

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT M. KUTZ and U.S. POSTAL SERVICE,
POST OFFICE, Honolulu, HI

*Docket No. 99-743; Submitted on the Record;
Issued January 11, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's entitlement to monetary compensation and medical benefits finding that his accepted work-related conditions had resolved by August 21, 1997.

The Board finds that this case must be reversed in part.

The Office accepted that on September 3, 1991 appellant, then a 40-year-old letter carrier, sustained subluxations at T12 and L4-5, and a herniated nucleus pulposus at L4-5. On September 10, 1992 an Office second opinion examiner, Dr. Rowlin L. Lichter, a Board-certified orthopedic surgeon, noted upon examination that appellant had hypesthesia in the anterior central thigh and that radiographic imaging demonstrated a broad-based disc bulge at L4-5 which impressed the thecal sac and apparently extended significantly below the level of the lowest portion of the L4-5 disc. Dr. Lichter diagnosed "[h]erniated L4-5 disc with hypesthesia on the left," but did not comment on the presence or absence of subluxations. He opined that appellant's prognosis was excellent, that he needed no further medical treatment and that he could return to work 8 hours per day with lifting restrictions of no more than 75 pounds intermittently for 4 hours per day, intermittent walking for 6 hours per day, intermittent climbing for 3 hours per day, and intermittent bending, squatting, kneeling and twisting for 2 hours per day.

By letter to Dr. Lichter dated October 29, 1992, the Office noted his diagnosis of "herniated disc at L4-5 with hypesthesia on the left" and asked him if there were residuals of the September 3, 1991 injury, and if so, what was the objective evidence.¹

¹ The Board notes that a herniated disc by radiographic determination is objective evidence, as is hypesthesia upon examination.

Also, on October 29, 1992 the Office issued a decision terminating appellant's entitlement to medical benefits finding that the weight of the medical evidence established that appellant required no further medical treatment for his September 3, 1991 injury. However, in the memorandum to the Director, the Office noted that the issue of whether appellant had any further residuals at all was still pending and that Dr. Lichter had been asked to provide medical reasoning to support an ongoing diagnosis of a herniated nucleus pulposus.

On September 29, 1992 while delivering mail, appellant stepped on a gecko (lizard) and slipped, catching himself before he fell but injuring his back. The Office accepted the claim for "temporary exacerbation of lumbar disc displacement HNP L4-5." Appellant was disabled until January 2, 1993 when he returned to work on light duty with no lifting over 20 pounds and no driving.

On November 11, 1992 Dr. Lichter replied to the Office's October 29, 1992 letter regarding September 3, 1991 injury residuals as follows:

"Residuals are --

"Mild L4 hypesthesia (clearing).

"MRI [magnetic resonance imaging] finding of L4-5 disc rupture.

"SI[ight] restriction of back flexion (SLR [straight leg raising] neg[ative]).

"[SI(ight) relative atrophy of R[igh]t thigh therefore probably not important.]

"Reflexes WNL [within normal limits].

"Slight asymmetry of lumbar motion at about the L3-S1 segment without apparent cause."

Dr. Lichter further noted "This is a "fielder's choice" since all these symptoms/signs are soft and the MRI scan is not a symptom."

In a May 4, 1993 medical progress note, Dr. Neil T. Katz, a Board-certified orthopedic surgeon and appellant's treating physician, indicated that appellant had been followed for a disc bulge at L4-5 with a secondary radiculopathy,² and noted that appellant stated that he felt like he had returned to his level of capacity prior to the slip and fall on the gecko, but that after working three or four days in a row he was very exhausted and needed to rest. He noted that appellant stated that, although he did have occasional soreness in his back after a fair amount of activity, he would like to return to full release for work at that stage. Dr. Katz diagnosed continued improvement of the low back pain with secondary radiculopathy and noted that appellant was

² Previous evaluation had revealed a degenerative disc at L4-5 with a midline disc protrusion and discogenic pain. Dr. Katz diagnosed right disc herniation on January 22, 1993 and noted appellant's work activity restrictions.

being given a full release, with the proviso that if he was feeling a generalized fatigue as opposed to just the muscles being sore after working a number of days he should be seen by his medical physicians for a work up.

