

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH B. SADOWSKI and DEPARTMENT OF THE TREASURY,
BUREAU OF THE MINT, Philadelphia, Pa.

*Docket No. 97-625; Submitted on the Record;
Issued January 5, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation on the grounds that he had no continuing disability from the accepted work injury.

On December 12, 1993 appellant then a 42-year-old materials expeditor supervisor, filed a notice of traumatic injury, claiming that while moving chairs and cleaning his office on October 20, 1993, he experienced sharp pains in his upper and lower back. The employing establishment controverted the claim, noting that appellant had L3-4 disc surgery on April 29, 1992,¹ that he returned to light duty on June 15, 1992 and to full duty on June 25, 1992, and that he took time off in mid 1993 for his back pain.²

On June 1, 1994 the Office accepted appellant's claim for a lumbar strain and paid appropriate compensation. On November 30, 1994 the Office referred appellant for a second opinion evaluation to Dr. Noubar A. Didizian, a Board-certified orthopedic surgeon. His conclusion that appellant was not disabled for work conflicted with that of appellant's treating physician, Dr. Seymour Leiner, an orthopedic practitioner, and the Office referred appellant to Dr. Frank A. Mattei, a Board-certified orthopedic surgeon, for an impartial medical examination.

On May 26, 1995 the Office issued a notice of proposed termination based on Dr. Mattei's report that appellant had no residuals of the October 20, 1993 injury. On June 26, 1995 appellant's attorney responded to the notice, contending that the Office had failed to meet its burden of proof with Dr. Mattei's report because it was based on an inaccurate statement of accepted facts, the questions posed to Dr. Mattei were improper, and the physician made numerous factual errors and failed to discuss appellant's cervical radiculopathy. Appellant also submitted a June 8, 1995 report from Dr. Leiner.

¹ Appellant had a hemilaminectomy with facetectomy and a foraminotomy and right discectomy at L3-4.

² Appellant stopped work on October 20, 1993 and took disability retirement on September 13, 1995.

In response to the Office's request for clarification, Dr. Mattei stated that appellant was not totally disabled and could perform light duties "which he has been performing since his previous surgery." Dr. Mattei added that appellant could return to full activity without restrictions, the same job he did preinjury, for he had no residuals of the October 1993 injury.

On August 22, 1995 the Office terminated appellant's compensation on the grounds that he had no disabling residuals of the accepted work injury. Appellant timely requested an oral hearing, which was held on July 25, 1996. Appellant's attorney argued that the record contained copies of newspaper articles describing alleged workers' compensation fraud, which improperly influenced Dr. Mattei's opinion; the attorney asked that the offending material be removed and the case be sent to another impartial referee.

Appellant's attorney also disagreed with the accepted condition, pointing out that appellant noted upper and lower back pain on his initial claim and the medical evidence showed that appellant had cervical herniation after the October 1993 work injury, as discussed in Dr. Leiner's June 8, 1995 report, which the Office failed to consider in its August 22, 1995 decision. The attorney also criticized Dr. Mattei's report, arguing that it was not rationalized and therefore insufficient to meet the Office's burden of proof.

Finally, appellant's attorney contended that the Office violated its procedures in requesting that Dr. Mattei supplement his report and asked leading questions that suggested what his responses should be. The attorney also asked that any decision be delayed until the Office had adjudicated the 1995 claim appellant had filed.³

On October 18, 1996 the hearing representative affirmed the termination of compensation, based on Dr. Mattei's opinion as buttressed by that of Dr. Didizian.

The Board finds that the medical evidence is sufficient to establish that appellant has no disabling residuals of the accepted work injury and that, therefore, the Office properly terminated appellant's compensation.

Under the Federal Employees' Compensation Act,⁴ when employment factors cause an aggravation of an underlying physical condition, the employee is entitled to compensation for the periods of disability related to the aggravation.⁵ When the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has

³ On March 23, 1995 appellant filed a notice of occupational disease, claiming that his upper and lower back condition was caused by operating a forklift on rough floors and lifting heavy items during his employment from 1980 through 1992. The claim was denied on September 22, 1995, and appellant requested an oral hearing. On May 26, 1996 the hearing representative remanded the case to the Office for further evidentiary development. This claim, A3-206704, is not before the Board on appeal.

⁴ 5 U.S.C § 8101 *et seq.* (1974).

⁵ *Richard T. DeVito*, 39 ECAB 668, 673 (1988); *Leroy R. Rupp*, 34 ECAB 427, 430 (1982).

ceased,⁶ even if the employee is medically disqualified to continue employment because of the effect work factors may have on the underlying condition.⁷

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of compensation.⁸ Thus, after the Office determines that an employee has disability causally related to his or her employment, the Office may not terminate compensation without establishing either that its original determination was erroneous or that the disability has ceased or is no longer related to the employment injury.⁹

In assessing medical evidence, the number of physicians supporting one position or another is not controlling; the weight of such evidence is determined by its reliability, its probative value, and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for, and the thoroughness of, physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.¹⁰ In cases where the Office has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹¹

In this case, the Office accepted a lumbar strain on the basis of medical evidence from Drs. Adler and Leiner, with whom appellant treated following the October 1993 injury. Dr. Adler stated in his April 24, 1994 report that appellant's back condition resulting from his surgery in April 1992 was exacerbated by moving furniture at work on October 20, 1993.

