

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of GARY M. KING and U.S. POSTAL SERVICE,  
POST OFFICE, Long Beach, CA

*Docket No. 99-709; Submitted on the Record;  
Issued May 25, 2000*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,  
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion in terminating medical benefits effective May 21, 1997; and (2) whether the Office properly denied appellant's request for merit review.

On September 8, 1995 appellant, then a 43-year-old mail carrier, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that he sustained an acute lumbar strain when he lifted a tray of mail off the ground.<sup>1</sup> The Office accepted the claim for lumbar strain. Appellant returned to light-duty work eight hours per day subsequent to November 24, 1995.

On February 15, 1996 the Office referred appellant, together with a statement of accepted facts, the medical record and list of questions, to Dr. Francis J. Thornton for a second opinion as to whether appellant continued to have any disability causally related to his accepted employment injury.

In a report dated February 20, 1996, Dr. Harry Marinow,<sup>2</sup> based upon a physical examination, history of the employment injury, position description, medical history and x-ray interpretations, diagnosed cervical, dorsal and lumbar spine pain syndrome with degenerative osteoarthritis and C3-4 spondylosis with degenerative disc disease at L1-2. He indicated that appellant could continue with his light-duty work.

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<sup>1</sup> This was assigned claim number A13-1086482. The Board notes that the record also contains an occupational disease claim filed on April 3, 1998 alleging that on September 25, 1995 appellant first realized that his back problems were due to factors of his federal employment. Appellant's occupational disease claim was assigned claim number A13-1158832. A review of the record indicates that a decision does not appear to have been issued on this claim.

<sup>2</sup> Appellant's attending Board-certified orthopedic surgeon. The Board notes that Dr. Marinow noted in his report that he had been selected by the employer as appellant's attending physician.

In a report dated March 6, 1996, Dr. Thornton, based upon a physical examination, employment injury history, statement of accepted facts, magnetic resonance imaging (MRI) test and x-ray interpretation, opined that the objective evidence was insufficient to support any continuing disability causally related to his September 8, 1995 employment injury. He also indicated that appellant had a temporary aggravation of his preexisting back problems due to the September 8, 1995 employment injury. The physician further noted that “[o]ne would anticipate that with a vigorous recondition exercise program and attention to his restricted chest expansion as described above, that this temporary aggravation would abate over the next six to eight weeks.” Dr. Thornton recommended that appellant continue with the restrictions on his bending, twisting and no lifting over 40 pounds due to his accepted employment injury as well as preexisting factors.

Dr. Marinow, in a March 14, 1996 supplemental report, which was based upon a physical examination and review of Dr. Thornton’s report, noted that appellant continued to have spine pain and indicated that appellant continue his modified-duty work.

In an April 15, 1996 report, Dr. Marinow noted that appellant continued to have neck and back discomfort as well as pain, which radiated to the rib cage and increased when walking or bending. He opined that appellant “avoid heavy lifting or carrying of mailbags weight 30 [to] 40 pounds on a permanent basis as this increased his spine pain. It is my opinion that he could work casing mail on a regular basis, but would be unable to return to his previous work as a [l]etter [c]arrier.”

In a prescription note dated April 15, 1996, Dr. Marinow stated that appellant was “to continue casing mail on a permanent modified restriction.”

In a May 13, 1996 supplemental report, Dr. Marinow noted that appellant continued to have symptoms related to his cervical and lumbar spine and recommended that appellant continue working his limited-duty position.

In a report dated June 26, 1996, Dr. Marinow noted diffuse paravertebral musculature tenderness in the cervical and lumbosacral spine as objective factors of disability. He opined that appellant should continue his permanent light-duty job of casing mail and again reiterated that appellant not carry heavy mail satchels or perform repetitive heavy lifting of mail. Next, Dr. Marinow opined that appellant had a five percent permanent disability according to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. He attributed appellant disability to his September 8, 1995 employment injury and that appellant’s condition was “permanent and stationary.”

