

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN C. FOX and DEPARTMENT OF HEALTH & HUMAN SERVICES,
SOCIAL SECURITY ADMINISTRATION, Pottsville, PA

*Docket No. 00-1022; Submitted on the Record;
Issued October 25, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof in finding that appellant had no employment-related disability after January 16, 1998; and (2) whether the Office abused its discretion in refusing to reopen appellant's case for a merit review of his claim under 5 U.S.C. § 8128.

On July 1, 1996 appellant, then a 45-year-old claims representative, filed a claim alleging that he had aggravated his back and neck due to his position as a claims representative. Appellant indicated that due to the nature of his job, he was constantly using a VDT and raising his head up and down performing his job duties. He indicated that he had a cervical herniated disc at the C5-6 and C6-7 levels and osteoarthritis of the right ankle. Appellant indicated that he first became aware of the disease on December 1, 1993 and realized that it was caused or related to his employment on February 1, 1994. He stopped work on May 24, 1996.¹

Accompanying appellant's claim were statements from his coworkers, supervisor and medical reports. The medical records dating from February 11, 1994 to June 12, 1995, indicated that appellant had broad central disc herniation at C5-6 and C6-7 with moderate canal stenosis and moderately severe to severe bilateral neural foraminal stenosis as well as bursitis and other conditions. The records revealed that an anterior cervical discectomy and fusion was performed on August 12, 1994.

In a June 12, 1995 report, Dr. Michael H.O. Dawson, a Board-certified orthopedic surgeon, indicated that he first saw appellant on February 11, 1994 with complaints of neck and left shoulder pain. He indicated that appellant's symptoms were exacerbated by sitting on a hard surface and at one time he had radiation into the left arm. Dr. Dawson opined that appellant suffered from symptomatic degenerative disc disease at C7 with asymptomatic degenerative disc

¹ The employing establishment indicated that appellant was out on sick leave, which would expire on August 9, 1996 and he was not expected to return to work.

disease at C5-6. He indicated that this was alleviated by a disc excision and interbody grafting on August 12, 1994. Dr. Dawson further stated that the disc degeneration became symptomatic as manifested by severed occipitalgia and intolerance to the air conditioning in the office. He indicated that appellant's prognosis was guarded as he now has a further symptomatic degenerative disc, his symptoms were permanent and he was restricted from any type of work that required heavy manual labor, overhead work, repetitive use of the shoulders and occupations that required extreme motion of the head such as looking to either side or looking overhead.

A March 28, 1996 electromyogram (EMG) and nerve conduction study from Dr. Stanford S. Feinberg, Board-certified in internal medicine, revealed an abnormal EMG and nerve conduction study demonstrating changes compatible with chronic right C6 cervical radiculopathy. He also noted active denervation below the region to the carpal tunnel suggestive of possible median nerve irritation at the right wrist. Dr. Feinberg indicated that these changes would be coming from a proximal source although there was no evidence of any proximal active denervation.

In a May 21, 1996 report, Dr. Dawson indicated that appellant was totally disabled from work due to degenerative arthritis of the neck and back.

In a letter dated July 23, 1996, the Office advised appellant of the type of factual and medical evidence needed to establish his claim and requested that he submit such evidence. The Office particularly requested that appellant submit a physician's reasoned opinion addressing the relationship of his claimed condition and specific employment factors.

In an August 9, 1996 statement, appellant indicated that he was forwarding Dr. Dawson's August 5, 1996 report. He also indicated that his illness came over a gradual period while sitting at work, he did not have any previous problems and was never treated for his neck prior to 1993.

In an August 5, 1996 report, Dr. Dawson indicated that he first saw appellant in March 1994 and he was suffering from symptomatic degenerative disc disease at C5-6. He noted that appellant underwent an anterior discectomy and fusion at C6-7 after conservative treatment failed. Dr. Dawson stated that appellant's subsequent course following the procedure was satisfactory, however, appellant was suffering also with headache, scapular pain and a feeling of pressure at the base of the neck. He stated that it was believed that these current symptoms arose from the broad-based disc herniation with degeneration seen at C5-6 but was not yet proven via analgesis discography. Dr. Dawson stated that appellant's pain and disability has been progressive throughout the time he treated him despite a successful fusion at C6-7. He stated that it was his belief that the nature of appellant's occupation was a substantial and contributing factor to his present condition and to the condition, which warranted the surgery of 1994. Dr. Dawson also stated that appellant's job required him to be seated all day with his neck flexed forward to assist in operating a computer with a video display terminal. He also stated that the air conditioning exacerbated his symptoms. Dr. Dawson stated that it was his opinion that appellant's employment caused degeneration with herniation at two discs in the cervical spine. He indicated that the C6-7 disc was responsible for his symptoms by means of discography in July 1994 and his recurrent symptoms were now thought to be due to herniation at the C5-6 disc, though such has not as yet been proven through discographic techniques. Dr. Dawson stated that appellant was totally disabled.