However, Dr. Katz again treated appellant on July 16, 1993 with the diagnosis of myofascial strain of the lumbosacral area following an increase in appellant's work load time wise and with a new route. He further treated appellant on March 10, 1994 for improved chronic low back pain. At that time appellant complained of occasional numbness in his left thigh similar to that which he experienced previously.³ On October 20, 1994 Dr. Katz noted a positive Laseque's sign and positive straight leg raising at 60 degrees on the left and 30 degrees on the right. Decreased sensation in the L4-5 nerve distribution was also noted. Concomitantly appellant underwent extensive physical therapy ordered by Dr. Katz with some improvement and by letter dated December 16, 1994, Dr. Katz noted the occurrence of appellant's 1991 and 1992 work-related injuries, indicated that he was still experiencing lower back pains and requested that his case be reopened so that appellant might receive the necessary treatment.

By letter dated January 31, 1995, the Office advised Dr. Katz that appellant had recovered fully from the effects of both injuries. The Office determined that appellant's current symptoms were brought on by a nonwork October 1994 coughing episode.

However, by letter dated May 22, 1996, the Office advised appellant that the fact that his recent episode of low back pain was brought on by coughing was "a moot point since you are still entitled to medical treatment for residuals of your accepted L4-5 disc herniation from your injury on September 29, 1992."

On July 30, 1996 appellant was seen by Dr. Paula T. Lenny, a general practitioner, who noted that he had left anterior thigh numbness and occasional tingling or burning pain which extended down his posterior thigh and lateral leg; she saw him again on August 12, 22, 26 and 28, September 5, 10, 17 and 26, on October 11 and 25, on November 7 and 29 and on December 13, 1996 and diagnosed chronic low back pain, L4-5 disc disease and intermittent right sciatica/radiculopathy. Decreased sensation to pinprick in the left anterior thigh area was noted, and straight leg raising was limited by low back pain. Date of injury was noted as September 29, 1992, history of injury was given for the September 3, 1991 injury and the accident mention was checked "yes" as the only cause of appellant's condition.

Appellant was then referred to Dr. Ramon H. Bagby, a Board-certified orthopedic surgeon, for a second opinion examination, with specific questions to be addressed regarding both accepted injuries and a statement of accepted facts which erroneously stated that appellant returned to regular duties on January 2, 1993.⁴

³ On April 5, 1994 appellant had filed a claim for exacerbation of his back condition when a stack of papers was shoved into his face which caused him to jerk backwards. The claim was denied for failure to establish fact of injury on June 15, 1995. Requests for modification were denied on January 16 and April 23, 1996.

⁴ The record shows that appellant returned to light duty with no lifting over 20 pounds and no driving.

By report dated August 28, 1996, Dr. Bagby reviewed appellant's history of injuries and noted his present complaints of constant dull achy to sharp stabbing pain in the low back accompanied by spasm, aggravated and worsened by sitting more than one and one half hours, walking, bending or twisting and intermittent pain into the right hip to the right knee. Dr. Bagby noted appellant's medical records without comment, conducted a physical examination and diagnosed lumbosacral sprain/strain, resolved. Dr. Bagby noted that examination showed some voluntary limited range of motion of the lumbar spine especially in extension and that appellant refused to perform rotary movements. He opined: "To this examiner it would appear that if indeed [appellant] had significant back symptomatology secondary to the injury of September 29, 1992 this has since resolved as noted by [appellant's] own admission by May 4, 1993 that he had returned to his previous level of capacity." No other medical or scientific rationale was given for this conclusion, particularly in light of appellant's present complaints. Dr. Bagby went on to state that "one must therefore conclude that any return of significant back pathology would have resulted from injuries post May 4, 1993 for which [appellant] has at least two."⁵ Dr. Bagby opined that no additional medical care for the September 29, 1992 injury was indicated, that no work restrictions were indicated,⁶ and that the diagnosis of the September work injury was lumbosacral sprain/strain with contusion.⁷ He opined that the September 29, 1992 injury was an aggravation of the September 3, 1991 injury which resolved by May 4, 1993. Dr. Bagby did not, however, explain how, pathophysiologically, a soft tissue muscular lumbosacral strain was an aggravation of a previously herniated L4-5 disc injury. Dr. Bagby further opined that appellant did not continue to suffer residuals of his September 3, 1991 or September 29, 1992 injuries, but he did not explain why, stating only that the medical records showed that appellant was able to return to his usual occupation and was able to work until May 19, 1994, but not commenting on Dr. Lichter's findings of residuals of a ruptured L4-5 disc and L4 hypesthesia, and not commenting on Dr. Lenny's reports of radiculopathy. Dr. Bagby further responded, however, that he would have no objection to appellant being subjected to spinoscopy or lumbar motion monitor to assess chronic lumbosacral impairment.

