

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MICHAEL J. PIETRAFITTA and DEPARTMENT OF THE NAVY,  
NAVAL AIR WARFARE CENTER, Lakehurst, NJ

*Docket No. 99-2129; Submitted on the Record;  
Issued August 1, 2001*

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DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issue is whether appellant had any disability after September 24, 1996, the date the Office of Workers' Compensation Programs terminated his wage-loss compensation benefits, causally related to his accepted August 24, 1993 employment injuries.

The Office accepted that on August 24, 1993 appellant, then a 35-year-old cost analyst, sustained lumbosacral strain and a herniated nucleus pulposus when he fell backwards and hit a drawer. Appellant underwent surgery on October 18, 1993 for an L5-S1 herniated disc excision. He received compensation benefits as appropriate.

By report dated August 23, 1995, Dr. Richard A. Cautilli, Jr., a Board-certified orthopedic surgeon, noted that appellant was injured at work on August 24, 1993 and that "[h]is back injury was so severe as to cause him to have bowel and bladder dysfunction which he persists with today.<sup>1</sup> He underwent surgical exploration which relieved some but not all of his symptoms.... He has never fully recovered from this injury." Dr. Cautilli noted that appellant had been working light duty until June 30, 1995 when his light duty was taken away, and that at the present time he was still able to work extremely light duty within previously articulated functional capacity requirements.<sup>2</sup>

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<sup>1</sup> On October 3, 1994 a Board-certified urologist, Dr. Anton Kapp, Jr., noted appellant's spinal cord compression injury and subsequent surgery, and reported that since then he had been having an unsteady gait, fecal soiling, urgency, urge incontinence and incontinence at night without any sensory awareness. Dr. Kapp noted that appellant was on long-term high dose pain medications for his back discomfort.

<sup>2</sup> Until June 30, 1995 appellant had been working flexi-place at his home; effective close of business June 30, 1995 the employing establishment terminated appellant's flexi-place arrangement. Appellant was on flexi-place as he was unable to drive or ride the distance required to get to and from the workplace.

Dr. Cautilli opined that appellant was totally disabled for his usual work for the period July 29 through August 26, 1995 due to his disc excision and that it was unknown how long his disability would continue.

By office note dated February 16, 1996, Dr. Cautilli indicated that appellant was seen with low back pain and continuing bowel and bladder problems. He noted that appellant was wearing diapers and had to go to the bathroom every 15 minutes and was positive for paraspinal tenderness. A work restriction evaluation completed that date by Dr. Cautilli indicated that appellant could only work one to two hours per day, with a limit of one hour per day intermittent standing, walking and sitting, and no lifting, bending, squatting, climbing, kneeling or twisting.

By narrative report dated February 20, 1996, Dr. Cautilli reviewed appellant's injury, his subsequent surgery and his remaining symptoms, noted that he had continued pain, the inability to sit and continued loss of bowel and bladder control. He noted that upon physical examination appellant had decreased range of motion of his back in all planes; he diagnosed "low back pain status/post disc excision," and opined that appellant's condition was definitely related to his original injury of August 24, 1993. Dr. Cautilli opined that appellant was totally disabled.

On April 6, 1996 the Office referred appellant for a second opinion to Dr. Mario J. Arena, a Board-certified orthopedic surgeon, for an evaluation.

By report dated May 3, 1996, Dr. Arena reviewed appellant's history and his current complaints, noted appellant's incontinence of urine and loss of bowel control, reported his findings upon physical examination, and diagnosed "[d]egenerative disc disease of the lumbosacral spine, status post excision of herniated disc on the left at L5-S1. No neurological compromise." He opined that appellant's ongoing symptoms were related to his underlying degenerative disc disease of the lumbosacral spine as well as postoperative changes at L5-S1. Dr. Arena did state that appellant's postoperative changes occurred as a result of the surgery which occurred as a result of the accident, but opined that appellant had no objective signs of lumbosacral strain or sprain and no longer had objective findings of a herniated L5-S1 disc. He opined that appellant's bowel and bladder problems were not related to the August 24, 1993 injury, as the disc was a left-sided herniation and to cause bowel and bladder compromise it would require bilateral nerve root compression. Dr. Arena opined that no further treatment was necessary for appellant's work-related injuries and that appellant was physically able to perform the job of contract negotiator. He completed a work capacity evaluation indicating that appellant could work 8 hours per day lifting up to 10 pounds frequently and up to 20 pounds occasionally, that he could sit and stand for 6 hours per day intermittently, walk for 4 hours per day, bend and twist for 3 hours per day, lift for 2 hours per day, and squat, climb and kneel for 1 hour per day.