In a July 22, 1996 report, Dr. Marinow noted:

“As you are aware, Dr. Thornton’s evaluation was performed on March 6, 1996 and I had treated and followed [appellant] well beyond that point. [Appellant] did indeed have the benefit of physical therapy, including a rehabilitation exercise program, through the lateral part of April 1996. I determined that his condition had reached the maximum medical benefit of medical treatment on June 26, 1996. It was my opinion that, when I discharged him on June 26, 1996, there was no

necessity for any vigorous exercise program that would substantially improve or cure [appellant] of his chronic residual back symptoms. I did, however, advise him to perform home neck and low back stretching and strengthening exercises and to walk, swim, or stationary cycle as tolerated. [Appellant] has a problem with exogenous obesity, which will not, in my opinion, change. Further, vigorous exercise programs relative to his spinal column, would, in all likelihood, aggravate his underlying condition.”

On April 16, 1997 the Office issued a notice of proposed termination on the basis that appellant no longer had any residual disability causally related to his accepted September 8, 1995 employment injury based upon Dr. Thornton’s opinion. In addition, the Office found that appellant’s temporary aggravation of his preexisting back condition ceased on June 26, 1996 when his treating physician discharged him from his medical care. The Office also noted that both Drs. Thornton and Marinow recommended that appellant continue with his light-duty position.

By letter dated May 6, 1997, appellant’s representative disagreed with the proposal to terminate benefits as there was an unresolved conflict in the medical opinion evidence.

In a decision dated May 21, 1997, the Office terminated appellant’s medical and monetary compensation benefits effective May 21, 1997 on the basis that the weight of the medical evidence established that he no longer had any residual disability due to his accepted employment injury. In the attached memorandum, the Office relied upon Dr. Thornton’s opinion that the September 8, 1995 employment injury had caused a temporary aggravation of his appellant’s underlying condition had resolved. The Office also noted that Dr. Marinow’s July 22, 1996 report supported Dr. Thornton’s opinion that the temporary aggravation had ceased as of June 1996 when appellant was discharged from his medical care.

On May 28, 1997 appellant’s representative requested a hearing before an Office hearing representative.

In a report dated December 15, 1997, Dr. Marinow determined that appellant had reached maximum medical improvement as of June 26, 1996 and opined that appellant “was capable of working permanent modified duty, casing mail.” He recommended that appellant not carry heavy mail satchels or perform repetitive heavy lifting “as this would predispose him to increase problems relative to his spine.” Regarding the position of city carrier, Dr. Marinow opined that appellant was not capable of performing the job duties which required carrying heavy mail sacks weighing up to 70 pounds or carrying mail satchels weighing up to 30 pounds or unloading mail sacks which weighed up to 70 pounds.

In a report dated March 6, 1998, Dr. Alexander T. Latteri, based upon a physical examination, employment injury history, review of medical records, x-ray interpretations and MRI tests, diagnosed traumatic degenerative disc disease of the cervical spine, traumatic aggravation degenerative disc disease of the thoracic spine and traumatic aggravation osteoarthritis in appellant’s thoracic spine. Regarding appellant’s ability to perform his usual work as a mail carrier, Dr. Latteri agreed with appellant’s attending physician that appellant was unable to perform those duties. He also concluded that appellant’s “present spinal disability is a

direct consequence of the continuous stress and strain associated to his spine as a consequence of work activities as a mail carrier” as well as his September 8, 1995 employment injury.

A hearing was held on March 25, 1998 at which appellant was represented by counsel, allowed to testify and submit evidence.

By decision dated August 12, 1998, the hearing representative affirmed the termination of appellant’s monetary and medical compensation benefits. In reaching this decision, the hearing representative relied upon the opinion of Dr. Thornton to find that appellant has no residual disability from his September 8, 1995 employment injury. Regarding Dr. Latteri’s opinion which was submitted subsequent to the termination decision, the hearing representative determined that it was not fully rationalized or specific on the issue of causal relationship and, thus, Dr. Thornton’s opinion remained the weight of the evidence to establish that appellant no longer had any residuals due to his accepted employment injury.

