

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN R. FLORES, JR. and DEPARTMENT OF VETERANS AFFAIRS,
LONG BEACH MEDICAL CENTER, Long Beach, CA

*Docket No. 00-538; Submitted on the Record;
Issued January 9, 2002*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issue is whether appellant had any disability for work or injury residuals requiring further medical treatment after November 5, 1997, causally related to his October 6, 1997 employment injury.

On December 3, 1985 appellant, then a 38-year-old housekeeping aid, slipped in a puddle of water while picking up trash. Appellant claimed that he injured his right leg and back; however, the Office of Workers' Compensation Programs accepted that he sustained contusion of the right buttock and internal derangement of the right knee.¹ Appellant underwent several knee surgeries, returned to light duty and worked sporadically until he sustained another injury.

On April 9, 1987 appellant was helping another employee empty a vacuum full of water when his foot slipped on the stripper and he fell. Appellant claimed that he injured his lower back. The Office accepted that appellant sustained low back strain and reagravation of disc disease at the lumbosacral junction.² Appellant returned to work in February 1990 for a short time but stopped soon afterwards as no light-duty work was available. He returned to duty as a housekeeping aid on August 22, 1994 with the restriction of no climbing ladders. Appellant was subsequently reassigned to the position of medical clerk due to his knee injury restrictions.

On December 22, 1995 as appellant was attempting to wring out a mop,³ the plastic wringer twisted, causing him to slip, strike his right knee on the floor and twist his back. Appellant claimed right knee and back injury. The Office accepted that appellant sustained a

¹ This claim was assigned No. 13-785598.

² This claim was assigned No. 13-823928.

³ Apparently appellant was performing housekeeping duties again instead of medical clerk duties.

medial/anterior meniscus tear; arthroscopic surgery was authorized.⁴ Appellant returned to work on February 15, 1996 performing a temporary sedentary duty clerical job.

By decision dated March 31, 1997, the Office terminated appellant's compensation entitlement under 5 U.S.C. § 8106(c) on the grounds that he refused an offer of suitable work.

On October 6, 1997 as appellant was putting charts on a cart the cart rolled forward and caused him to slip and fall. Appellant claimed injury to his right knee and low back. The Office accepted that appellant sustained a right knee contusion and lumbar strain.⁵ Appellant stopped work on October 30, 1997, returned for one day on June 1, 1998, was placed on administrative leave that date, and has not worked since then.

Appellant filed CA-7 forms, claim for compensation, for consecutive periods following the October 30, 1997 cessation of work. In support he submitted several disability slips from Dr. Michael J. Esposito, a Board-certified orthopedic surgeon, which indicated only that appellant should remain off work.

By letter dated December 29, 1997, the Office advised appellant that there was no medical evidence of record to support disability for the periods claimed. It requested a current report from appellant's treating physician.

Appellant submitted a January 5, 1998 notice of disability status from Dr. Esposito indicating that appellant was to remain off work until January 26, 1998. Also included was a copy of a November 25, 1997 magnetic resonance imaging (MRI) scan which revealed multilevel degenerative disc disease, except for L2-3; small, central disc protrusions at L1-2 and L5-S1 and mild disc bulging at L4-5 with foraminal narrowing at that level but without canal compromise.

By letter dated January 13, 1998, the Office advised appellant that the medical evidence of record was insufficient to establish his claim and it requested that he submit a detailed medical narrative including an opinion supporting causal relation of appellant's disability to the accepted employment conditions.

In response appellant submitted another disability status report from Dr. Esposito which stated that appellant should remain off work from January 26 until March 2, 1998. Also submitted was a February 15, 1998 electromyogram (EMG) report which documented evidence of right chronic motor radiculopathy of the right anterior and posterior rami of roots L5-S1.

By decision dated February 19, 1998, the Office rejected appellant's claim for compensation for the period December 14, 1997 through March 2, 1998 finding that appellant had failed to submit medical evidence establishing disability for work during that period. The Office noted that Dr. Esposito offered no definitive diagnosis or opinion on causal relation with the October 6, 1997 injuries.

