U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JERRY NASH and U.S. POSTAL SERVICE,
POST OFFICE, Las Vegas, NV

Docket No. 98-679; Submitted on the Record;
Issued January 7, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation.

On July 20, 1996 appellant, then a 32-year-old postal carrier, sustained a back injury when his postal truck was struck on the right front side by another vehicle in the performance of duty. Appellant was initially treated at a local emergency room for acute lumbosacral strain, where he was prescribed pain medication. An x-ray of the lumbar spine taken on July 20, 1996 revealed discongenic disease L5-S1. The Office accepted the claim for a sprain in the sacroiliac region. Appellant received continuation of pay from July 22 until August 1, 1996, when he was approved for light duty.

In progress notes dated July 24 and July 31, 1996, Dr. Timothy M. Deneau, an osteopath, reported that appellant was treated for back pain related to a car accident on July 20, 1996. He noted that appellant had a history of herniated lumbar discs with occasional flare-ups of lumbosacral pain and sciatica. Dr. Deneau noted physical findings and diagnosed acute lumbosacral strain, for which he prescribed bed rest and subsequent physical therapy. Appellant was released by Dr. Deneau for light duty on August 1, 1996 with restrictions of no lifting and only intermittent sitting, walking and standing.

In an August 14, 1996 progress note, Dr. Deneau noted that appellant had full range of motion, negative leg raising and only mild discomfort in the lumbosacral area. According to Dr. Deneau, appellant's lumbar spine myositis due to the July 20, 1996 work injury had resolved. He noted, however, that appellant suffered from continuing chronic low back pain secondary to preexisting lumbar spine disease. Dr. Deneau approved appellant for full duty effective November 14, 1996.

In an August 29, 1996 progress note, Dr. Deneau stated that appellant presented with "over-exaggerated symptoms" of lumbar spine pain. His physical findings included full range of

motion with some tenderness in the spinal area. Dr. Deneau recommended that appellant be placed on light duty and be examined by an orthopedic surgeon.

In a report dated September 11, 1996, Dr. Dennis P. Gordon, a Board-certified orthopedic surgeon, noted appellant's history of intermittent back pain and his complaints of back pain following a July 20, 1996 car accident. He reported physical findings and noted that x-rays showed disc space narrowing and a traction spur at 5-1. Dr. Gordon diagnosed degenerative disc disease but also stated: "the verbal [MRI] magnetic resonance imaging scan report indicated that there was no nerve compression but it did not really address whether there were any proliferative changes at the end plates which is important to know in this gentleman. At this point I think he needs to be evaluated as a new injury which he is." Dr. Gordon opined that appellant had a significant exacerbation of preexisting back disease and ordered an MRI scan.

An MRI scan of the lumbar spine taken on September 17, 1996 revealed degenerative disc disease with broad-based subligamentous protrusion and a component of caudal extrusion at the L5-S1 level, with possible early neural encroachment.[1] In a September 23, 1996 report, after reviewing the MRI scan, Dr. Gordon recommended that appellant undergo surgery consisting of decompression and fusion at L5-S1.

Dr. Gordon subsequently referred appellant to Dr. Michael D. Daubs, a Board-certified orthopedic surgeon, for a surgical consultation. In an October 3, 1996 report, he diagnosed chronic lower back pain with mechanical back pain, cervical degenerative disc disease at L5-S1 and radiculopathy. Dr. Daubs advised that appellant was a candidate for surgery and recommended that appellant be permanently placed in a light-duty position.

Appellant continued to be treated by Dr. Gordon for his back symptoms. He kept appellant on light duty with restrictions.

At some point, appellant also apparently requested that he be examined by Dr. Hisham Hito, an orthopedic surgeon. In a March 7, 1997 report, he noted appellant's complaints of lower back pain and his July 20, 1996 work injury. Dr. Hito reported that appellant was previously involved in a car accident on March 28, 1995 which resulted in cervical strain, right shoulder and lower back problems. According to him, x-rays taken at the time of the March 7, 1997 examination showed narrowing of the disc space and degenerative disc disease, which he described as being essentially unchanged from earlier MRI scans dated September 25, 1995 and September 17, 1996. Dr. Hito diagnosed lower back sprain and myositis superimposed on preexisting degenerative disc disease. He opined that appellant's condition was stable and reported that no further treatment seemed to be necessary. In order to prevent further spinal injury, Dr. Hito recommended that appellant work in a moderate type of job and that he not be permitted to lift more than 40 pounds. He stated "I do not see any conclusive evidence that [the 1996 car accident] contributed a great deal to [appellant's preexisting back] problem, but the

[1] The record contains a prior MRI scan dated September 25, 1995 which revealed disc bulge at L5-S1, with a posterior osteophyte and moderate neural foraminal narrowing on the right and mild foraminal narrowing on the left.

combination of this and the preexisting problem makes me believe that a moderate amount of work would be helpful to [appellant] in the future."

In a March 18, 1997 report, Dr. Gordon requested that the Office approve surgery for decompression and fusion at L5-S1.

