

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ARMENGOL BELTRAN and U.S. POSTAL SERVICE,  
POST OFFICE, Lincoln, NE

*Docket No. 00-878; Submitted on the Record;  
Issued February 25, 2002*

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issue is whether appellant had any disability for work or injury residuals requiring further medical treatment after June 22, 1996, the date the Office of Workers' Compensation Programs terminated his compensation entitlement.

This is appellant's second appeal before the Board. In the prior appeal, the Board reversed the Office's termination of appellant's compensation for refusal of suitable work. The facts and circumstances of the case are set forth in the prior decision and are hereby incorporated by reference.<sup>1</sup>

By letter dated November 28, 1994, the Office requested a report from appellant's treating physician, Dr. Jackson J. Bence, a Board-certified orthopedic surgeon, who noted in May 1995 that appellant could work four hours per day.

By letter to Dr. Bence dated June 12, 1995, the Office requested that he provide a report including a reasoned opinion regarding the relationship between appellant's continuing condition and his employment injury.

In a report dated August 30, 1995, Dr. Bence stated that appellant had lumbosacral pain secondary to degenerative changes or osteoarthritic changes in the lower lumbar spine. Dr. Bence stated that appellant could not return to work.

The Office prepared a statement of accepted facts and referred appellant, questions to be addressed and the relevant case record to Dr. John Yost, a Board-certified orthopedic surgeon, for a second opinion examination. A surveillance video of appellant was also provided by the employing establishment.

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<sup>1</sup> Docket No. 93-1597, issued October 3, 1994. Appellant sustained an injury on October 29, 1988 which was accepted for a lumbar strain.

An employing establishment investigation service memorandum accompanying the surveillance video noted that appellant was observed on multiple occasions pushing a cart stacked with as many as five cases of beer weighing 20 pounds each and bending, twisting and lifting, loading them into his car trunk and was observed carrying 40 pounds of beer into his house with his left hand only.

By report dated December 19, 1995, Dr. Yost reviewed appellant's medical history, noted his subjective complaints, performed a physical examination and testing and described his findings. He opined that appellant had minimal degenerative spinal changes that were compatible with his age and that the injury of October 29, 1988 did not contribute to the degenerative changes in his back. Dr. Yost further noted that appellant's acute work injury had subsided and that his symptoms were on a myofascial basis. He stated that he could find no physical findings to account for any nerve root pain extending into either leg and he opined that appellant could not be considered disabled based upon his extensive activity in complying with the requested medical examination. Dr. Yost opined that appellant's subjective complaints could not be substantiated by objective findings and he completed a work capacity evaluation indicating that appellant could work four hours per day with activity restrictions.<sup>2</sup> He did not indicate whether any work restrictions were due to the employment injury. In an addendum Dr. Yost noted that there were sociopsychological factors that have created a great deal of functional overlay and that appellant's subjectivity was far greater than any of his objective findings.

By letter dated February 5, 1996, the Office requested that Dr. Yost provide clarification as to whether appellant had residuals of his accepted lumbar strain. In a response dated February 12, 1996, Dr. Yost stated that the only objective findings that appellant had concerning his lumbosacral strain were minimal limitations of forward flexion and extension.

The Office determined that a conflict in medical opinion evidence was created between Dr. Bence and Dr. Yost. The Office referred appellant, a statement of accepted facts, the relevant case record, a surveillance videotape and questions to be resolved, to Dr. Mark B. Kirkland, a Board-certified osteopathic orthopedic surgeon, for an impartial medical opinion.

In a report dated April 18, 1996, Dr. Kirkland reviewed appellant's factual and medical history, described his subjective complaints, performed a comprehensive physical examination and testing and described his objective findings. He opined that the degenerative changes of the lumbar spine noted upon x-ray and computerized tomography (CT) scan were minimal.<sup>3</sup> Dr. Kirkland further indicated that there were no current findings of lumbar strain and opined that appellant's current symptoms were not the result of his October 29, 1988 lumbar strain injury.<sup>4</sup> He diagnosed resolved lumbar strain, atherosclerosis of the aorta, smoking abuse,

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<sup>2</sup> On January 23, 1996 Dr. Yost noted that appellant's "limitation in returning to gainful employment is going to be primarily on the basis of the unrehabilitated left knee."

<sup>3</sup> As a possible source of continuing lower back discomfort, Dr. Kirkland noted radiologically that appellant had calcification of the aorta with increased dilation anterior to the disc space at L3-4. The CT scan of the lumbosacral spine showed "mild degenerative facet changes lower lumbosacral spine but no significant disc pathology."

