

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LEON R. LAPINA and DEPARTMENT OF THE NAVY,
NAVAL BASE, Pearl Harbor, HI

*Docket No. 00-2422; Submitted on the Record;
Issued August 28, 2002*

DECISION and ORDER

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

The issue is whether appellant sustained disability on or after February 28, 1999 causally related to his federal employment.

On December 9, 1998 appellant, a 37-year-old plumber, injured his neck and low back when the truck he was driving was struck by another vehicle. He filed a claim for benefits on December 11, 1998, which the Office of Workers' Compensation Programs accepted for cervical and lumbar strains. Appellant received continuation of pay for a period of temporary total disability not exceeding 45 days.

In a report dated February 22, 1999, Dr. Antonio B. Cordero, a Board-certified orthopedic surgeon and appellant's treating physician, noted that appellant was currently not working because he was unable to perform his usual duties, which included climbing ladders, lifting and driving all day. Dr. Cordero recommended that appellant continue with physical therapy and advised that he could return to light duty on March 1, 1999. He stated that appellant should be restricted from driving more than 2 to 3 hours, lifting no more than 10 to 20 pounds and should do no stooping or crawling.

In a report dated March 8, 1999, Dr. Cordero related that appellant did not return to work on March 1, 1999, due to persistent low back pain and because there was no light duty available. He indicated that appellant felt he was not ready to return to work because of continued low back pain. Dr. Cordero released him to return to regular duty without limitations on April 1, 1999, recommending that appellant request assistance with lifting more than 50 to 60 pounds. A March 3, 1999 handwritten note from the physician stated that "[Appellant] called and said he did not go to work because his back is still hurting, will be coming to his appointment on [March 8, 1999]."

By letter dated March 30, 1999, the employing establishment informed the Office that appellant's supervisor had indicated that appellant did not contact the employing establishment to ask whether light duty was available as of March 1, 1999. The employing establishment

indicated that light duty was available as of that date, had appellant requested it. The employing establishment contacted Dr. Cordero on March 22, 1999 to advise him that light duty was available and was informed that Dr. Cordero was planning to release appellant to light duty on April 1, 1999.

Appellant returned to light-duty work on April 1, 1999, but on April 5, 1999 he sought treatment from Dr. Cordero due to a recurrence of back and neck pain.

Appellant subsequently submitted an April 22, 1999 disability slip from Dr. Bernard M. Portner, Board-certified in physical medicine and rehabilitation, who indicated that appellant should remain "off work" from April 21 through May 5, 1999. Dr. Portner submitted an April 22, 1999 report, in which he stated findings of low back pain on examination and diagnosed lumbar disc dysfunction.

By letter dated April 26, 1999, the Office informed appellant that his claim for temporary total disability through March 31, 1999 was not payable. The Office noted that the employing establishment controverted his claim on the grounds that he was released to return to light duty as of March 1, 1999 but made no effort to report to work. The Office noted that appellant apparently misinformed Dr. Cordero regarding the availability of light duty in order to gain an extension of temporary total disability through March 31, 1999. The Office advised appellant that Dr. Cordero's March 8, 1999 report had not indicated any objective findings of an ongoing injury and noted a negative neurological examination. Therefore, the medical evidence did not support granting an extension of his temporary total disability through March 31, 1999. The Office advised appellant to submit probative, rationalized medical evidence within 30 days to support his claim for temporary total disability subsequent to February 28, 1999. The Office noted that appellant sought medical care from Dr. Portner and advised appellant that it had not authorized a change in treating physicians. Dr. Portner's disability slips were of no probative value in supporting an ongoing injury-related condition.¹

In a disability slip dated May 3, 1999, Dr. Cordero indicated that he had advised appellant to stay home from March 1 to 31, 1999 and that he could return to light work as of April 1, 1999.

In a report dated June 21, 1999, Dr. Portner stated that appellant had an apparent herniated disc with radiculopathy at L5-S1, as indicated by electromyograph (EMG). He submitted additional disability extensions through August 3, 1999, in addition to period progress reports regarding his lower back condition.

By letter June 22, 1999, the Office asked Dr. Cordero for clarification of his May 3, 1999 disability slip regarding the period of March 1 through 31, 1999. The Office advised that it was unclear whether there were any objective findings of work-related low back pain, to support appellant's claim for temporary total disability.