Appellant’s representative requested reconsideration in a letter dated November 2, 1998 and submitted a supplemental report dated July 21, 1998 from Dr. Latteri in support of his request. He opined in the July 21, 1998 report that appellant’s modified work activities aggravated his preexisting arthritic back condition which he stated was supported by MRI tests taken of appellant’s spine.

In a decision dated November 18, 1998, the Office denied appellant’s request for reconsideration on the basis that the evidence submitted was repetitious and insufficient to warrant modification of the prior decision. The Office also recommended that appellant’s September 8, 1995 traumatic injury claim be merged with his occupational injury claim.

The Board finds that Office failed to meet its burden of proof to terminate appellant’s compensation benefits effective May 21, 1997.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>3</sup> 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.<sup>4</sup> The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability. To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.<sup>5</sup>

In the instant case, the Office relied upon Dr. Thornton’s opinion to terminate appellant’s compensation on the basis that he no longer had any disability related to his September 8, 1995

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<sup>3</sup> *Mohamed Yunis*, 42 ECAB 325 (1991).

<sup>4</sup> *Id.*

<sup>5</sup> *Frederick Justiniano*, 45 ECAB 491 (1994); see *Marlene G. Owens*, 39 ECAB 1320 (1988); *Calvin S. Mays*, 39 ECAB 993 (1988).

employment injury. The Board finds that the Office erred in relying upon Dr. Thornton's March 6, 1996 report to terminate benefits. In his report, Dr. Thornton indicated that appellant had a temporary aggravation of his preexisting back problems due to the September 8, 1995 employment injury and that he anticipated that with "a vigorous recondition exercise program" that the temporary aggravation would abate in six to eight weeks. He recommended that appellant continue with his restrictions which Dr. Thornton attributed to both appellant's preexisting condition and his September 5, 1995 employment injury. Dr. Thornton's report is insufficient to meet the Office's burden to terminate benefits as the physician did not specifically state that appellant no longer had any residuals due to his employment injury nor did he opine that the temporary aggravation had ceased. He opined that the aggravation probably would abate if appellant followed an aggressive exercise program. Furthermore, Dr. Thornton specifically stated that appellant was to continue with restrictions on his lifting, bending and twisting, which he attributed to appellant's accepted employment injury as well as his preexisting back problems.

The Office in terminating benefits stated that it had relied upon Dr. Marinow's statement that he released appellant on June 26, 1996 from his medical care to support Dr. Thornton and the termination of benefits. While Dr. Marinow did state that he discharged appellant from medical care on June 26, 1996 the physician in a July 22, 1996 report clarified this statement by noting that appellant had reached maximum medical improvement on June 26, 1996 and he saw no necessity for an exercise program at that time. In his reports, Dr. Marinow continued to reiterate the physical restrictions appellant had as well as noting that appellant condition was permanent. He attributed appellant's disability to his September 8, 1995 employment injury.

It is the Office's burden to establish that employment-related disability or residuals have ceased before it may terminate benefits. In order to meet this burden, there must be probative medical evidence that the disability has ceased or is no longer causally related to appellant's employment injury. Both Drs. Marinow and Thornton opined that appellant should continue with the restrictions in his light-duty job and that the disability was due to his September 8, 1995 employment injury as well as a preexisting back condition. Neither Drs. Thornton nor Marinow gave an opinion indicating that appellant no longer had any residuals due to his accepted employment injury. Thus, the Board finds that the medical evidence of record is not of sufficient probative value to meet the Office's burden in this case.

In light of the Board's resolution of the first issue, the Board need not address the second issue in this case.

The decisions of the Office of Workers' Compensation Programs dated November 18 and August 12, 1998 are hereby reversed.

Dated, Washington, D.C.  
May 25, 2000

George E. Rivers  
Member

David S. Gerson  
Member

A. Peter Kanjorski  
Alternate Member