By letter dated November 13, 1996, the Office advised appellant that additional medical studies were warranted in order to clarify the cause and extent of his injury-related impairment. Appellant was advised that an examination was scheduled for November 20, 1996 with Dr. Paul Liebert, a Board-certified orthopedic surgeon.

In a December 18, 1996 report, Dr. Liebert noted appellant's history of injury and treatment. He indicated that appellant suffered from a herniated nucleus pulposus at the C6-7 level, with a smaller herniation at the level above C5-6. Dr. Liebert indicated that these were also assessed by degenerative changes, which were initially treated conservatively but necessitated operative intervention with a cervical fusion in August 1994. He indicated that appellant had reached a point of maximum medical improvement from his injury treatment. Dr. Liebert stated that appellant exhibited fairly significant decreased range of motion, especially in extension and to a lesser extent, in rotation of his neck. He indicated that appellant had signs and symptoms of carpal tunnel in the right upper extremity, which was not work related. Dr. Liebert stated that he found no significant signs of ongoing radiculopathy in the right or left upper extremities, nor any signs of impingement. He indicated that appellant was also able to move his neck and sit in the examination room during the interview, fairly comfortably and did not demonstrate any sort of abnormal posturing or splinting behavior. Dr. Liebert concurred with the treating surgeon, Dr. Dawson, that appellant should not return to his previous condition as it was described. He further opined that it would aggravate his condition. Dr. Liebert further advised that appellant could return to the work force in some capacity, limiting frequent neck motions in flexion and extension and advised of the types of restrictions.²

In an April 7, 1997 clarification report, Dr. Liebert stated that appellant's magnetic resonance imaging (MRI) dated February 14, 1994 was consistent with a herniated disc at the C5-6 and C6-7 levels. This resulted in moderately severe central canal stenosis and bilateral neural foraminal stenosis at these two levels. He opined that appellant exacerbated the underlying condition of his cervical spine, which included severe spinal stenosis and herniated discs by history. Dr. Liebert also stated that there was no documentation causally related to herniated discs and any specific work-related injury. He explained that the discomfort in appellant's neck and upper shoulders was more likely than not, due to the natural progression of his underlying degenerative condition of his cervical spine and not on any specific work-related injury mechanism. Dr. Liebert further opined that he would have anticipated a resolution of his soft tissue exacerbation with a period of six to nine months from its onset. He indicated that any further ongoing symptoms in appellant's neck were strictly due to the basis of the underlying condition and not to any work-related process.

By letter dated July 24, 1997, appellant was advised that due to a conflict in the medical evidence, he was being referred to a physician to resolve the conflict.

In a September 3, 1997 report, Dr. Brendan J. O'Brien, D.O., an orthopedic surgeon, certified by the American Osteopathic Association, noted appellant's history of injury and

² The restrictions were limitation of frequent movements of the neck, lifting, kneeling and crawling. Also, limitations with respect to flexion, extension and rotation of the neck, no lifting over 15 to 20 pounds continuously and no kneeling or crawling.

treatment. He stated that based upon his examination of appellant, it was his opinion that appellant's complaints were those of disc pathology at the C5-6, C6-7 area. Dr. O'Brien stated that the degenerative changes noted in the diagnostic studies certainly preceded appellant's complaints in late 1993 and early 1994. He indicated that it was his opinion that these changes and the changes and the associated herniated nucleus pulposus were not brought about by his duties at work. Dr. O'Brien stated that they may have been aggravated by these duties but certainly not brought about by these duties. He opined that this was also his feeling with regard to the air conditioning. Dr. O'Brien further elaborated that Dr. Dawson's fusion at the level of C6-7 was in order, however, he would not be as optimistic in his diagnosis that appellant was given complete relief from his symptoms. He explained that the C5-6 area was not addressed at the time of the surgery and was also causing appellant's ongoing problems. Dr. O'Brien further stated that although appellant's ongoing complaints could be aggravated by his return to work duties that did not mean that appellant was unemployable at a sedentary or light level of duties. He further opined that if the degenerative changes at the C5-6 level had been addressed with a discectomy and fusion, there would be no reason why appellant could not return to his regular duties as a claims representative.

By letter dated July 22, 1997, appellant forwarded a copy of a newsletter discussing continued health problems at the Social Security Administration.