⁴ This claim was assigned No. 13-1097637.

⁵ This claim was assigned No. 13-1149352.

In a report dated February 20, 1998, Dr. Esposito reviewed appellant's pre-October 6, 1997 accident history, the accident of October 6, 1997, and subsequent low back and right knee symptomatology. Dr. Esposito opined that "it is my determination that, as a result of this October 6, 1997 injury, [appellant] has exacerbated his preexisting right knee condition, with no worsening or aggravation of his right knee noted." He continued:

"However, there is objective evidence that [appellant] has aggravated his preexisting low back condition, in light of the fact that when [appellant] was previously treated from 1995 through the time of his permanent and stationary evaluation of September 4, 1996, [appellant's] low back symptoms and problems were minimal at best and primarily required minimal treatment. There was no evidence of persistent radicular symptoms or significant findings warranting a need for further diagnostic studies, as has been the case at this time."

Dr. Esposito opined that appellant was temporarily totally disabled from October 30, 1997 through March 2, 1998 and he diagnosed appellant's problems as follows:

"(1) Lumbar degenerative disc disease at multiple levels, with moderate spinal stenosis at the L4-5 and L5-S1 levels, as documented by MRI study;

"(2) Recurrent lumbar strain/lumbar facet syndrome in exacerbation with right lower extremity radiculopathy;

"(3) Long-standing history of right knee injury and multiple surgical procedures in the past, with recent exacerbation of right knee pain;

"(4) Documented post-traumatic right knee end-stage osteoarthritis."

By letter dated February 26, 1998, the Office advised that it had reviewed Dr. Esposito's February 20, 1998 report and had found: "It is not sufficient for us to reverse the decision dated February 19, 1998." The Office stated that Dr. Esposito did not explain how appellant's work injury of October 6, 1997 exacerbated his condition nor did he address the fact that appellant was able to work for 24 days before stopping work. The Office further stated that, although the EMG did support the presence of right chronic motor radiculopathy of the right anterior and posterior rami of roots at L5-S1, the medical records supported that appellant had a 3.5 mm to 4 mm broad-based posterior disc bulge at L5-S1 as far back as 1987.⁶

By report dated March 2, 1998, Dr. Esposito again noted appellant's ongoing symptoms, reported his findings upon physical examination, including restricted spinal range of motion and positive straight leg raising test on the right, reviewed diagnostic studies, and provided diagnoses consistent with his February 20, 1998 report. Dr. Esposito opined that appellant's symptoms were slowly worsening since evaluation on January 5, 1998, and that appellant was totally disabled for work, and he reiterated that appellant's disability for work and need for further treatment was related to the incident of October 6, 1997.

⁶ No appeal rights were included with this letter, and no medical review of Dr. Esposito's report was conducted.

In response to an Office request for elaboration, Dr. Esposito provided a March 16, 1998 supplemental report. Dr. Esposito reported appellant's presenting symptoms following the October 6, 1997 injury, noted that it was recommended that appellant continue to try to work while conservative medical care was initiated, and noted that due to increased symptomatology appellant was advised to stop working on October 30, 1997 following examination at Dr. Esposito's office. Dr. Esposito noted a continued worsening of appellant's symptoms, noted electrodiagnostic and radiographic testing results, and concluded that appellant suffered a moderate aggravation of his preexisting low back condition as a result of the October 6, 1997 injuries. He further noted that appellant's need for ongoing orthopedic care and disability for work was a direct result of the October 6, 1997 incident.

On April 10, 1998 the Office referred appellant, a statement of accepted facts,⁷ questions to be addressed, and relevant parts of the case record, to Dr. Thomas R. Dorsey, a Board-certified orthopedic surgeon, for a second opinion examination.

