7, 1996, the Office denied modification of its prior decisions.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened, to order 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

The Board finds that the Office did not meet its burden of proof in terminating appellant's compensation benefits as of March 30, 1996.

In the present case, there is a disagreement between Dr. Levitt, the second opinion examiner, and Dr. Azer, appellant's physician, as to whether appellant still experienced residuals from his December 5, 1993 employment injury. Dr. Azer noted in his May 17 and June 14, 1995 reports that appellant had experienced symptomatic improvement but that his symptoms had recurred. He emphasized, however, that the condition and diagnosis were the same and were caused by his injury of December 5, 1993. In his June 14, 1995 progress note, Dr. Azer stated that appellant still had pain and tenderness in the lumbar spine region at L4, L5, and S1 with satisfactory range of motion and could perform light duties, and could continue working part time four hours per day at the same restrictions he outlined in his January 14, 1994 progress

² *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

³ *Id.*

note. Dr. Levitt contradicted this opinion, stating in his January 11, 1996 report that appellant did not appear to have any active pathology from his lower back condition and therefore did not have any identifiable residuals from his December 5, 1993 employment injury. Dr. Levitt also stated that appellant's complaints were mostly subjective, and that there were no physical findings that supported his complaints.⁴ Based on this conflict in the medical evidence between Drs. Azer and Levitt, the Office should have referred the case to an independent medical examiner to resolve the conflict. Therefore it erred in terminating appellant's compensation.

The decision of the Office of Workers' Compensation Programs dated March 27, 1996 is therefore reversed.

Dated, Washington, D.C.
January 8, 1999

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

⁴ The Board notes that Dr. Levitt stated that appellant's April 21, 1994 MRI results appeared to indicate a significant disc abnormality that clinically correlated with his complaints of pain, that he was aware of appellant's restrictions and accommodations at his former light-duty job with the employing establishment, and that he had cautioned there would be some increased risk of additional back pain and disability. Dr. Levitt, however, reiterated that appellant was not disabled by any means and had the capacity to engage in gainful employment. He indicated there might have to be some alteration in his job activities to accommodate his back disease, and opined that this need for accommodation was causally related to the accepted December 5, 1993 employment injury. The Office stated in its notice of proposed termination that although Dr. Levitt indicated appellant should continue working in a light-duty capacity, this was intended as a preventative measure which was not compensable under the Federal Employees' Compensation Act, and was not based on residuals from appellant's December 5, 1993 back injury.