On January 24, 1997 the Office issued a notice of proposed termination of compensation finding that the weight of the medical evidence established that appellant had no residuals remaining from the work injuries of September 3, 1991 and September 29, 1992. The Office found that the weight of the medical evidence consisted of the reports of Dr. Bagby and Dr. Katz, presumably only up until May 4, 1993; it found that these reports outweighed the reports of Dr. Lenny, and, ostensibly Dr. Katz's reports post May 4, 1993, and that neither Dr. Katz nor Dr. Bagby "were able to report any objective findings associated with the work

⁵ The April 5, 1994 injury claim which was denied for failure to establish fact of injury and the October 1994 coughing incident.

⁶ Dr. Bagby did note, however, that appellant had had subsequent injuries which might necessitate prophylactic work restrictions of no repetitive bending, stooping, climbing, crawling or lifting greater than 50 pounds. The Board is not clear, from the record, to which subsequent injuries Dr. Bagby is referring, as appellant's injury of April 5, 1994 was denied for failure to establish fact of injury, and it is not clear why the coughing episode of October 1994 would necessitate such work restrictions.

⁷ Dr. Bagby disregarded the accepted condition of "exacerbation of lumbar disc displacement HNP L4-5" as the September 29, 1992 injury in formulating his answers.

injuries of September 3, 1991 and September 29, 1992.”⁸ The Office proposed termination of compensation after May 4, 1993 on the grounds that the weight of the medical evidence established that appellant had no objective residuals of the work injuries and was in no need of further medical treatment and had no disability after that date due to the injuries of September 3, 1991 and September 29, 1992.

By letter dated February 6, 1997, appellant disagreed with the proposed termination of compensation. He argued that he was released to full duties on May 4, 1993 only because he requested to be so released, and that at that time he had verbal restrictions on twisting, bending and lifting. Appellant also argued that he had taped Dr. Bagby’s evaluation and could document that he never claimed to have returned to his full capacity of prior to the September 1991 injury. He additionally argued that Dr. Lenny had been provided a complete medical history dating back to appellant’s first visit to Dr. Katz.

In support appellant submitted his approved application for Office of Personnel Management (OPM) disability retirement, accompanied by a report from Dr. Vincent S. Aoki, an employing establishment physician, who noted appellant’s history of injuries, indicated that he stopped work altogether on May 19, 1994, noted work restrictions recommended by appellant’s treating physician on September 29, 1995, noted that a functional capacity assessment evaluation on July 9, 1996 found that appellant was not fit for full duty as a letter carrier and that his restrictions were permanent and opined that appellant was permanently disabled from any employing establishment employment. Dr. Aoki diagnosed chronic low back pain due to recurrent myofascial strain of the lumbosacral area.

In support of his claim, appellant also submitted a February 28, 1997 report from Dr. Robert J. Gaudet, a Board-certified occupational medicine specialist, which noted appellant’s history of employment injury, dated September 29, 1992, recorded his complaints of almost daily lower back pain that increased with activity and with driving and for which he wore a back brace, noted examination results which included hypoactive deep tendon reflexes. Decreased sensation to light touch in the anterior aspect of the left thigh, forward flexion to 75 degrees with pain and extension to 15 degrees with discomfort. Dr. Gaudet diagnosed chronic lower back pain, history of L4-5 disc disease and intermittent right sciatica/radiculopathy. In a March 31, 1997 report, Dr. Gaudet noted that appellant walked with a stiff gait and appeared to have limited flexibility in his lower back, and he diagnosed history of bulging disc at L4-5 interspace. In an April 28, 1997 report, Dr. Gaudet noted that the pain appellant had in his lower back pain which radiated to his right buttock and leg had become worse, that he now had pain on the top of his right foot, that he had tenderness to palpation at the L4-5 level at the midline and at the right sciatic area, and that appellant had pain with forward flexion at about 45 degrees. Dr. Gaudet noted that deep tendon reflexes were hypoactive; he diagnosed history of midline bulging disc at the L4-5 interspace and he referred appellant to Dr. Lenny for rehabilitation evaluation.

