

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM J. BOYLAN and U.S. POSTAL SERVICE,
POST OFFICE, Abington, Pa.

*Docket No. 98-2429; Submitted on the Record;
Issued March 17, 1999*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation benefits effective July 20, 1997.

On June 9, 1993 appellant, then a 54-year-old letter carrier, filed an occupational disease claim alleging that he sustained an injury to his back commencing on March 1, 1985, which he attributed to carrying mail.

By decision dated September 14, 1994, the Office accepted appellant's claim for a temporary aggravation of degenerative disc disease of the cervical and lumbar spine.

By letter dated March 2, 1995, the Office placed appellant on the periodic compensation rolls to receive compensation benefits for temporary total disability.

By letter dated November 7, 1995, the Office referred appellant, along with a statement of accepted facts and copies of medical records, to Dr. Frederick S. Lieberman, a Board-certified orthopedic surgeon, for an examination and evaluation as to whether appellant had any remaining disability or medical condition causally related to his 1985 employment injury.

In a narrative report dated January 25, 1996, regarding a physical examination on December 7, 1995, Dr. Lieberman provided a history of appellant's condition, a summary of the medical records, findings on examination and diagnosed preexisting degenerative disc and joint disease of the cervical spine and nonwork-related mild spinal stenosis and costovertebral angle tenderness. Dr. Lieberman stated:

“With respect to the right upper extremity, scalene musculature, ulnar nerve symptomatology and the diagnostic studies of the cervical and thoracic spines, we note degenerative disc disease. The degenerative disc disease is age related as well as post traumatic. It may or may not be related to his activities, but probably

not. The scalene symptomatology may be aggravated by [appellant's] work activities such as carrying a mailbag.”

He indicated that appellant was capable of performing a sedentary job for 4 hours per day with standing limited to 2 hours per day and no lifting over 10 pounds continuously.

By letter dated February 23, 1996, the Office asked Dr. Lieberman to clarify whether appellant's 1985 work-related temporary aggravation of degenerative disc disease had ceased in view of the fact that appellant had not worked since 1992 or whether appellant had sustained a permanent aggravation from his work injury. The Office also asked Dr. Lieberman to provide work restrictions, if any, based solely upon the employment injury.

By letter dated March 21, 1996, Dr. Lieberman stated:

“Given the fact that [appellant] has not been significantly gainfully employed since 1992, I do not believe that the ‘temporary aggravation’ has continued and as such, the degenerative disc disease has not suffered a permanent aggravation from his work-related injuries. The only significant residual from the original work-related injury, that was on the evaluation of December 7, 1995, is that of right upper extremity symptomatology secondary to the scalenes and the region of the thoracic outlet. This would include those findings referable to the ulnar nerve in the C8-T1 root. The restrictions that are significant here, would be to prohibit [appellant] from working above shoulder level with his right upper extremity. He should lift up to a maximum of 20 pounds.

“I believe that it is coincidental that the majority of restrictions occasioned by the right upper extremity and the scalene musculature problems are similar to many of those which will benefit his lumbar spine. However, said restrictions should not be considered necessary on the basis of his lumbar spine symptomatology alone.”

By letter dated January 14, 1997, the Office sent appellant a notice of proposed termination of compensation and advised him that the weight of the medical evidence, as represented by Dr. Lieberman's report dated February 15, 1996, established that appellant was no longer experiencing residuals from his 1985 employment injury. Appellant was advised to submit additional evidence or argument within 30 days if he disagreed with the proposed termination.

The record shows that appellant did not submit additional evidence or argument within 30 days.

By decision dated July 7, 1997, the Office terminated appellant's compensation benefits effective July 20, 1997 on the grounds that the weight of the medical evidence, as represented by Dr. Lieberman's report, established that appellant's employment injury disability ceased no later than that date.

By letter dated July 28, 1997, appellant, through his representative, requested an oral hearing before an Office hearing representative.

In a report dated May 30, 1997, Dr. Berry Schnall, a Board-certified physiatrist, provided a history of appellant's condition, findings on examination and the results of tests, which included electromyography and nerve conduction velocity studies. He stated that the findings were consistent with a continued multiple L3 or L4-S1 lumbosacral radiculopathy, spinal stenosis and a complaint of burning down the right lateral thigh consistent with a right meralgia paresthetica.

