

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH M. BLAKE and U.S. POSTAL SERVICE,
MAINTENANCE OFFICE, Jersey City, NJ

*Docket No. 00-1950; Submitted on the Record;
Issued May 24, 2001*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective August 28, 1998.

The Office accepted that on September 15, 1996 appellant, then a 55-year-old custodian, fractured his right ankle, left foot and left second metatarsal and strained his back when a metal file cabinet fell on him.¹ Appellant stopped work on September 16, 1996 and did not return.

In reports dated October 30 and November 4, 1996, Dr. Victor Daibo, a Board-certified orthopedic surgeon and appellant's attending physician, indicated that appellant remained totally disabled due to his fractures and low back syndrome.

On December 24, 1996 Dr. Daibo completed a work capacity evaluation form indicating: "[Appellant] cannot do any physical activities."

Dr. Alapatt P. Thomas, a Board-certified internist, indicated that appellant was totally disabled for his usual job due to lumbar radiculopathy and lumbosacral spine syndrome, but would be able to perform some work with restrictions as of June 1997.

On August 22, 1997 the Office referred appellant, with an August 21, 1997 statement of accepted facts,² the complete case record and questions to be addressed, to Dr. Arthur T. Canario, a Board-certified orthopedic surgeon, for a second opinion examination.

¹ Appellant had two duplicate cases created for these injuries; No. A2-723198, accepted for lumbosacral strain, fractured right ankle and fractured left second metatarsal and No. A2-718930, accepted for fractured right ankle and fractured left foot, which on February 2, 1998 were combined under master case No. A2-718930.

² Based on claim No. A2-718930.

In a report dated September 12, 1997, Dr. Canario reviewed the history of the employment incident, reported appellant's present complaints of pain and noted numbness in all toes and fingertips consistent with diabetic peripheral neuropathy; appellant was an insulin-dependent diabetic. Dr. Canario stated that when examined appellant had restricted lumbar spine motion, but that when distracted he had full spinal motion in all planes without pain. He documented negative straight leg raising, no reflex changes in his knees or ankles, no spasm or sciatic notch tenderness, and no motor loss.

Dr. Canario noted full motion of the left ankle, subtalar and mid-tarsal joints, with negative Tinel's and Phalan's signs. He found that right ankle motion in dorsiflexion and volarflexion was full, that the subtalar joint was supple in pronation and supination, that the mid-tarsal joints were supple, that the medial and lateral malleoli were not tender, and that neither foot had swelling, edema or tenosynovitis. Current x-rays revealed a healed fracture of the lateral malleolus in excellent position above the ankle joint, no evidence of any significant metatarsal fracture, and no arthritic changes within either foot. Dr. Canario opined:

“This man has severe complaints to both feet, yet these were two minor fractures. These fractures heal uneventfully and they do not cause major residua as this patient claims he has. I simply cannot give him credence for the amount of symptoms he has in his foot following an undisplaced metatarsal fracture and a lateral malleolar fracture that is above the ankle joint that has also healed in excellent position. There is absolutely no question in my mind that there is a large degree of magnification of his symptoms. As regards his lower back, again he has subjective complaints but does not have any neurologic findings.... However, I simply cannot explain why [appellant] remains out of work, now a year from his injury. I feel he is employable in his regular job as a custodian with the [employing establishment], and he should return to his full duty.”

Dr. Canario completed a work capacity evaluation indicating that appellant had no limitations on any specific activities.

On October 29, 1997 Dr. Daibo stated that appellant was still limping, favoring his left lower extremity and still had marked spasms of the lumbosacral paravertebral musculature. He opined that appellant “is not yet gainfully employable.”

In a November 14, 1997 report, Dr. Thomas opined that appellant had significant limited use of his back and right ankle joint and would require continued treatment of an active and supportive nature on an indefinite basis.

In a report dated February 13, 1998, Dr. Shan Nagendra, a Board-certified neurologist, opined that appellant was totally disabled for his usual employment and would not be able to do heavy physical activity. Appellant had permanent lumbar injury with progressive arthritis following trauma, lumbar radiculopathy and degenerative arthritis of both knees.

The Office determined that a conflict in medical opinion evidence existed between Drs. Daibo and Thomas and the second opinion specialist, Dr. Canario, and referred appellant, an

updated statement of accepted facts, questions to be addressed and the complete case record to Dr. Robert L. Swearingen, a Board-certified orthopedic surgeon, for resolution of that conflict.

