

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT L. SANDERS and DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION, Des Plaines, IL

*Docket No. 99-1061; Submitted on the Record;
Issued June 27, 2000*

DECISION and ORDER

Before DAVID S. GERSON, 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 wage-loss compensation.

On October 7, 1991 appellant injured his back when the back of his chair broke and he fell to the floor. The Office accepted the claim for lumbosacral strain and bulging disc L4-5, S1 and authorized a laminotomy and microdiscectomy at L4-5 on the left. Appellant returned to work on June 2, 1992.

On August 1, 1993 appellant filed a claim for recurrence of disability commencing June 21, 1993. The Office accepted appellant's recurrence claim and placed him on the automatic rolls for temporary total disability effective December 12, 1993. The Office authorized surgery which was performed on February 15, 1994. Appellant returned to light-duty work for five hours per day effective June 20, 1994 and subsequently returned working 40 hours per week.

On July 15, 1996 appellant filed a recurrence of disability claim commencing July 11, 1996 which was accepted by the Office. He retired from the employing establishment effective September 16, 1996.

On March 4, 1997 appellant elected to receive benefits under the Federal Employees' Compensation Act rather than retirement benefits from the Office of Personnel Management.

In notes dated January 9, 1997, Dr. Dirk Nelson,¹ based upon a physical examination, noted forward flexion and extension of the knees was limited to 50 percent as was lateral bending on both sides. He also reported:

“[R]otation of the torso is also said to be somewhat uncomfortable. In the sitting position, straight leg raising on the left is negative[,] straight leg raising on the left is negative, straight leg raising on the right causes some back pain at 90 degrees. Deep tendon reflexes 2+ symmetrical, ankles and knees bilaterally. Motor examination shows no weakness in EHL or tibialis bilaterally. In the supine position, straight leg raising on the left is negative; straight leg raising on the right is positive for back and buttock pain only at 80 to 90 degrees.”

In conclusion, Dr. Nelson diagnosed discogenic back pain with possible recurrent herniation at L4-5, right side and recommended that a magnetic resonance imaging (MRI) scan be performed.

A January 11, 1997 MRI scan revealed a “central herniation of the nucleus pulposus at the L5-S1 level with scar tissue around it.” The report also showed “[t]he L5-S1 intervertebral disc also shows disc desiccation.”

In notes dated January 23, 1997, Dr. Nelson reported, based upon review of the MRI scan, “a small central herniation of the nucleus pulposus at L5-S1 without significant stenosis or significant impingement on the lateral recesses.” He indicated that appellant’s discogenic back pain with radiculitis appeared to be resolving and recommended physical therapy.

In a March 10, 1997 report, Dr. Nelson noted that physical therapy had not provided any improvement in appellant and that he continued to have some right leg and back pain symptoms. He recommended an epidural steroid injection and a home electrical stimulation unit.

On March 28, 1997 the Office referred appellant for a functional capacity evaluation test to determine his ability to return to his date-of-injury job or current restrictions to be used for vocational rehabilitation services.

In a physical capacity evaluation dated April 8, 1997, Jim Judge, a physical therapist, concluded that “[d]espite the evidence of invalid test results, it is apparent that [appellant] would be able to return to work as an air traffic control specialist without restriction” and that his symptoms appeared “excessively exaggerated and his Waddell[’s] signs were positive at 3/5.” Furthermore, he concluded that appellant’s “pain behavior and his effort were extremely suspect.” In his summary of the test, Mr. Judge noted that appellant was only able to complete two and one-half hours of the four-hour test and refused to come back the next day to complete the test “due to his increased levels of back pain.” He indicated that, despite appellant’s failure to complete the test, “he was able to perform work at the light level of demand and was able to perform sustained sitting tolerance without significant difficulty.”

¹ A second opinion Board-certified orthopedic surgeon.

By letter dated May 29, 1997, the Office referred appellant to Dr. Nelson to complete the evaluation and for appellant to obtain the results of the functional capacity evaluation to be used to assist appellant in returning to gainful employment. An attached position description noted the requirements of appellant's position. No physical restrictions were noted on the position description.

In a report dated June 9, 1997, Dr. Nelson, based upon a physical examination, stated that appellant had flexibility to his mid-tibia, extension was 50 percent of normal and that his lateral bending was normal on both sides. He also noted that "[p]ressure on the tops of the shoulders" was negative as was rotation of the torso, the deep tendon reflexes in a sitting position were 2+, normal power in appellant's extensor hallucis longus and tibialis anterior and negative straight leg raising in both sitting and supine positions. Regarding the April 8, 1997 functional capacity evaluation, Dr. Nelson noted that Mr. Judge opined that appellant had some exaggeration in his symptoms and that the test was somewhat inconsistent, but that appellant was capable of performing his date-of-injury position according to Mr. Judge. Dr. Nelson concluded, based upon the April 8, 1997 functional capacity evaluation and his physical examination, that appellant was capable of performing his usual employment as an air traffic controller without any restrictions.

On August 15, 1997 the Office issued a notice of proposed termination of wage-loss benefits. The Office relied upon Dr. Nelson's June 9, 1997 report to find that appellant was capable of performing his date-of-injury job without any restrictions, as Dr. Nelson's report was based upon a physical examination, review of his position description and a review of the April 8, 1997 functional capacity evaluation performed by Mr. Judge.