By report dated May 4, 1998, Dr. Dorsey reviewed appellant's factual and medical history, noted his current complaints, reported the results of his orthopedic examination, and summarized that the January 1998 electrodiagnostic studies showed chronic motor radiculopathy of the right anterior and posterior rami of the L5-S1 nerve root. He noted that the November 1997 MRI showed degenerative disc disease throughout the lumbar spine except for L2-3, and the February 1996 lumbar spine radiograph showed slight anterior wedging involving the inferior border of L1, but no evidence of significant canal compromise and minimal relative narrowing of the fifth lumbar interspace, suggesting some degree of degenerative disc disease at L5-S1. Dr. Dorsey diagnosed "Right knee contusion, resolved; preexisting right knee degenerative arthritis; lumbar musculoligamentous sprain/strain, resolved; [and] preexisting lumbar degenerative disc disease. Dr. Dorsey answered the Office's questions noting that in his opinion:

"There is no condition which is currently referable to the events of October 6, 1997. There is no evidence of a material change in the knee as a result of October 6, 1997 on which to believe that [appellant] has any continuing ongoing medical pathology in the right knee. With regard to the lumbar spine, at most, [appellant] would have sustained a lumbar musculoligamentous sprain/strain. The known history of resolution of lumbar musculoligamentous sprain/strain is that of complete resolution within 30 days. There is no material change seen in the lumbar spine upon reviewing pre- and post-alleged injury MRIs. There is also no evidence of any acute findings which would have been legitimately medically referable to the events of October 6, 1997, in the examination of the lumbar spine."

Dr. Dorsey opined that there was no evidence of any aggravation of any preexisting condition due to the events of October 6, 1997. He opined that appellant had no legitimate injury-related factors of disability at this time, but had nonindustrial preexisting right knee degenerative disease and preexisting lumbar spine degenerative facet disease and degenerative disc disease. Dr. Dorsey opined that appellant required no medical treatment for the events of

⁷ This statement of accepted facts appears to be incomplete.

October 6, 1997 at that time. He noted that appellant was “totally disabled from October 30, 1997, subsequent to the October 6, 1997 injury. He is no longer totally disabled at this time,” and he listed appellant’s work activity restrictions.

By decision dated May 29, 1998, the Office rejected appellant’s claim for compensation finding that the weight of the medical evidence established that his disability from work ended on November 6, 1997, and that as of May 4, 1998 he had no further residuals of the October 6, 1997 work injury. The Office found that Dr. Esposito performed a less comprehensive physical examination and failed to adequately explain how the work injury of October 6, 1997 aggravated appellant’s preexisting conditions and that his reports were speculative, whereas Dr. Dorsey’s report was well rationalized, and therefore the weight of the medical evidence.

By letter dated June 18, 1998, appellant requested reconsideration of the May 29, 1998 decision.

By report dated July 13, 1998, Dr. Esposito diagnosed lumbar degenerative disc disease L4 to sacrum with mild disc protrusion at L5-S1 and lumbar facet syndrome in moderate exacerbation, noted that appellant’s condition had worsened since his last examination and he noted “motion of lumbar spine continues to progressively worsen by clinical evaluation, right radiculopathy persists” and that appellant’s sitting and standing tolerance was very limited. He opined that appellant should remain off work until his symptoms have diminished and recommended that he undergo facet blocks.

Appellant was removed from employment effective July 24, 1998 for cause.

On December 29, 1998 the Office referred appellant, a statement of accepted facts, questions to be addressed, and the relevant case record, to Dr. Jay Jurkowitz, a Board-certified neurologist, for a second opinion examination.