On June 11, 1996 the Office sent appellant a notice of proposed termination of compensation finding that the second opinion report from Dr. Arena demonstrated that appellant could perform the position of contract negotiator. The Office found that the weight of the medical opinion evidence rested with Dr. Arena as he provided a detailed history of appellant's medical condition and capabilities and as Dr. Cautilli's medical reports did not provide any objective findings. The Office advised that appellant had 30 days within which to submit medical evidence supporting further disability.

By decision dated July 15, 1996, the Office finalized its proposed termination effective that date, finding that Dr. Arena's report established that appellant could return to his date-of-injury job.

By letter dated July 24, 1996, appellant requested reconsideration, and in support he submitted two new medical reports.

By report dated June 28, 1996, Dr. Mark S. Nemiroff, a Board-certified anesthesiologist, noted that appellant had been under his care for a long time, that his recurrent chronic low back pain followed the lumbar disc excision surgery and that he had been left completely incapacitated with low back pain since that time. He noted that at that time they were managing appellant's condition with injections and medication, and he opined that he could not anticipate that appellant would return to his former duties in the foreseeable future and that his overall prognosis for complete recovery was poor. Dr. Nemiroff opined that appellant would require multiple medications, including pain relievers, for an indefinite period of time. On an attached work restriction evaluation, he opined that appellant could only sit, stand and walk intermittently for one hour per day, and that all other activities were completely restricted.

Another work restriction evaluation from Dr. Cautilli dated July 8, 1996 reported the same as his February 16, 1996 evaluation.

On July 22, 1996 the Office received medical office notes from Dr. Cautilli dated June 21, 1996 which reported appellant's condition and the results of physical examination, and opined "[w]e do not believe that at this point that [appellant] is capable of work secondary to the pain that he has in his back."

By decision dated September 24, 1996, the Office again terminated appellant's wage-loss compensation benefits effective that date finding that appellant had no further injury-related disability.<sup>3</sup> The Office found that the report of Dr. Arena demonstrated that there was no continuing injury-related disability.

By letter dated September 11, 1997, appellant, through his representative, requested reconsideration of the September 24, 1996 termination of his compensation.

By letter decision dated September 17, 1997, the Office denied appellant's reconsideration request finding that it included no new and relevant evidence nor raised any substantive legal question.

On September 23, 1997 appellant again requested reconsideration and he resubmitted medical reports previously of record. Also in support of the reconsideration request, appellant submitted new medical evidence.

By report dated November 15, 1996, Dr. Joseph R. Trubia, a Board-certified orthopedic surgeon, reviewed appellant's history of injury and treatment, noted his present symptomatology,

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<sup>3</sup> It appears from the record that appellant's wage-loss compensation benefits were not terminated in July 1996 as per the Office's July 15, 1996 decision.

reported his positive objective physical examination results, and opined that both the severe back pain with left leg radiation and the ensuing bowel and bladder incontinence were directly related to the 1993 work injury and herniated disc. Dr. Trubia disagreed with Dr. Arena's assessment of appellant's condition that the present "symptomatology" was the "result of degenerative changes," and he explained that degenerative complaints in no way can result in bowel and bladder incontinence, and opined that appellant might be able to perform very sedentary work.

By report dated February 10, 1997, Dr. Barry R. Halpern, a Board-certified urologist, reviewed appellant's history of injury and treatment, noted his present complaints and wet diaper, and opined that appellant had a neurogenic bladder which was caused by the herniated disc work injury.

By report dated September 25, 1997, Dr. Howard A. Richter, a Board-certified neurosurgeon, reviewed appellant's history of injury and treatment, presented positive physical examination results including slight decreased strength in the plantar flexor muscles of the toes, slight atrophy of the left calf, and decreased sensation to touch and vibration in the small toes of the left foot. Also noted was decreased sensation to touch in the entire left S1 distribution including the lateral foot, a markedly decreased left ankle jerk and positive straight leg raising on the left at 60 degrees with a positive Sicard sign. Dr. Richter diagnosed chronic intractable back and left leg pain with persistent left S1 radiculopathy and urinary incontinence secondary to the injury at work in 1993. He further opined that appellant was totally disabled from any and all gainful employment and indicated that he disagreed with Dr. Arena's report on all counts, since the 1992 magnetic resonance imaging (MRI) scan appellant brought to the examination showed no evidence of preexisting degenerative disc disease. Dr. Richter opined that the injury and amount of compression on the spinal cord by the herniated disc was sufficient to explain appellant's bladder problems.