By report dated April 2, 1998, Dr. Swearingen reviewed appellant's factual and medical history and indicated that on examination of range of back motion, appellant flexed to 45 degrees without spasm, but that "[t]here is pain with splinted rotation and axial compression suggesting the presence of symptom magnification." He noted normal straight leg raising and reflexes, no loss of sensation, ankle swelling or lower extremity edema and normal dorsiflexion, but pain everywhere he touched on both ankles and feet. Dr. Swearingen found no disability related to the September 15, 1996 incident and opined that appellant could return to work as a custodian. He stated that appellant may have had an exacerbation of his preexisting degenerative spine disease with the September 15, 1996 incident, but there was no evidence that any exacerbation continued. Dr. Swearingen noted that appellant's feet and ankles had healed without residua and that there was no corroboration for his complaints regarding them.

In answer to the questions posed by the Office, Dr. Swearingen opined: "There are no current objective findings of the accepted conditions, [t]here is no medical evidence that [appellant] can not do his date-of-injury job, [t]here are no work limitations [and] [b]ased on this exam[ination], any back injury associated with the September 15, 1996 incident has resolved, most likely within three months following the incident.... Only treatment recommended is for degenerative spine disease and this is anti-inflammatory medication."

By notice dated July 24, 1998, the Office proposed to terminate appellant's compensation and advised appellant that if he disagreed with this proposed termination, he should submit further evidence or argument within 30 days.

Appellant submitted a February 26, 1997 neurological consultation report from Dr. Nagendra and June 4, 1998 nerve conduction velocity (NCV) and electromyographic (EMG) testing results. Dr. Nagendra diagnosed: "Occipital neuralgia, cervical sprain and cervical muscle spasm, lumbar degenerative arthritis following trauma, diffuse lumbar radiculopathy, lumbosacral arthropathy, sacroiliac joint arthritis, degenerative arthritis of both knees [and] right ankle arthritis." He opined "These injuries are causally related to the fall he had on September 15, 1996 and degenerative arthritis and radiculopathy and associated symptoms set in following this trauma." He added that appellant was unable to go back to work. The EMG and NCV results were consistent with bilateral L5 and S1 radiculopathy.

By decision dated August 28, 1998, the Office terminated appellant's compensation based on the well-rationalized report of the impartial medical examiner, Dr. Swearingen.

By letter dated November 11, 1998, appellant requested reconsideration and resubmitted EMG and NCV testing results.

By decision dated December 11, 1998, the Office denied appellant's request on the grounds that the electrodiagnostic testing results were repetitious, cumulative and irrelevant, and were therefore insufficient to warrant reopening appellant's case for further merit review.

By letter dated January 28, 1999, appellant requested reconsideration and submitted a January 18, 1999 report from Dr. Peter M. Crain, a Board-certified psychiatrist and neurologist.

He reviewed appellant's factual and medical history and several medical reports of record and reported appellant's present complaints. Dr. Crain diagnosed "bilateral L4-5 and S1 radiculopathies secondary to spinal stenosis" and opined:

"[A]lthough the spinal canal stenosis preexisted the accident of September 15, 1996, [appellant] was entirely asymptomatic before this injury. There was no radiculopathy. The accident of September 15, 1996 precipitated the condition by aggravating the effect of the stenosis. The spinal canal was already narrow, and the injury caused inflammatory changes to the nerves at the spinal level, which remained irritated due to the presence of stenosis. My own neurologic examination elicited weaknesses of the left lower extremity that were consistent with pathology affecting L4-5 nerve roots, while the sensory deficits would cover the territory supplied by L4 through S1 fibers as well. The fact that [appellant] had intact ankle and knee jerks would argue against this condition being related to diabetes. The radiculopathy was solely related to the traumatic injury of September 15, 1996."

Dr. Crain concluded that appellant was unable to perform the duties of his job as a custodian/maintenance worker at the employing establishment as a result of the September 15, 1996 accident and noted that he expected no improvement.

By decision dated February 23, 1999, the Office denied reconsideration finding that the evidence submitted in support was insufficient to warrant modification.

By letter dated March 8, 1999, appellant requested reconsideration and argued that the Office had improperly determined that a conflict existed in the medical evidence of record. Appellant's representative stated that Dr. Canario was given an incomplete statement of accepted facts because it referred to claim No. A2-718930, accepted for right ankle and left foot injuries, before it had been administratively combined with claim No. A2-723198, accepted for lumbosacral strain, fractured right ankle and left metatarsal. Appellant's representative argued that Dr. Canario's opinion was thus insufficient to create a conflict with the opinions of Drs. Daibo, Thomas and Swearingen's opinion was therefore not entitled to special weight.

By decision dated May 25, 1999, the Office denied modification of the February 23, 1999 decision finding that appellant's arguments were without merit and that the weight of the medical evidence remained with the impartial medical examiner.

