

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT L. COOPER and U.S. POSTAL SERVICE,
POST OFFICE, Fresno, CA

*Docket No. 00-622; Submitted on the Record;
Issued February 9, 2001*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether appellant had any disability causally related to his temporary work-related aggravations subsequent to July 16, 1997, the date the Office of Workers' Compensation Programs terminated his compensation benefits.

On November 21, 1997 appellant, then a 52-year-old distribution/widow clerk, filed a notice of occupational disease and claim for continuation of pay/compensation. He alleged that he initially sustained a nonwork-related injury to his lower back on September 23, 1995 when he bent over to feed his cat. Appellant related that he underwent treatment and returned to full duties on February 5, 1996. He asserted that his work duties aggravated his back condition and he stopped working on July 16, 1997 because of the pain. Appellant stated that he first became aware that his condition was aggravated by his employment on November 3, 1997. The record indicates that appellant eventually returned to work in a gradual basis with restrictions in April 1999.

By decision dated February 18, 1998, the Office denied appellant's compensation claim because the weight of the medical opinion evidence did not establish that appellant sustained an injury. The Office relied on the January 21, 1998 report of Dr. Gerald W. Cady, a Board-certified orthopedic surgeon and Office referral physician, who opined that appellant's ongoing symptoms related to his preexisting conditions and were nonoccupational in origin. Specifically, Dr. Cady opined that appellant's ongoing back symptoms were the result of the nonoccupational herniated nucleus pulposus sustained in September 1995; the thoracic spine symptoms were a result of probable osteoarthritis and should be considered nonoccupational in origin; and, the degenerative arthritis of the right acromioclavicular joint, in the absence of any trauma related to the job or prolonged heavy overhead use of the right upper extremity, should not be considered occupational in origin. He further noted that appellant's left arm deformity symptoms were the result of a birth injury and from the naturally occurring slow degeneration of muscular function.

In a letter dated February 25, 1998, submitted through appellant's senator's office, appellant requested reconsideration and submitted additional medical evidence along with a statement of "errors" he believed were contained in Dr. Cady's second opinion report. By decision dated February 26, 1998, the Office modified the basis for the disallowance of appellant's claim. The Office found that the weight of the medical opinion evidence demonstrated that appellant's diagnosed medical conditions were not causally related to factors of employment. Appellant's subsequent reconsideration request of April 28, 1998 was denied, after a merit review, in a decision dated June 4, 1998.

By letter dated July 14, 1998, appellant again requested reconsideration and argued that the statement of accepted facts was incorrect as he was never provided light duty but was returned to full duty on February 5, 1996 with no restrictions by both his doctor and the employing establishment's physician. In statements dated July 11 and 13, 1998, appellant reiterated that he was not placed in a modified position when he returned to work on February 5, 1996, disagreed with Dr. Cady's opinion that he has a preexisting thoracolumbar scoliosis, and stated that his right shoulder was injured. He asserted that Dr. Cady's remarks concerning restrictions and job modification were not true.¹ Appellant also expressed his disagreement with the claims examiner's interpretation of the medical reports he submitted. He also submitted medical evidence in support of his request.

In a May 12, 1998 medical report, Dr. Brian H. Claque, a neurologist and appellant's treating physician, conducted a physical examination and provided an impression of symptomatic lumbar stenosis with radiculitis from a disc injury. In a July 7, 1998 medical report, Dr. Claque noted that appellant never had his duties modified, but instead, appellant modified his own lifting techniques to protect his injuries. He further stated that appellant was required to work alone and that this has caused further damage to his lower back, injured his right shoulder, and caused the thoracic pain. Dr. Claque further stated that he agreed with Dr. Patrick Brauner's May 12, 1998 letter which explained how appellant's injuries pertain to his daily job activities. He further stated that the possibility that the workplace produced repetitive trauma to his back over the years, which may have contributed to a developmental cervical or thoracic osteoarthritis condition, as well as, his lumbar condition needed to be considered.

The Office determined that a conflict existed in the medical evidence between the opinions of Drs. Brauner and Claque, appellant's treating physicians, who opined that appellant's injuries of the low back, thoracic and right shoulder were occupational in nature as they had been aggravated by the daily performance of his job requirements, and the contrary opinion of Dr. Cady, the Office referral physician, and referred appellant for an independent, referee medical examination with Dr. Lynn W. Cooman, a Board-certified orthopedic surgeon, pursuant to section 8123(a).