By report dated January 19, 1999, Dr. Jurkowitz reviewed appellant’s factual and medical history including the medical reports of record, noted his current low back and right radicular complaints, reported the results of his neurologic examination and electrodiagnostic testing, and opined that testing demonstrated a left L5 or S1 radiculopathy. Dr. Jurkowitz noted that appellant had positive straight leg raising bilaterally, atrophy of the left extensor digitorum brevis muscle, decreased strength in the left toe dorsiflexor, an absent left ankle jerk, and decreased pinprick sensation in the right knee area, the right median foreleg and left lateral leg. He diagnosed left L5 radiculopathy, and status post multiple right knee surgeries with purely orthopedic knee problems, and he answered the Office’s questions as follows: Dr. Jurkowitz opined that there was some neurological damage to appellant’s back resulting in problems in the extremities, L5 radiculopathy and loss of muscle tone, strength and power. He opined that appellant’s back problem was a nonwork-related condition, that appellant could perform the duties of a medical clerk, and that he was able to return to work on June 1, 1998. Appellant’s activity restrictions were attached to Dr. Jurkowitz’s report.

By report dated March 4, 1999, Dr. Dorsey reviewed appellant’s factual and medical history including the medical reports of record, noted his current low back and right radicular complaints, reported the results of his orthopedic examination, and diagnosed “Lumbar spinal

stenosis, with intermittent radicular symptomatology, left lower extremity, mild, [and] right knee moderate-to-severe tricompartmental osteoarthritis....” Dr. Dorsey noted that Dr. Jurkowitz found evidence of L5 radiculopathy on the left, which he did not find on his examination, however he speculated that it was possible “that with a neuroforaminal stenosis the positive examination findings could be intermittent. He noted that on examination of appellant he had found no sensory loss or alteration, loss of muscle strength or tone, or restriction of motion of the extremities, but he noted that Dr. Jurkowitz did find an absent ankle jerk, and diminished left great toe dorsiflexor, and he indicated that appellant was unavailable for reexamination to clear these discrepancies up. Dr. Dorsey noted that there was no improvement since 1998. He opined that appellant’s right knee arthritis had been accelerated by his surgical procedures, and therefore appellant’s right knee condition was related to his work status by acceleration. Dr. Dorsey noted that appellant’s lumbar spinal stenosis was not related to any particular episode of injury, but “would have been accelerated by his work activities” in housekeeping. He noted that appellant did have ongoing medical residuals, ongoing right knee tricompartmental osteoarthritis and ongoing lumbar spinal stenosis, and could not return to his date-of-injury housekeeping job. Dr. Dorsey opined that he did not believe that any of appellant’s conditions were related to the October 6, 1997 episode, but that they were related to factors of employment.

By decision dated June 23, 1999, the Office denied modification of the May 29, 1998 decision finding that the evidence submitted in support was not sufficient to warrant modification. The Office noted that appellant would have no entitlement to compensation for injuries or a medical condition that was present prior to the March 31, 1997 termination of compensation under 5 U.S.C. § 8106(c), regardless of whether or not the actual medical condition worsened after the decision was issued and regardless of whether or not the various conditions were considered industrial or not. The Office noted that appellant had been referred to Dr. Dorsey, an orthopedist, and Dr. Jurkowitz, a neurologist, for second opinion examinations and that Dr. Jurkowitz opined that appellant could perform the duties of a medical clerk, that his symptomatology could be controlled with over-the-counter medications, and that his back condition was nonindustrial. Dr. Dorsey opined that appellant’s clinical examination was not compatible with a lumbar radiculopathy, but also stated that such a condition could be intermittent in a patient with neuroforaminal stenosis which was appellant’s current diagnosis. Dr. Dorsey stated that appellant’s October 6, 1997 injury had ceased, but that, based upon his review of the new information, appellant’s spinal stenosis had been accelerated by his long-term employment as a housekeeping aid. Both Dr. Jurkowitz and Dr. Dorsey agreed that appellant could work within certain restrictions. However, Dr. Dorsey, after reviewing Dr. Jurkowitz’s report, contacted the Office and requested reexamination of appellant, as Dr. Jurkowitz’s clinical examination was not consistent with his own. The Office, however, advised Dr. Dorsey to issue his examination results as is, because appellant had moved out of the area.