<sup>4</sup> He found that appellant's symptoms were as a result of obesity, smoking, life-style choices and deconditioning.

overweight and deconditioning and noted that appellant was not totally disabled because of the October 29, 1988 injury. Dr. Kirkland noted: “[w]atching the videotape of [appellant] lifting and twisting and putting cases of beer in his car convinced me that he is not disabled.” He indicated that appellant’s limiting factors for work were the obesity and deconditioning and he completed a work-capacity evaluation indicating that appellant could work six to eight hours per day with limited bending.

On May 8, 1996 the Office sent appellant a notice of proposed termination of compensation on the grounds that the weight of the medical evidence established that his disability due to his employment injury had ceased and that he had no medical residuals requiring further treatment. The Office noted that the conflict in medical opinion evidence between Drs. Bence and Yost had been resolved by the well-rationalized impartial medical examiner’s report. Appellant was given 30 days within which to submit further medical evidence or argument if he disagreed with this proposed action. No further evidence was submitted.

By decision dated June 11, 1996, the Office terminated appellant’s compensation entitlement effective June 22, 1996.

Appellant disagreed with the decision and requested an oral hearing. The hearing was held on July 29, 1998 at which appellant testified.

By decision dated October 9, 1998, the hearing representative affirmed the June 11, 1996 decision, finding that the weight of the medial opinion rested with the well-rationalized report of Dr. Kirkland, who found that appellant’s employment-related disability had ceased and he had no residuals requiring further medical treatment.

By form report dated April 13, 1998, Dr. John C. Yeakley, a Board-certified orthopedic surgeon, indicated that appellant could return to work for four to six hours per day with certain activity restrictions.

By reports dated October 17 and 19, 1998, Dr. Bence opined that appellant may return to work to his date-of-injury job with certain restrictions for four hours per day and may increase this one half an hour per day as tolerated.

By letter dated June 7, 1999, appellant requested reconsideration. He disagreed with the employing establishment’s removal of him as a custodian without the due process of law.

By decision dated September 17, 1999, the Office denied modification of the June 22, 1996 decision. The Office noted that it had no jurisdiction over the employing establishment’s decisions about his removal and about failing to offer him a job within his physical restrictions. The Office indicated that the report of Dr. Kirkland remained the weight of the medical opinion evidence with regard to the October 29, 1988 injury and residual disability.

The Board finds that the Office properly terminated appellant’s compensation benefits.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>5</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>6</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>7</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>8</sup>

In the present case, appellant's treating physician, Dr. Bence, provided several reports indicating, that appellant continued to have disability due to the October 29, 1988 injury and that he could work for four hours per day with restrictions. However, the Office's second opinion specialist, Dr. Yost, examined appellant and opined that appellant had minimal degenerative spinal changes that were compatible with his age and that residuals of the injury of October 29, 1988 did not contribute to the degenerative changes in his back. Dr. Yost opined that appellant's acute work injury had subsided, that his symptoms were on a myofascial basis, that he could find no physical findings to account for any nerve root pain extending into either leg and that appellant was not disabled based upon his extensive activity in complying with the requested medical examination. Dr. Yost opined that appellant's subjective complaints could not be substantiated by objective findings."

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."

The Office found that a conflict in medical opinion was created between Dr. Bence and Dr. Yost. It properly referred appellant, a statement of accepted facts, the relevant case record and questions to be resolved, to Dr. Kirkland for an impartial medical examination.

Dr. Kirkland provided a clear and comprehensive report based upon an accurate factual and medical history and complete examination and testing results. Dr. Kirkland determined that the degenerative changes of appellant's lumbar spine were minimal, that there were no current findings of lumbar strain, and that appellant's current symptoms were not the result of his October 29, 1988 muscle strain injury. Dr. Kirkland indicated that appellant's limiting factors for work were obesity and deconditioning. He completed a work capacity evaluation indicating that appellant could work six to eight hours per day with limited bending. No continuing

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<sup>5</sup> *Harold S. McGough*, 36 ECAB 332 (1984).

<sup>6</sup> *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

<sup>7</sup> *Marlene G. Owens*, 39 ECAB 1320 (1988).

<sup>8</sup> *See Calvin S. Mays*, 39 ECAB 993 (1988); *Patricia Brazzell*, 38 ECAB 299 (1986); *Amy R. Rogers*, 32 ECAB 1429 (1981).

disability was found and no medical residuals of the accepted lumbar strain requiring further treatment were identified.

Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.<sup>9</sup>

Dr. Kirkland's report is based upon a proper background, is comprehensive and well rationalized and is entitled to special weight. Accordingly his report resolves the conflict in medical opinion evidence and establishes that appellant had no further disability for employment or medical residuals requiring further treatment.

Accordingly, the decision of the Office of Workers' Compensation Programs dated September 17, 1999 is hereby affirmed.

Dated, Washington, DC  
February 25, 2002

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>9</sup> *Aubrey Belnavis*, 37 ECAB 206, 212 (1985).