Dr. Cooman examined appellant and issued a report dated September 29, 1998. She, after reviewing the statement of accepted facts and appellant's medical records, stated his findings on examination and provided the following diagnoses:

¹ Witness statements contained in the record verified appellant's statement that he was working without any restrictions in his normal job.

“(1) L4-5 disc bulge, degenerative, nonindustrial. This is confirmed on the MRI [magnetic resonance imaging] in an objective fashion. A disc bulge is not a herniated nucleus pulposus. A disc bulge is a degenerative condition and is not necessary pathological. However, this area of disc bulging does correlate with the next two diagnoses.

“(2) Low back pain secondary to #1.

“(3) Right L5 radiculopathy secondary to #1. This diagnosis is based on the patient’s pattern of hypesthesia and the EMG [electromyogram] findings.

“(4) Mild, degenerative, age-related changes of thoracic spine and lumbosacral spine, nonindustrial.

“(5) Osteoarthritis right acromioclavicular joint, age-related, degenerative and nonindustrial.

“(6) Left arm brachial plexus palsy, congenital, nonindustrial.”

Dr. Cooman concluded that, with respect to diagnoses number 1 to 4, the etiology was nonindustrial but that appellant sustained a temporary aggravation of these diagnoses between February 5, 1996 and July 16, 1997. This occurred with repeated bending, twisting and lifting and ceased when the work activity ceased on July 16, 1997. Dr. Cooman concluded that there was no permanent aggravation or no acceleration of these diagnoses on an industrial basis. With respect to diagnosis #5, he also concluded that appellant sustained a temporary aggravation of this diagnosis between November or December 1996, when symptoms were first noted, and July 16, 1997. Dr. Cooman stated that the temporary aggravation ceased on July 16, 1997, when employment ceased. He also opined that the nonindustrial lower back injury on September 23 or 24, 1995 led to diagnoses number 1 to 3; appellant has preexisting, nonindustrial, age-related degenerative changes of the thoracic spine and lumbosacral spine; preexisting, age-related degenerative and nonindustrial acromioclavicular joint osteoarthritis with secondary subacromial impingement; and, preexisting congenital and nonindustrial left brachial plexus palsy. Dr. Cooman stated that there had been no period of total disability due to any work-related conditions. She further advised that, although the job description, which he had referred to “the position of automotive mechanic” and that this was not the correct job description for appellant, she stated that the functional requirements seem appropriate for appellant’s job description as a distribution/window clerk. Dr. Cooman stated that although appellant was unable to perform the usual and customary employment as a distribution/window clerk, appellant was capable of performing light-duty employment within the restrictions outlined in the OWCP-5 form. She stated, however, that appellant’s current disability, based on both objective and subjective factors, was due to nonindustrial conditions and none to any work-related injury or cumulative trauma.

By decision dated November 2, 1998, the Office vacated its prior decision of February 26, 1998 and accepted the conditions of temporary aggravations of underlying degenerative conditions of the thoracic and lumbosacral spines, and of underlying osteoarthritis,

right acromioclavicular joint, all ceasing as of July 16, 1997, as causally related to appellant's employment.

By letter dated December 10, 1998, appellant requested reconsideration of the Office's decision and argued that he has ongoing residuals of his work-related injury. Appellant also submitted evidence in support of his request.

In a December 2, 1998 letter to the claims examiner, Dr. Brauner stated that appellant was removed from his job on July 17, 1997 for a stress disorder caused by daily pain in his back and right shoulder. He noted the physicians to whom appellant was referred for evaluation and treatment. Dr. Brauner opined that without appellant's daily medication, his pain level would be considered unchanged from the time he was working.

A copy of a grievance filed October 7, 1996 was submitted.

A September 25, 1995 radiology-ultrasound consultation of appellant's lumbar spine was provided which concluded that there were three degree levoscoliosis at L3-4, small anterolateral hypertrophic spurs and slight straightening of the lumbar lordotic curvature.

A November 30, 1998 letter from Patricia Nickels, office manager to Dr. Matthew L. Nickles, stated that appellant's spine films were checked out to another physician over a year ago and have never been returned.

In a December 9, 1998 statement, appellant expressed his disagreement with his examination under Dr. Cooman.

By merit decision dated January 11, 1999, the Office denied appellant's request for reconsideration on the basis that the evidence submitted was insufficient to warrant modification of the prior decision.