In a merit decision dated January 16, 1998, the Office denied appellant's claim because the evidence of file failed to establish that the claimed medical condition or disability was causally related to the injury. The Office further indicated that because all of the physician's agreed that appellant suffered an aggravation of his preexisting degenerative condition, appellant was entitled to compensation for the period of May 24, 1996 when he ceased work until the present date, January 16, 1998. The Office also informed appellant that both the second opinion examiner and the impartial specialist stated that appellant's aggravation had now ceased and that any continued restrictions were due to his underlying degenerative condition. He was advised that a rejection of claim was issued for the reason that appellant did not continue to suffer residuals of the condition causally related to factors of his federal employment.

In a letter received by the Office on February 2, 1998, appellant requested an oral hearing.

In a February 5, 1998 attending physician's report, Dr. Dawson noted a pain in the left side of the neck radiating down into the left shoulder and left arm. He diagnosed foraminal stenosis C5-6 and C6-7. Dr. Dawson checked the box "yes" indicating that he believed that appellant's condition was caused or aggravated by his employment activity. He stated that the nature of his occupation was a substantial contributing factor to appellant's condition and to the condition which warranted surgery in 1994. He advised that appellant was unable to return to work.

In an August 8, 1998 letter, appellant submitted additional medical evidence. He enclosed a January 24, 1997 MRI and a July 15, 1998 report from his treating physician.

In the January 24, 1997 MRI, Dr. T.F. Bednarek, a Board-certified radiologist, indicated that appellant had a fusion at the C6-7 level with exuberant anterior bone density indenting the

precervical soft tissues. There is residual uncinat spurting at this level posteriorly, centrally and to the left of the midline, which causes encroachment on the adjacent cord and the left foramen. Dr. Barnarek indicated that appellant had significant uncinat spurting at C5-6, which was productive of mild central stenosis and caused bilateral foraminal stenosis.

In a July 15, 1998 report, Dr. Dawson indicated that appellant continued with significant symptoms arising in his cervical spine. He opined that appellant's degenerative disc disease in the cervical spine was not directly caused by his employment, however, it did cause an exacerbation. Dr. Dawson further stated that the exacerbation was manifested by the appearance of disc herniations or protrusions at both C5-6 and C6-7 in the neck. He referred to the February 11, 1994 MRI of Dr. Feinberg, where he noted broad-based central disc herniations at C5-6 and C6-7. Dr. Dawson further stated that although Drs. O'Brien and Liebert indicated that the exacerbation had ceased, he opined that the exacerbation was irreversible. He noted that the evidence could be found in the MRI of January 25, 1997 where the degenerative process at C5-6 was clearly progressive since the prior examination 1994. Dr. Dawson stated that a significant exacerbation was sustained while at work towards the end of January 1996. He stated that appellant appeared to suffer a sprain of the right trapezius muscle and symptoms from this were so severe to the extent that appellant retired on disability effective May 1996 and further noted that despite retiring, appellant's symptoms progressed. Dr. Dawson further noted that the exacerbation from appellant's work conditions continued to this day. He explained that appellant's current symptoms arose from the C5-6 disc and it was likely that this would require further investigation and surgery into the future. He also stated that appellant's symptoms were exacerbated by appellant's work using a video terminal and computer and by looking up and down constantly while interviewing clients on a daily basis. Dr. Dawson also stated that the air conditioning exacerbated his symptoms. He indicated that since appellant ceased working, his symptoms became progressive and if he were to return to work, the exacerbation of his symptoms would be greatly accelerated to the point that appellant would be rendered even more disabled than his present condition.

In a January 11, 1999 letter, appellant's representative indicated he wanted to offer a few points regarding the medical documentation in the record and proceeded to point out specific areas in the medical reports that he believed were relevant to appellant's claim.

In a January 14, 1999 decision, the hearing representative found that the Office met its burden of proof in terminating appellant's entitlement to compensation and medical treatment pertaining to the 1993 employment injury effective January 17, 1998.

In a March 10, 1999 letter, appellant indicated that he was appealing, however, it was later determined that this was a request for reconsideration.³ He enclosed a February 19, 1999 report from Dr. Dawson and indicated that he no longer had a representative. Appellant also enclosed a newspaper article.