The Board finds that the Office properly terminated appellant's compensation effective August 28, 1998.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.³ After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation

³ *Harold S. McGough*, 36 ECAB 332 (1984). See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812, para. 3 (March 1987).

without establishing that the disability has ceased or that it is no longer related to the employment.⁴

The Office has met its burden in this case with the thorough and well-rationalized impartial medical opinion of Dr. Swearingen.

Appellant's treating physicians submitted several reports opining that he remained totally disabled due to sequelae of his September 15, 1996 employment injuries, including healed fractures, lumbar radiculopathy, lumbosacral spine syndrome and "low back syndrome."⁵ None of these reports contained a well-rationalized opinion explaining how any of these disabling conditions developed as a consequence of appellant's September 15, 1996 accident or of his specific accepted employment injuries.

Appellant's arguments that Dr. Canario was provided an incomplete, inaccurate and improper statement of accepted facts are without support. At the time the Office sought a second opinion evaluation from Dr. Canario in August 1997, appellant had two claims for injuries stemming from the same September 15, 1996 accident. The duplicative claims were not combined until February 2, 1998, so the August 21, 1997 statement of accepted facts provided to Dr. Canario for claim No. A2-718930 was entirely correct and proper for that claim at that point in time, which had been accepted for a right ankle fracture and a left foot fracture.

The Board finds that Dr. Canario was given a complete and appropriate statement of accepted facts and that his opinion clearly created a conflict with the opinions of Drs. Daibo and Thomas, which required referral to an impartial medical specialist for resolution. Moreover, the Board notes that Dr. Canario did report that appellant also sustained a lower back injury, in addition to his fractures and examined appellant specifically in relation to his lower back complaints.

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."

Dr. Swearingen reviewed appellant's complete factual and medical history, including all of the medical reports of record, performed a thorough and complete physical examination, and determined that appellant was manifesting symptom magnification. Based upon the negative results of his examination and testing, Dr. Swearingen determined that appellant had no further disability or current objective findings causally related to his accepted employment injuries, required no physical restrictions for injury residuals and could return to his regular employment duties. He noted that appellant had returned to the same functional level he had prior to the September 15, 1996 accident, that the only treatment recommended was anti-inflammatory

⁴ *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

⁵ Neither lumbar radiculopathy, lumbosacral spine syndrome or "low back syndrome" had been accepted by the Office as being an employment-related injury. Therefore, any continuing disability due to these diagnoses would not be compensable.

medication for the preexisting degenerative spinal condition and that there was no medical evidence that appellant could not do his former job.

In this case, Dr. Swearingen provided a well-rationalized report based upon a proper factual and medical background, a review of the entire combined case record, and a thorough and complete physical examination with physical testing. According to this report, the special weight it deserves results in it constituting the weight of the medical opinion evidence of record, which establishes that appellant had no further disability or injury residuals after that date. Accordingly, the Office met its burden of proof to terminate appellant's wage-loss compensation entitlement.

Additionally submitted reports from Dr. Nagendra are of insufficient probative value to outweigh the impartial medical opinion from Dr. Swearingen because they diagnosed conditions not accepted as related to the incident of September 15, 1996 and predicated appellant's disability on those conditions.⁶ Further, these reports do not contain sufficient medical rationale to establish that these diagnosed conditions occurred as a result of the September 15, 1996 incident.

The subsequent report from Dr. Crain is also insufficient to outweigh the well-rationalized report of Dr. Swearingen because it was rendered almost three years after the 1996 accident and its rationale that appellant was asymptomatic of radiculopathy before the September 15, 1996 accident but symptomatic afterwards is unconvincing. The Board has held that the opinion of a physician that a condition is causally related to an employment injury or incident because the employee was asymptomatic before the employment injury or incident and symptomatic afterwards is insufficient, without supporting medical rationale, to establish causal relation.⁷

Dr. Crain also had no explanation for why, if appellant's radicular problems resulted directly from the September 15, 1996 incident, which allegedly caused irritation continuously, thereafter, physical examination on September 12, 1997 by Dr. Canario revealed no evidence of radicular symptomatology and examination on April 2, 1998 by Dr. Swearingen confirmed this absence. Because Dr. Crain's opinions are based upon assumed facts not supported by the case record and are unrationalized, they are insufficient not only to outweigh the well-rationalized report of Dr. Swearingen, but also to create a new conflict with it.

⁶ Such conditions would not be compensable under the Act with respect to these combined claims.

⁷ *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996); *Kimper Lee*, 45 ECAB 565 (1994); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

The decision of the Office of Workers' Compensation Programs dated May 25, 1999 is hereby affirmed.

Dated, Washington, DC
May 24, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member