Dr. Leiner stated in his January 31, 1994 report that appellant had continuing back pain due to his herniated disc at L4-5, subsequent surgery, and degenerative disc disease. Subsequently, Dr. Leiner diagnosed herniated cervical and lumbar discs and found appellant unable to work.

The second opinion specialist, Dr. Didizian, reviewed all the medical evidence, including the electromyogram and nerve conduction study dated January 24, 1994, which revealed chronic right L5 nerve root irritation, the magnetic resonance imaging (MRI) scan dated April 27, 1994, which showed scar formation and mild bulging in the lumbar spine, and the objective tests indicating severe cervical radiculopathy and herniated discs at C6-7. He opined that appellant had "excessive subjective complaints" about his lower back.

⁶ *Ann E. Kernander*, 37 ECAB 305, 310 (1986); *James L. Hearn*, 29 ECAB 278, 287 (1978).

⁷ *John Watkins*, 47 ECAB ____ (Docket No. 94-1615, issued May 17, 1996); *Marion Thornton*, 46 ECAB 899, 906 (1995).

⁸ *William Kandel*, 43 ECAB 1011, 1020 (1992).

⁹ *Carl D. Johnson*, 46 ECAB 804, 809 (1995).

¹⁰ *Connie Johns*, 44 ECAB 560, 570 (1993).

¹¹ *Gary R. Sieber*, 46 ECAB 215, 223 (1994).

Appellant had chronic back problems, including disc herniation, and on October 20, 1993 developed symptoms as part of the natural history of the prior 1992 surgery. Dr. Didizian reported that appellant's back condition may have been exacerbated on October 20, 1993, but if so, the aggravation would have subsided in three to six months. Dr. Didizian concluded that appellant could work in a sedentary position such as supervisor if he avoided significant bending or lifting.

Because Dr. Didizian's conclusion that appellant could return to his supervisory position conflicted with the opinion of Drs. Adler and Leiner that appellant was "totally disabled from gainful employment," the Office properly referred appellant to Dr. Mattei for an impartial medical evaluation.¹² In his April 27, 1995 report, Dr. Mattei noted appellant's "multiple subjective complaints" of back pain but concluded that the October 20, 1993 incident was "not the true cause of [appellant's] pathology but rather a temporary exacerbation of his preexisting back condition," which would have resolved within six weeks, returning appellant to his preinjury level of activities. Dr. Mattei added that appellant could return to full duty without restrictions and had no residuals of the incident at work.

Appellant argues that Dr. Mattei's opinion is insufficiently rationalized to meet the Office's burden of proof in terminating compensation. However, Dr. Mattei provided an accurate medical history and reviewed the medical reports and results of diagnostic testing; he thoroughly examined appellant and indicated his clinical findings, including some positive responses. The minor factual inconsistencies pointed out by appellant's attorney do not detract from Dr. Mattei's conclusion, which is based on the medical evidence.

The alleged impropriety of the Office in requesting clarification from Dr. Mattei is illusory -- the Office in its June 28, 1995 letter requested that Dr. Mattei "advise" whether he meant that appellant could return to "light duties" or regular duty.¹³ The letter did not, as appellant's attorney asserts, "suggest" any answer but merely repeated Dr. Mattei's conclusion that appellant had no residuals from the accepted work injury. Further, the claims examiner's telephone call to Dr. Mattei was a follow up to the Office's June 28, 1995 request, as evidenced by her note to the file. The Board finds no improper communication between the Office and Dr. Mattei.¹⁴

The newspaper articles submitted by the employing establishment are irrelevant to Dr. Mattei's referee evaluation of appellant and the record is devoid of any evidence -- beyond the general allegation by appellant's attorney -- that Dr. Mattei was influenced in any manner by their contents. Indeed, the articles describe the state workers' compensation system, congressional hearings on the Act, and restitution of a fraudulent overpayment but make no reference to appellant.

¹² Section 8123(a) provides that if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an independent examination. *Shirley L. Steib*, 46 ECAB 309, 316 (1994).

¹³ Dr. Mattei clarified that appellant could perform the duties he was performing prior to the October 20, 1993 injury when he was a supervisor and that he could return to "full activity without restrictions."

¹⁴ See *Carl D. Johnson*, *supra* note 9 finding no evidence in the record to substantiate that the Office and the impartial medical examiner engaged in a prohibited oral communication regarding the disputed issue.

Dr. Leiner's June 8, 1995 report contradicts his January 1994 report -- he stated then that appellant's initial back pain at work in April 1992 occurred "without any injury that he could relate to the onset of these symptoms," but more than a year later Dr. Leiner related that it "became obvious in discussions" with appellant that the initial onset of injury prior to April 1992 was related to his work operating a forklift over uneven ground and moving heavy items.

However, appellant became a supervisor in November 1990, and his position description constitutes sedentary work. Dr. Leiner does not explain how work factors caused appellant's herniated cervical or lumbar discs or why appellant remains disabled from the accepted work injury. Therefore, the Board finds that his report has little probative value.

Given Dr. Mattei's thorough physical examination of appellant, his review of the medical and factual evidence, and his status as an impartial medical examiner, his report represents the weight of the medical evidence and establishes that appellant had no objective evidence of any residuals of the accepted work injury.¹⁵ Therefore, the Office properly terminated appellant's compensation.

The October 18, 1996 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
January 5, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

¹⁵ See *Thomas Bauer*, 46 ECAB 257, 265 (1994) (finding that the additional report from appellant's physician concerning his emotional condition was insufficient to overcome the special weight accorded to the impartial medical examiner's opinion).