In a September 15, 1997 report, Dr. Leonard Weiss² described details in Mr. Judge's report which Dr. Weiss believed were inaccurate and that the April 8, 1997 functional capacity evaluation test was invalid. He critiqued the various reports submitted by Dr. Nelson as well as noting that Dr. Nelson failed to mention or consider the pain medication appellant takes in reaching the conclusion that appellant could perform his usual employment. Regarding appellant's employment, Dr. Weiss noted that it required a lot of nonsedentary moving around as evidenced by his being required to assist in the moving and assembling of computers and moving furniture around to accommodate the computer equipment. Dr. Weiss also noted that neither Dr. Nelson nor Mr. Judge took into account that appellant "was taking a significant amount of pain medication" which "included the opioids Tylenol #3 with codeine as needed (up to three per day) and Viocodin" and that these pain medications would affect appellant's subjective pain and, thus, objective observations. In conclusion, Dr. Weiss noted:

"Therefore, taking all of this 'additional' and 'argument', into account we feel that unquestionably, all of the evidence, enclosed documents and looking at the case of this claimant as a whole, he has had and continues to have, continuing disability to work, as a result of [h]is 'injury of October 7, 1991 or form [sic] the recurrence of July 11, 1996.' This is a logical outgrowth of objectively assessing

² An attending physician Board-certified in internal medicine, psychiatry, addiction psychiatry and forensic psychiatry.

the evidence *in toto* and giving proper weight to the data as well as to who provided the information.”

By decision dated September 18, 1997, the Office finalized the termination of appellant’s compensation on the basis that appellant had no continuing disability causally related to his accepted employment injury. The Office found that the weight of the medical evidence rested with Dr. Nelson’s report. The Office further found Dr. Weiss’ September 15, 1997 report to lack any probative value and was speculative as he failed to provide a medical opinion, supported by objective evidence and medical rationale, that appellant was unable to perform his date-of-injury job.³

Appellant, through counsel, requested an oral hearing which was held on April 15, 1998.

By decision dated June 25, 1998, the hearing representative affirmed the termination of benefits.

Appellant’s counsel requested reconsideration and submitted a July 31, 1998 report by Dr. Weiss in support of his request.

In his July 31, 1998 report, Dr. Weiss reported examination findings and concluded that appellant was unable to perform his position as an air traffic controller due to the medications he was taking as well as to his severe symptoms. He indicated that appellant’s symptoms, his physical examinations and MRI scans supported a finding that he was unfit to perform his usual employment. Dr. Weiss noted that, “over the last 21 months, his physical condition from his original injury has exacerbated, to an even greater extent. Even the most powerful painkillers, the opioid derivatives, barely make his life manageable” and appellant “absolutely could not function in the workplace because just when he takes enough medicine to alleviate his symptoms, he is too drowsy to function.” Dr. Weiss also opined that appellant, due to his surgery, “was and is unable to sit for any length of time” and that he continued to have disc herniation and impingement of the nerve roots which made “it impossible for him to function in the workplace.” In addition, Dr. Weiss noted that the medication appellant took disqualified him from working as an air traffic controller pursuant to federal regulation.

By merit decision dated November 23, 1998, the Office denied modification of its prior decision.

The Board finds that the Office improperly terminated appellant’s wage-loss compensation on the basis that he no longer has any continuing disability due to his accepted October 7, 1991 employment injury effective October 12, 1997.

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits. 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

³ On October 12, 1997 appellant was restored to the civil service annuity rolls.

employment.⁴ The Office's burden of proof includes the necessity of furnishing rationalized medical evidence based on a proper factual and medical background.⁵ The Office has not met its burden in this case.

In the instant case, the Office accepted that appellant sustained a lumbosacral strain and bulging disc at L4-5, S1 and authorized surgery for an injury sustained on October 7, 1991. Subsequently, the Office accepted that appellant had a recurrence of disability on August 1, 1993 and July 11, 1996.

The evidence relevant to whether appellant has any continuing disability due to his accepted employment injury are the June 9, 1997 report by Dr. Nelson, an Office referral physician and the September 15, 1996 report by Dr. Weiss, his attending physician. In his September 15, 1996 report, Dr. Weiss, appellant's attending physician, opined that appellant was unable to perform the position of air traffic controller due to his accepted employment disability as well as the medications taken to relieve appellant's pain from those injuries and that appellant was totally disabled. Dr. Nelson opined in his June 9, 1997 report, based upon Mr. Judge's report and his physical findings, that appellant was capable of performing the duties as an air traffic controller without any restrictions. The Board, thus, finds that a conflict exists in the current medical opinion evidence regarding the extent of appellant's continuing disability and his capacity for full-time employment.

The Act, at 5 U.S.C. § 8123(a), states in pertinent part: "If there is 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." To resolve this conflict, the Office should have referred the case record and a statement of accepted facts to an appropriate medical specialist for an impartial medical evaluation and opinion pursuant to 5 U.S.C. § 8123(a). The Office did not obtain an impartial medical evaluation on whether appellant continued to be totally disabled due to his accepted employment injury and, therefore, did not meet its burden of proof in this case.

⁴ *Wallace B. Page*, 46 ECAB 46 ECAB 227, 229-30 (1994); *Jason C. Armstrong*, 40 ECAB 907, 916 (1989).

⁵ *Larry Warner*, 43 ECAB 1027, 1032 (1992); *see Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

The decisions of the Office of Workers' Compensation Programs dated November 23 and June 25, 1998 are hereby reversed.

Dated, Washington, D.C.
June 27, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member