By decision dated January 7, 1998, the Office denied modification of the termination decision finding that the evidence submitted in support was insufficient to warrant modification. The Office found that the services of a referee specialist were not needed, that Dr. Halpern's report was unrationalized, that Dr. Trubia's report was equivocal, and that Dr. Richter's report was unrationalized.

By letter dated March 20, 1998, appellant, through a new representative, again requested reconsideration. In support, he submitted further medical evidence.

Recent January 7, 1998 electromyogram and nerve conduction velocity testing demonstrated bilateral chronically active L5-S1 radiculopathy. A January 7, 1998 report from Dr. Stephen E. Sacks, an osteopath, noted that appellant's "disc material had herniated so severely that there was significant nerve damage occurring as well as spinal cord injury. As a result of this, significant function was lost including bladder control." Dr. Sacks opined that, as a result of these injuries, appellant was totally disabled and would continue to be so on a permanent basis. He reported positive objective examination results, noted that the electromyogram showed significant peripheral neuropathic changes and reiterated that, as a result, appellant was rendered permanently disabled.

By decision dated March 22, 1999, the Office denied modification of the January 7, 1998 decision finding that the evidence submitted in support was insufficient to warrant modification. The Office found that Dr. Sacks' report was of diminished probative value because he did not discuss the relationship between appellant's current condition and his degenerative disc disease or why appellant was totally disabled.

The Board finds that the Office did not meet its burden of proof due to an unresolved conflict in medical opinion.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>4</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>5</sup> Further, the right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for wage loss.<sup>6</sup> 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.<sup>7</sup>

The Office has not met its burden to terminate compensation or medical benefits in this case.

Dr. Cautilli, a Board-certified orthopedic surgeon and appellant's treating physician, reported that he had never recovered from his work injuries, that his 1993 back injury was so severe as to cause him to have bowel and bladder dysfunction which persisted today, and that when the employing establishment terminated appellant's flexi-place work agreement, appellant became totally disabled. He performed multiple physical examinations and reported positive objective findings, including loss of bowel and bladder control and decreased range of motion of his back in all planes. Dr. Cautilli opined that appellant was totally disabled from his regular employment and that his total disability was causally related to his 1993 low back employment injuries.

However, the Office's second opinion referral, Dr. Arena, also a Board-certified orthopedic surgeon, found a negative physical examination and opined that all of appellant's complaints and symptoms were related to degenerative disc disease. Dr. Arena opined that appellant had no neurological compromise, no objective evidence of soft tissue muscular strain or the herniated disc which was excised by surgery. Dr. Arena opined that appellant could return to his usual duty for 8 hours per day including lifting up to 10 pounds frequently and up to 20 pounds occasionally, that he could sit and stand for 6 hours per day intermittently, walk for 4

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<sup>4</sup> *Harold S. McGough*, 36 ECAB 332 (1984).

<sup>5</sup> *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

<sup>6</sup> *Marlene G. Owens*, 39 ECAB 1320 (1988).

<sup>7</sup> *See Calvin S. Mays*, 39 ECAB 993 (1988); *Patricia Brazzell*, 38 ECAB 299 (1986); *Amy R. Rogers*, 32 ECAB 1429 (1981).

hours per day, bend and twist for 3 hours per day, lift for 2 hours per day, and squat, climb and kneel for 1 hour per day.

Title 5 U.S.C. § 8123(a) states in pertinent part: “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.” In this case, the second opinion specialist clearly disagrees with appellant’s treating orthopedist on disability status as well as on causal relation, the reports from each orthopedist are of virtually equal weight and rationale, and therefore a conflict exists.<sup>8</sup> As an unresolved conflict in medical opinion evidence exists, the Office has failed to meet its burden of proof to terminate wage-loss compensation benefits, and such termination must be reversed.

Accordingly, the decision of the Office of Workers’ Compensation Programs dated March 22, 1999 is hereby reversed.

Dated, Washington, DC  
August 1, 2001

Michael J. Walsh  
Chairman

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>8</sup> See *Robert D. Reynolds*, 49 ECAB 561 (1998); *Gertrude T. Zakrajsek (Frank S. Zakrajsek)*, 47 ECAB 770 (1996).