The Office referred appellant for a second opinion evaluation with Dr. Irvin Gettleman, a Board-certified orthopedic surgeon, for an opinion as to whether appellant required surgery and whether he suffered from residuals of his work injury. In a report dated April 9, 1997, he noted that appellant began experiencing severe lower back pain with radiating numbness and tingling in his lower extremities after his mail truck was struck by another car on July 20, 1996. Dr. Gettleman reported that appellant injured his back during military service in 1990, when he loaded a bomb cart and that appellant sustained many fractures in the past from which he fully recovered. He also noted physical findings which included positive straight leg raising and limited range of motion in the lumbar spine. According to Dr. Gettleman, appellant's medical history, x-rays, pain pattern and MRI scan results supported a diagnosis of chronic degenerative L5-S1 disc disease without neurological deficit. He opined that appellant aggravated his preexisting back condition of degenerative disc disease when he was involved in a work-related car accident on July 20, 1996. Dr. Gettleman, however, indicated that the aggravation was temporary and should have ceased within three months of the work injury or October of 1996. He further stated that there did not appear to be "any material changes that altered the course of appellant's underlying disease." Dr. Gettleman concluded that while appellant's prognosis was guarded, surgery was not required at that time. He recommended a weight reduction program and a series of lumbar epidural blocks. Dr. Gettleman also recommended that appellant avoid work involving heavy lifting and repetitive bending. On a work evaluation form dated April 9, 1997, he indicated that appellant could only work part time with a 20-pound lifting restriction due to his preexisting degenerative back condition.

The Office issued a notice of proposed termination on May 14, 1997. Appellant was informed that he had 30 days to submit additional medical evidence.

In a letter dated May 22, 1997, appellant argued that he still had residuals of the July 20, 1996 injury or he would have been able to return to work without restrictions, consistent with his pre-July 20, 1996 work status.

By letter dated June 13, 1997, appellant submitted a June 5, 1997 report from Dr. Gordon. He advised that appellant was still symptomatic and noted his opinion that appellant should be given his choice of whether or not to have surgery.[2]

In a decision dated July 7, 1997, the Office terminated appellant's compensation on the grounds that he no longer suffered any residuals causally related to the July 20, 1996 employment injury.

[2] Appellant also submitted a copy of a his 10 percent disability rating decision form the Department of Veteran's Affairs. The Board notes that findings of other agencies are not determinative with regard to proceedings under Federal Employees' Compensation Act which is administered by the Office and the Board. *George A. Johnson*, 43 ECAB 712 (1992).

On September 30, 1997 appellant, by counsel, requested an oral hearing.

In a decision dated November 20, 1997, the Office denied appellant's request for a hearing as untimely filed, noting that issue in the case could be equally well addressed by a request for reconsideration before the Office.

The Board finds that the Office improperly terminated appellant's compensation.[3]

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[4] 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.[5]

In the instant case, the Office accepted that appellant sustained a back strain as a result of his work-related car accident on July 20, 1996. Since he returned to work on August 1, 1996, appellant has only been receiving medical benefits and not wage-loss compensation. In terminating appellant's medical benefits, the Office found that the opinion of Dr. Gettleman an Office referral physician, constituted the weight of the medical evidence. He essentially opined that appellant had no continuing disability or residuals related to his accepted employment injury. Dr. Gettleman opined in his April 9, 1997 report that appellant's work-related injury on July 20, 1996 caused a temporary aggravation of his preexisting degenerative back condition and that the aggravation should have ceased within three months of the car accident or by October 1996. He further opined that there did not appear to be any material changes related to appellant's work injury that altered appellant's underlying back condition.

Contrary to the Office's analysis of the medical evidence, however, the Board finds that a conflict exists between the opinions of Drs. Gettleman and Gordon. Dr. Gordon's opinion creates a conflict in the medical evidence because he opined in his September 11, 1996 report that appellant has a significant exacerbation of his preexisting back disease caused by the July 20, 1996 work injury. He recommended that appellant undergo surgery sometime after September 23, 1996 for his back condition while Dr. Gettleman indicated that appellant's work-related back condition would have completely resolved by October 1996. Moreover, Dr. Gettleman disagreed with Dr. Gordon as to whether appellant required surgical intervention.

Section 8123(a) of the Act provides that, "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary

[3] By letter dated April 23, 1997, appellant, by counsel, requested a schedule award. A schedule award is not payable for the loss, or loss of use of a member, function, or organ of the body not specifically enumerated in the Act or its regulations. *Billie Sue Barnes*, 47 ECAB 478 (1996). In the instant case, the Office accepted the claim for a back sprain and not the permanent condition of degenerative disc disease. Additionally, the back is specifically excluded from the definition or "organ" under the Act; *see James E. Jenkins*, 39 ECAB 860 (1988).

[4] *Harold S. McGough*, 36 ECAB 332 (1984).

[5] *Jason C. Armstrong*, 40 ECAB 907 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979).

shall appoint a third physician who shall make an examination."[6] As there is an existing conflict of medical opinion evidence regarding the extent of appellant's employment-related condition and whether or not he suffers from residuals related to his work injury which would entitle him to continuing medical benefits, the Office failed to meet its burden of proof to terminate appellant's compensation.

The decision of the Office of Workers' Compensation Programs dated November 20 and July 7, 1997 are hereby reversed.[7]

Dated, Washington, D.C.
January 7, 2000

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

[6] 5 U.S.C. § 8123.

[7] The November 20, 1997 decision denying appellant's request for a hearing is rendered moot by the Board's reversal of the Office's July 7, 1997 decision.