⁸ The Board notes that Dr. Katz reported appellant’s L4-5 disc herniation several times and gave no indication that it went away, particularly as all of his pre- and post-May 4, 1993 reports listed “herniated disc” as a diagnosis at the head of the page, which was an objective finding as well as an accepted condition. The Board further notes that Dr. Bagby identified the existence of a broad-based central disc protrusion at L4-5 in his second opinion records review, and nowhere in his report did he indicate that this objective disc protrusion resolved.

By report dated May 27, 1997, Dr. Lenny noted that appellant's straight leg raising was positive at 40 degrees causing low back pain and she opined that a repeat MRI scan and neurosurgical consultation would be reasonable. On June 10, 1997 Dr. Lenny noted that appellant's straight leg raising was to 30 degrees bilaterally. Dr. Lenny noted decreased sensation to pinprick in the lateral right leg and foot.

By decision dated August 21, 1997, the Office terminated appellant's entitlement to compensation and medical benefits effective that date finding that the weight of the medical evidence of record established that appellant had no further residuals of his "work injuries of September 3, 1991, September 29, 1992 and April 5, 1994."⁹ The Office found that the weight of the medical evidence of record consisted of the reports of Drs. Lichter, Bagby and Katz who concur that appellant "has no disability and is capable of performing his regular work duties effective May 19, 1994." However, the Office then recommended that all benefits be terminated as the evidence of record establishes that appellant had "no further residuals of his work injuries of September 3, 1991, September 29, 1992 and April 5, 1994."

By letter dated August 26, 1997, appellant requested an oral hearing. In support of his claim, he submitted multiple further reports from Dr. Lenny reporting similar findings as in her previous reports, and a new form report and narrative from Dr. Chris A. Boulange, a general practitioner.

A hearing was held on June 9, 1998 at which appellant testified. Following the hearing further medical evidence was submitted which included a narrative in which Dr. Boulange reported positive straight leg raising at 5 degrees on the right and at 50 degrees on the left.

A June 26, 1998 report from Dr. James A. Ferrier, an orthopedic surgeon, was also submitted which indicated that there was no evidence that appellant had significant back pain prior to his work-related injuries, that there was one moment in time when he apparently returned to his baseline as noted by Dr. Katz, but that was a relatively brief period, that appellant now had persistent back pain that was not disabling, and that 50 percent of his complaints are related to his work-related injuries of 1991 and 1992 and 50 percent are due to ongoing degenerative disease unrelated to any specific injury.

By decision dated August 27, 1998, the hearing representative affirmed the August 21, 1997 decision finding that the report of Dr. Bagby constituted the weight of the medical opinion evidence of record and "explained why he did not relate [appellant's] current and ongoing complaints to the 1991 and 1992 injuries."

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.¹⁰ After it has determined that an employee has disability

⁹ Under the discretionary authority granted by 5 U.S.C. § 8128(a) the Office may review an award for or against the payment of compensation at any time on its own motion any may, as a result of that review, affirm, reverse or modify the previous decision; *see* 20 C.F.R. § 10.138(a). This includes the prior termination of medical benefits on October 29, 1992, but does not apply to termination of benefits related to the April 5, 1994 injury which was never accepted by the Office as occurring.

¹⁰ *Harold S. McGough*, 36 ECAB 332 (1984).