In the February 19, 1999 report, Dr. Dawson indicated that he again reviewed the independent medical evaluations of Drs. O'Brien and Liebert and the decision of the hearing

³ Appellant clarified his request on April 1, 1999.

representative dated January 14, 1999. He stated that the exacerbation of appellant's degenerative disc disease was permanent. Dr. Dawson explained that an exacerbation of a preexisting condition can either be temporary or permanent. He opined that if it were temporary, then on ceasing the exacerbating activities, the symptoms should abate. On the other hand, if the exacerbation is permanent, then the symptoms will persist despite ceasing the activities which caused the exacerbation. Dr. Dawson further explained that in appellant's case, the exacerbation was permanent. He found that appellant ceased working on May 24, 1996 and despite this, continued to experience symptoms. Dr. Dawson noted Dr. O'Brien's explanation that the most likely cause of appellant's continued symptoms was the presence of degenerative disc disease with herniation at C5-6 at the time of the original surgery at C6-7 and that appellant's symptoms may have gone away if both were operated on at the same time. He explained that he took a differing view as his surgical treatment was conservative. Dr. Dawson elaborated by indicating the success rate for a two level anterior interbody fusion in the neck, in the absence of internal fixation was only 65 percent whereas the success rate for a single level fusion was 90 percent. He indicated that at the time of the investigative discography, appellant's symptoms were largely abolished by the injection of the C6-7 segment, it was elected to operate that segment only and to treat the other degenerated and herniated segment in an expectant fashion. Dr. Dawson indicated that both Drs. O'Brien and Liebert agreed that appellant's preexisting disc disease was exacerbated by the work activities. He also noted that Dr. O'Brien concluded that appellant's ongoing symptoms were due to degeneration with disc herniation at C5-6 and, therefore, Dr. Dawson explained that appellant's ongoing symptoms were due to irreversible exacerbation of degenerative disc disease at C5-6. He further explained that the irreversible acceleration was caused by appellant's cumulative work activities through the time of his ceasing work. Dr. Dawson also indicated that appellant was totally disabled from any and all occupations.

By merit decision dated June 30, 1999, the Office denied the claim finding that the evidence submitted in support of the reconsideration was insufficient to warrant modification of the January 14, 1999 merit decision.

By letter dated October 20, 1999, appellant requested reconsideration. In support of his request, he enclosed a transcript from a television program featuring Dr. Wanda Filer and discussed a newspaper article he had previously submitted.

In a November 10, 1999 decision, the Office denied appellant's request for a merit review of its June 30, 1999 decision on the grounds that the evidence submitted was of an immaterial nature and not sufficient to warrant a review of the prior decision.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.⁴ As appellant filed his appeal with the Board on February 7, 2000, the only decisions properly before the Board are those dated November 10 and June 30, 1999.

⁴ *Oel Noel Lovell*, 42 ECAB 537, 539 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2) (1998) and 20 C.F.R. § 10.607(a) (1999).

The Board finds that this case is not in posture for a decision due to an unresolved conflict in medical opinion regarding whether appellant had an employment-related disability after January 16, 1998.

In the present case, the record reveals that there was a conflict in the medical opinion between Dr. Dawson, a Board-certified orthopedic surgeon, and Dr. Liebert, a Board-certified orthopedic surgeon, who acted as an Office referral physician, on whether appellant's aggravation of his preexisting condition had ceased. The Office referred appellant to Dr. O'Brien, an osteopath, for an impartial medical evaluation and opinion regarding whether appellant had an employment-related disability. On the basis of his opinion, the Office terminated appellant's entitlement to compensation and medical treatment pertaining to the 1993 employment injury effective January 17, 1998. The Board notes, however, that there is no indication in the record that Dr. O'Brien is a Board-certified medical specialist.⁵ The Office's procedures require that an impartial medical specialist be a Board-certified physician unless the physician has special qualifications for performing the examination as documented by the medical adviser.⁶ The record does not reflect that the Office documented any special qualifications of Dr. O'Brien. Therefore, his opinion cannot be accorded the special weight of an impartial specialist. Thus, the record contains an unresolved conflict in medical opinion regarding whether the aggravation of appellant's preexisting condition had ceased. Accordingly, the case is remanded to the Office for the referral of the case record and a statement of accepted facts to a Board-certified impartial medical specialist for an opinion on whether the employee's aggravation of his preexisting condition had ceased.

In view of the Board's holding, it will not address the issue of whether the Office properly denied merit review of appellant's request for reconsideration pursuant to 5 U.S.C. § 8128.

⁵ A search of the directories reveals that Dr. O'Brien is certified by the American Osteopathic Association.

⁶ *Albert Cremato*, 50 ECAB 550 (1999). Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4 (b)(1) (March 1994).

The decisions of the Office of Workers' Compensation Programs dated November 10 and June 30, 1999 are hereby set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Dated, Washington, DC
October 25, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member