¹ By letter dated April 27, 1999, appellant stated the Office that he changed treating physicians because Dr. Cordero had habitually made him wait one to two hours prior to his examinations on his scheduled appointments and because although he was experiencing severe pain in his back and neck in addition to severe headaches on April 21, 1999, he was unable to schedule an appointment with him until April 26, 1999.

By letter dated June 23, 1999, the Office informed appellant that he had provided insufficient rationale to change physicians from Dr. Cordero to Dr. Portner. The Office also reiterated that it required additional medical evidence to support his claim for compensation after February 28, 1999.

In a report dated July 17, 1999, Dr. Cordero advised the Office that appellant had no objective findings and that his neurological examination was negative. He advised that appellant had “unexplainable back pain” and had maintained that he was not able to return to work. Dr. Cordero further noted that appellant failed to attend his next appointment on April 26, 1999.

In a report dated July 27, 1999, Dr. Portner stated:

“I would like to clarify my diagnosis of discogenic low back pain. While [appellant] does not have MRI [magnetic resonance imaging] scan findings to suggest a completely ruptured disc his clinical findings are consistent with an internal disc derangement. This condition has been shown to cause back pain due to painful fissuring within annulus of the disc itself.

“In any case [appellant] was not having a back pain prior to his injury and is currently suffering from back pain as a result of and since the injury. Calling this a lumbar strain [as opposed to] a lumbar disc derangement may be debatable but is not the central issue. Regardless of the precise diagnosis [appellant] does have a lower back condition that has not yet resolved and is causing him to be unable to sit, bend, lift, carry ... or perform his usual work functions.”

By decision dated October 12, 1999, the Office denied appellant’s claim for compensation for temporary total disability after February 28, 1999. The Office found that Dr. Cordero’s medical reports supported disability due to the December 9, 1998 injury to March 1, 1999 when the physician advised appellant could return to light duty. The Office stated that subsequent to this period, however, appellant failed to submit sufficient medical evidence to establish that he had a disabling medical condition causally related to his December 9, 1998 employment injury.

By letter dated October 19, 1999, appellant requested reconsideration. He did not submit any additional medical evidence or legal argument in support of his claim.

By decision dated November 1, 1999, the Office denied appellant’s request reconsideration on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require a review of the prior decision.

By letter dated April 6, 2000, appellant requested reconsideration, and submitted reports dated November 15, 1999; November 29, 1999; December 13, 1999; December 30, 1999; and March 17, 2000 from Dr. Scott McCaffrey, Board-certified in emergency medicine. In his March 17, 2000 report Dr. McCaffrey stated:

“Based on the information available to me, it appears [appellant] injured himself on the above date of injury while driving in truck at a job site during which time he was struck by a bulldozer. He has been troubled by severe lumbosacral back

pain since that time. [Appellant does also appear to have had periods of temporary remission. This may have been why Dr. Cordero thought he could return to work approximately one year ago.]”

Dr. McCaffrey advised that appellant had chronic lumbar dysfunction, probable L3-4 lumbar disc herniation with left radiculopathy and severe myofascial and myospastic pain disorder of the quadratus lumborum and piriformis muscles of the low back.

By decision dated July 6, 2000, the Office denied modification of its prior decisions, noting that the evidence from Dr. McCaffrey failed to include a rationalized medical opinion explaining the relationship between the conditions he diagnosed and the accepted injury.

The Board finds that this case is not in posture for decision.

Appellant sustained an injury on December 9, 1998, accepted by the Office for cervical and lumbar strains. He subsequently sought additional compensation based on submission of Forms CA-8; as such, appellant maintained the burden of establishing entitlement of continuing disability which was related to the employment injury.² This burden includes providing medical evidence from a physician who concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.³ In this case appellant has submitted supporting medical evidence consisting of medical reports from Drs. Portner and McCaffrey indicating that appellant sustained wage-loss caused by his work-related low back condition subsequent to February 28, 1999.