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.¹¹

The Office met its burden of proof to terminate appellant's entitlement to monetary compensation benefits in this case as he was not receiving monetary compensation at the time of the termination order, as the medical evidence of record supports that appellant is not totally disabled due to his 1991 and/or 1992 employment injuries, and as appellant was able to return to work following each injury and did not stop work permanently in 1994 due to a recurrence of disability, but instead eventually elected to receive OPM disability retirement.

However, the right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for wage loss.¹² To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition that require further medical treatment.¹³ The Office has not done that in this case.

In the instant case, the Office has relied on the opinion of the second opinion examiner, Dr. Bagby, as the weight of the medical evidence is establishing that appellant has no residuals of his accepted herniated L4-5 disc or its 1992 temporary aggravation. However, Dr. Bagby's report is unrationalized and conclusory. He noted appellant's multiple back complaints, yet provided no explanation for why appellant was experiencing them; he noted appellant's medical records without commenting on any of them, conducted a physical examination without discussing his findings or their meaning, and diagnosed lumbosacral sprain/strain, resolved, without any explanation as to why, considering that the accepted condition was not a strain but was an aggravation of an L4-5 herniated disc. Dr. Bagby opined: "To this examiner it would appear that if indeed [appellant] had significant back symptomatology secondary to the injury of September 29, 1992 this has since resolved as noted by [appellant's] own admission by May 4, 1993 that he had returned to his previous level of capacity," but offered no other medical or scientific rationale for this conclusion, relying entirely on the fact that appellant asked to be released to full work as his "medical rationale." Dr. Bagby went on to state that "one must therefore conclude," but he did not explain why, "that any return of significant back pathology would have resulted from injuries post May 4, 1993 for which [appellant] has at least two," one of which the Board notes was not accepted as occurring and one of which appears to be inconsequential, as there are no medical reports of record discussing treatment of the coughing "injury." Dr. Bagby opined that no additional medical care for the September 29, 1992 injury was indicated, yet he stated that a spinoscopy would not be objectionable, and that no work restrictions were indicated, yet he listed significant work restrictions for a nonexistent and an inconsequential injury.

¹¹ *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

¹² *Marlene G. Owens*, 39 ECAB 1320 (1988).

¹³ *See Calvin S. Mays*, 39 ECAB 993 (1988); *Patricia Brazzell*, 38 ECAB 299 (1986); *Amy R. Rogers*, 32 ECAB 1429 (1981).

The Board finds these statements, without further detailed explanation, highly inconsistent. Dr. Bagby further opined that the diagnosis of the September work injury was lumbosacral sprain/strain with contusion, in contrast to the actual condition accepted by the Office and presented to Dr. Bagby in the statement of accepted facts as a fact. He opined that the September 29, 1992 injury was an aggravation of the September 3, 1991 injury which resolved by May 4, 1993, but did not explain how, pathophysiologically, a soft tissue muscular lumbosacral strain was an aggravation of a previously herniated L4-5 disc injury. Dr. Bagby further opined that appellant did not continue to suffer residuals of his September 3, 1991 or September 29, 1992 injuries, but he did not explain why, stating as “rationale” once again, only that the medical records showed that appellant was able to return to his usual occupation and was able to work until May 19, 1994, but not commenting on subsequent reports of residuals of a ruptured L4-5 disc, L4 hypesthesia, and radiculopathy. As Dr. Bagby’s report is flawed in a variety of ways, including being unrationalized and conclusory, it cannot constitute the weight of the medical opinion evidence, and merely creates a conflict with the reports of the other physicians of record, including Drs. Lichter, Katz, Lenny, Gaudet, Ferrier and Boulange, all of whom have noted some postinjury residuals related to appellant’s 1991 L4-5 disc disruption, accepted as an L4-5 disc herniation, and its 1992 exacerbation.

The Federal Employees’ Compensation Act, at 5 U.S.C. § 8123(a), in pertinent part, provides: “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.”

The Office failed to do this in the instant case, and therefore failed to meet its burden of proof to terminate appellant’s entitlement to medical benefits.

Accordingly, the decision of the Office of Workers' Compensation Programs dated August 27, 1998 is affirmed in part with respect to appellant's entitlement to monetary compensation benefits, but is reversed with respect to his entitlement to continuing medical benefits.

Dated, Washington, D.C.
January 11, 2000

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member