By letter dated May 5, 1999, appellant requested reconsideration. In an April 5, 1999 report, Dr. Thomas J. O'Laughlin, a Board-certified physiatrist, noted appellant's history of injury and medical treatment and provided the results of his physical examination. Dr. O'Laughlin stated that appellant has chronic lumbar pain that was initiated probably by work activity. He noted that appellant had some stiffening occurring but the actual frank lumbar disc injury, which had been radiographically demonstrated as an L4-5 annular disc disruption and central protrusion, was his chief injury, which was brought on by a bending episode at home. Dr. O'Laughlin stated that appellant's lumbar injury seems to have been aggravated by a lifting injury at work, which occurred only a short time after his return to work. He stated that appellant had mid-back pain with underlying T5 degenerative disc disease, with marginal spurring at this level and active inflammation demonstrated by a bone scan, with increased uptake at the T5 level matching the x-ray results. Dr. O'Laughlin stated that this segment would be more inclined to injury by both rotation and flexion of the spine, both of which he does a great deal of at work and, is reasonable to attribute his back pain predominately to his work efforts. He stated that appellant was probably somewhat predisposed by his left upper extremity brachial neuropathy which renders the left upper extremity inefficient for any higher level function and, therefore, he has been largely right handed, loading his back somewhat

asymmetrically. Dr. O’Laughlin noted that appellant’s right shoulder pain was probably secondary to acromioclavicular arthritis with impingement syndrome and subacromial spurring, and some subacromial bursitis. He opined that this problem was 100 percent work related, although appellant was predisposed affectively by having only one functional upper extremity. Other conditions were diagnosed, but no opinion was rendered on causation. Dr. O’Laughlin concluded by stating that appellant’s thoracic spine and right shoulder were compensable and that he would attribute 50 percent of appellant’s symptoms in the lumbar region to the second work injury and that it could be argued that it was set up for his work activity even though the principle blow took place while bending at home. He released appellant to work on a trial basis with restrictions and gradually returning to a normal 40-hour week schedule.

The Office denied appellant’s request for reconsideration in a nonmerit decision dated July 30, 1999. The Board notes that the Office engaged in a weighing of Dr. O’Laughlin’s opinion and found that his opinion did not rise to the level to outweigh or cause conflict with that of Dr. Cooman. Accordingly, the Board finds that the Office engaged in a merit review and will treat the Office’s July 30, 1999 decision accordingly.

The Board finds that the Office met its burden of proof to terminate appellant’s compensation benefits effective July 16, 1997 on the grounds that his work-related disability had ceased on or before that date.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.² After it has determined that an employee has disability causally related to his 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.³ Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁴ To terminate authorization or medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.⁵

In this case, the Office, in its decision of November 2, 1998, accepted that appellant sustained a temporary aggravation of underlying degenerative conditions of the thoracic and lumbosacral spines, and of underlying osteoarthritis, right acromioclavicular joint, all ceasing as of July 16, 1997. The Office accepted that appellant’s employment-related disability extended to, but not beyond, July 16, 1997 based on the September 29, 1998 report of Dr. Cooman, the independent medical examiner. In his September 29, 1998 report, Dr. Cooman, while conceding that appellant’s preexisting degenerative conditions of the thoracic and lumbosacral spines and preexisting osteoarthritis of the right acromioclavicular joint were temporarily aggravated from February 5, 1996 through July 16, 1997, he specifically concluded that there was no permanent

² *Lawrence D. Price*, 47 ECAB 120 (1995).

³ *Id.*; see *Patricia A. Keller*, 45 ECAB 278 (1993).

⁴ *Furman G. Peake*, 41 ECAB 361, 364 (1990).

⁵ *Id.*

aggravation or acceleration of these diagnoses on an industrial or work-related basis. He stated that the temporary aggravation ceased on July 16, 1997, when appellant's employment ceased. Moreover, appellant did not sustain any temporary total disability during the period from February 5, 1996 through July 16, 1997 due to any work-related conditions. Dr. Cooman concluded that appellant's current disability, under which he provided restrictions, was related to nonindustrial conditions and was not due to any on-the-job injury or cumulative trauma. The Office correctly found that the weight of the medical evidence rested with the independent medical opinion of Dr. Cooman as it was sufficiently probative, rationalized and based upon a proper factual background. Therefore, the Office acted correctly in according the opinion of Dr. Cooman the special weight of an impartial medical examiner.⁶ Accordingly, the November 2, 1998 decision was proper as the opinion of Dr. Cooman represented the weight of medical opinion evidence at the time of the Office's termination decision.