In a report dated August 11, 1997, Dr. Peter Giammanco, a physician whose specialty is not indicated in the record, provided a history of appellant's condition and stated that appellant had a magnetic resonance imaging (MRI) study performed in May 1997, which demonstrated spinal stenosis in the cervical spine at C2-3 through C6-7 and that an MRI of his lumbar spine showed slight degenerative disc disease at L4-5 and a small midline protrusion of the disc which encroached minimally upon the ventral aspect and the cal sac. Dr. Giammanco stated:

"It is my medical opinion following both a complete history and physical examination as well as continued follow-up care with [appellant] that there is a causative relationship between the employment of [appellant's] history causing these injuries. I do not believe that it is a coincidental finding as well as an incidental problem in reference to my patient. I feel that the right upper extremity symptomatology is secondary not to scalenes and thoracic outlet which in itself [is] significant, but referable to the entrapped nerve which was solely induced [by] chronic repetitive action, work-related activities.

"I am at a loss to understand Dr. Lieberman's contention that the upper extremity scalene musculature problems are similar to many of those which will benefit his lumbar spine. I am also at a loss that these restrictions could not be considered necessary on the basis of his lumbar spine symptomatology alone. I find this very vague and not specific as well as incomplete in reference to the data and studies that [I] have knowing [appellant] for some approximately 18 years."

On February 24, 1998 a hearing was held before an Office hearing representative at which time appellant testified.

By decision dated April 27, 1998, an Office hearing representative affirmed the Office's decision dated July 7, 1997.

The Board finds that the Office has not met its burden of proof in terminating appellant's compensation benefits.

It is well established that once the Office accepts a claim, it has the burden of justifying termination or modification 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 had ceased or that it is no longer related to the employment.¹

In this case, the Office accepted that appellant sustained a temporary aggravation of degenerative disc disease and he was placed on the periodic compensation roll to receive compensation benefits for temporary total disability.

In a narrative report dated January 25, 1996, regarding a physical examination on December 7, 1995, Dr. Lieberman, a Board-certified orthopedic surgeon and Office referral physician, provided a history of appellant's condition, a summary of the medical records, findings on examination, and diagnosed preexisting degenerative disc and joint disease of the cervical spine and nonwork-related mild spinal stenosis and costovertebral angle tenderness. Dr. Lieberman stated:

“With respect to the right upper extremity, scalene musculature, ulnar nerve symptomatology and the diagnostic studies of the cervical and thoracic spines, we note degenerative disc disease. The degenerative disc disease is age related as well as post traumatic. It may or may not be related to his activities, but probably not. The scalene symptomatology may be aggravated by [appellant's] work activities such as carrying a mailbag.”

He indicated that appellant was capable of performing a sedentary job for 4 hours per day with standing limited to 2 hours per day and no lifting over 10 pounds continuously.

In response to a request for clarification as to whether appellant had any remaining work-related disability or medical condition, by letter dated March 21, 1996, Dr. Lieberman stated:

“Given the fact that [appellant] has not been significantly gainfully employed since 1992, I do not believe that the ‘temporary aggravation’ has continued, and as such, the degenerative disc disease has not suffered a permanent aggravation from his work-related injuries. The only significant residual from the original work-related injury, that was on the evaluation of December 7, 1995, is that of right upper extremity symptomatology secondary to the scalenes and the region of the thoracic outlet. This would include those findings referable to the ulnar nerve in the C8-T1 root. The restrictions that are significant here, would be to prohibit [appellant] from working above shoulder level with his right upper extremity. He should lift up to a maximum of 20 pounds.

“I believe that it is coincidental that the majority of restrictions occasioned by the right upper extremity and the scalene musculature problems are similar to many of those which will benefit his lumbar spine. However, said restrictions should not be considered necessary on the basis of his lumbar spine symptomatology alone.”

¹ See *Alfonso G. Montoya*, 44 ECAB 193 (1992); *Gail D. Painton*, 41 ECAB 492 (1990); *Leona Z. Blair*, 37 ECAB 615 (1986).

The Board finds that Dr. Lieberman's reports are not sufficient to establish that appellant's work-related condition has resolved. In the January 25, 1996 report, Dr. Lieberman indicated that the degenerative disc disease could be related to appellant's work activities but "probably not." However, in his March 21, 1996 supplemental report, he provided conflicting statements. He first stated in that report that appellant's employment-related temporary aggravation of his degenerative disc disease had ceased but in the next sentence he stated that a "significant residual" from the employment-related injury was some right upper extremity symptomatology and that this symptomatology dictated certain work restrictions. In view of the conflicting statements provided by Dr. Lieberman, the Board finds that the Office has not met its burden of proof in terminating appellant's compensation benefits based upon the reports of Dr. Lieberman.

The April 27, 1998 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, D.C.
March 17, 1999

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member