Dr. Cordero, appellant’s treating physician, released appellant to return to light duty as of March 1, 1999 and full duty as of April 9, 1999. In a note dated March 3, 1999, however, Dr. Cordero stated that appellant had called his office and asserted that he did not go to work because his back was still hurting. In a report dated March 8, 1999, Dr. Cordero related that appellant did not return to work on March 1, 1999, purportedly because of his persistent low back pain and because there was no light duty available. He indicated that appellant felt he was not ready to return to work because of his continued low back pain, but released him to return to regular duty without limitations on April 1, 1999, although Dr. Cordero recommended that appellant request assistance with lifting more than 50 to 60 pounds. The employing establishment, however, indicated in a March 30, 1999 letter to the Office that appellant, contrary to what he told Dr. Cordero, did not contact the employing establishment to ask whether light duty was available on March 1, 1999, although light duty was available to appellant had he sought it. The employing establishment further indicated that it had contacted Dr. Cordero on March 22, 1999 to advise him that light duty was available and was informed that Dr. Cordero was planning to release appellant to light duty on April 1, 1999. Appellant returned to light duty on April 1, 1999, but on April 5, 1999 he sought treatment from Dr. Cordero due to alleged reoccurrence of back and neck pain. Dr. Cordero stated in a disability slip dated May 3, 1999 that he had advised appellant to stay home from March 1 to 31, 1999 and that he could return to light work as of April 1, 1999. In his final report dated July 17, 1999, Dr. Cordero advised the

² *Charles E. Robinson*, 47 ECAB 536 (1996); *Donald Leroy Ballard*, 43 ECAB 876 (1992).

³ *See Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

Office that appellant had no objective findings and a negative neurological examination, although appellant claimed to be unable to return to work.

Appellant also submitted reports from Dr. Portner and Dr. McCaffrey, from whom appellant sought treatment after terminating his association with Dr. Cordero. Dr. Portner stated in his June 21, 1999 report that appellant had an apparent herniated disc with radiculopathy at L5-S1 based on an EMG and kept appellant on disability through August 3, 1999. He stated in a July 27, 1999 report that appellant's clinical findings were consistent with an internal disc derangement, a condition capable of causing back pain due to painful fissuring within annulus of the disc itself. Dr. Portner concluded that appellant had back pain resulting from the December 9, 1998 employment injury and that irrespective of the precise diagnosis he had an unresolved lower back condition which rendered him unable to sit, bend, lift, carry or perform his usual work functions. In an opinion dated October 29, 1999, Dr. Portner stated:

“[Appellant] did report to my office April 22, 1999 complaining of a lower back pain which persisted as a result of an injury dated December 9, 1998. The fact is that he never recovered from this injury. Dr. Cordero released [appellant] to regular work unrestricted duty for April 1, 1999, but he did so during an office visit dated March 8, 1999. Dr. Cordero was anticipating in March that the patient would be completely recovered and able to return to unrestricted duty on April 1. This was a prediction not a fact. Dr. Cordero did not see [appellant] on April 1, 1999 to establish that the condition was indeed resolved... While a patient under my care, [appellant] underwent intensive treatment, including painful and invasive spinal injections in order to try to get better. This speaks to the seriousness and genuineness of his persistent complaints.”

Dr. McCaffrey submitted several treatment reports from November through December 1999 in which he stated findings on examination, in addition to a March 17, 2000 report in which he reviewed his course of treatment and opined that appellant had experienced severe, ongoing lumbosacral back pain since his initial December 1998 injury. He diagnosed chronic lumbar dysfunction, probable L3-4 lumbar disc herniation with left radiculopathy and severe myofascial and myospastic pain disorder of the quadratus lumborum and piriformis muscles of the low back. Thus Drs. Portner and McCaffrey sufficiently described appellant's symptoms in detail and indicated that his work-related lower back condition could have caused wage loss beyond February 28, 1999.

The Board finds that the evidence submitted by appellant, which contains a history of the development of appellant's work-related low back condition and medical opinions consistent with the history of development, is sufficient to require further development of the record.⁴ Although the medical evidence submitted by appellant is not sufficient to meet appellant's burden of proof, the medical evidence of record raises an inference that appellant's employment-related disability could have resulted in wage-loss subsequent to February 28, 1999, and is sufficient to require further development of the case record by the Office.

⁴ *John J. Carlone*, 41 ECAB 354 (1989).

On remand, therefore, the Office should further develop the medical evidence by requesting that the case be referred to a Board-certified specialist to submit a rationalized opinion on whether appellant sustained any employment-related disability subsequent to February 28, 1999. After such development of the case record as the Office deems necessary, a *de novo* decision shall be issued.

The decision of the Office of Workers' Compensation Programs dated July 6, 2000 is set aside and the case is remanded for further action in accordance with this decision.

Dated, Washington, DC
August 28, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member