Subsequent to the Office's November 2, 1998 termination decision, the burden of proof in this case shifted to appellant, who thereafter submitted both nonmedical and medical evidence in his December 10, 1998 and May 5, 1999 requests for reconsideration. The Board notes that the issue is whether appellant has any ongoing residuals of his work-related injury, which the Office accepted as a temporary aggravation. Accordingly, the November 30, 1998 correspondence from Patricia Nickels is of no probative value as is the October 7, 1996 grievance document as neither document contains a medical opinion regarding the issue of causal relationship of appellant's conditions prior to the Office's acceptance on November 2, 1998. Appellant's December 9, 1998 statement does not offer any new medical evidence or opinion on how any condition subsequent to July 16, 1997 is causally related to his prior work factors.

Of the medical evidence submitted, the Board finds that it is not sufficient to outweigh or create a new conflict with Dr. Cooman, the impartial medical specialist in this case. In Dr. Brauner's December 2, 1998 letter to the claims examiner, the physician states that appellant was removed from his job on July 17, 1997 for a stress disorder caused by daily pain in his back and right shoulder. The Board notes a stress disorder is not an accepted condition in this case. The pain which Dr. Brauner refers to is not a diagnosis, but rather a symptom. The occurrence of pain during the workday is not sufficient to establish that appellant has any ongoing residuals of his accepted work-related injuries. Moreover, the Board notes that, as Dr. Brauner is appellant's attending physician and was on one side of the conflict which was resolved by Dr. Cooman, this report may not be used to overcome the weight accorded to Dr. Cooman's report or to create a new conflict.⁷ Although the September 25, 1995 x-ray report documents the condition of appellant's lumbar spine, it does not contain a medical opinion on the causal relationship of the conditions noted to appellant's specific work factors. Moreover, as the x-ray report predates the period of acceptance of appellant's work-related conditions, it also fails to provide any opinion as to any ongoing disability after July 16, 1997.

⁶ Gary R. Seiber, 46 ECAB 215 (1994).

⁷ Virginia Davis-Banks, 44 ECAB 389 (1993).

Although in his April 5, 1999 report, Dr. O’Laughlin opines that appellant’s chronic lumbar pain was initiated probably by work activity before the actual lumbar disc injury brought about by the bending incident at home, his opinion that appellant’s lumbar condition was causally related to appellant’s work is equivocal and thus his opinion is of diminished probative value and is insufficient to outweigh or create a new conflict with Dr. Cooman, who opined that appellant’s lumbar condition was a degenerative, nonindustrial condition.⁸ Dr. O’Laughlin also does not offer any opinion on the issue of whether appellant’s preexisting conditions were more than just temporarily aggravated by his employment prior to July 16, 1997. Although Dr. O’Laughlin states that he thinks appellant’s thoracic spine and right shoulder conditions are compensable and that he would “attribute 50 percent of his symptoms to the second work injury, and that it could be argued that it was set up for his work activity even though the principle blow took place while bending at home,” Dr. O’Laughlin provides no medical rationale or objective studies for his statement. Accordingly, this statement is also insufficient to create a new conflict with or to outweigh Dr. Cooman’s well-rationalized and unequivocal opinion that appellant’s work-related aggravation had ceased at the time he stopped working. Dr. O’Laughlin’s report also fails to establish that appellant still had residuals from his accepted temporary aggravations after July 16, 1997.

⁸ See generally *James Mack*, 43 ECAB 321 (1991).

The decisions of the Office of Workers' Compensation Programs dated July 30 and January 11, 1999 and November 2, 1998 are hereby affirmed.⁹

Dated, Washington, DC
February 9, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

⁹ The Board notes that new medical evidence was received by the Office after the issuance of its July 30, 1999 decision. The Board's jurisdiction on appeal is limited to a review of the evidence which was in the case record before the Office at the time of its final decision; *see* 20 C.F.R. § 501.2(c). Therefore, the Board is precluded from reviewing this evidence. Appellant may resubmit this evidence and legal contentions to the Office accompanied by a request for reconsideration pursuant to 5 U.S.C. § 8128(a). 20 C.F.R. § 10.606(b) (1999).