The Office noted that no conflict in medical evidence existed because Dr. Esposito’s reports were not supported by testing or clinical examination or a review of the complete record, such that Drs. Dorsey and Jurkowitz constituted the weight of the medical opinion evidence.

The Office, however, did accept that appellant sustained acceleration of spinal stenosis arising out of appellant’s housekeeping duties. It added this condition to claim No. 13-1097637, the claim accepted for right medial/anterior meniscus tear, for which compensation was

terminated for refusal of suitable work on March 31, 1997.⁸ The Office acknowledged that it could require appellant to file a new Form CA-2 occupational illness claim for this condition, but it declined to do so to avoid increased paperwork and because it would not afford appellant any additional entitlements. The Office explained that because the spinal condition was seen as arising out of factors of employment that ceased in 1985, which was before the March 31, 1997 termination for refusal of suitable work.⁹ The Office stated that the position offered appellant included “accommodations for his spinal condition,” and therefore appellant’s “current need for industrial medical care is not considered due to an injury that occurred after March 31, 1997. Given this situation, [appellant] has no entitlement to any future monetary compensation in any of his cases because the weight of medical evidence shows that he does not suffer residuals of his October 6, 1997 injury and because he is subject to the sanction decision of March 31, 1997 for all conditions incurred prior to that March 31, 1997 (even though the industrial back diagnosis (acceleration of spinal stenosis) was labeled as degenerative disc disease, herniated disc, etc.) when the suitable job offer was made.¹⁰

The Board finds that this case must be reversed in part and affirmed in part.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.¹¹ 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.¹² Further, the right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for wage loss.¹³ 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.¹⁴

The Board has not met this burden due to an unresolved conflict in medical opinion evidence.

In this case, appellant’s treating physician, Dr. Esposito, in his multiple reports, reviewed appellant’s multiple clinical testing results, including radiographic and electrodiagnostic

⁸ The claims accepted for back conditions included the April 9, 1987 low back strain injury, No. 13-823928, and the October 6, 1997 lumbosacral strain injury, No. 13-1149352.

⁹ The record supports that appellant was still performing some housekeeping duties as recently as December 22, 1995 when he sustained injury as he was attempting to wring out a mop in a plastic wringer.

¹⁰ The Board notes that the condition of spinal stenosis is distinct from a herniated disc or degenerative disc disease. See Dorland’s *Illustrated Medical Dictionary*, 27th Edition, 1988, pp. 1579-80.

¹¹ *Harold S. McGough*, 36 ECAB 332 (1984).

¹² *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

¹³ *Marlene G. Owens*, 39 ECAB 1320 (1988).

¹⁴ See *Calvin S. Mays*, 39 ECAB 993 (1988); *Patricia Brazzell*, 38 ECAB 299 (1986); *Amy R. Rogers*, 32 ECAB 1429 (1981).

findings, performed physical examinations and found objective symptoms of restricted spinal range of motion and positive straight leg raising, and opined that appellant's symptoms were slowly worsening and that appellant was totally disabled for work. Dr. Esposito opined that appellant suffered a moderate aggravation of his preexisting low back condition as a result of the October 6, 1997 injuries, and had right chronic motor radiculopathy at the L5-S1 level. He further explained why appellant continued to work until October 30, 1997 when Dr. Dorsey recommended that he stop work.

On the other hand, Dr. Dorsey reviewed the same electrodiagnostic and radiographic testing results, noted the right chronic motor radiculopathy of the L5-S1 nerve root, degenerative disc disease throughout the lumbar spine, slight anterior wedging involving the inferior border of L1, and minimal narrowing of the fifth lumbar interspace, but noted no significant canal compromise. He opined, however, that there was no condition that was currently referable to the events of October 6, 1997 and no material change in the knee since then, and he opined that appellant had no ongoing medical pathology of the knee or lumbar spine, and that the "known history" of any lumbar musculoligamentous sprain/strain would have resolved within 30 days of occurrence. The Office based its termination date on this hypothetical "finding" of a duration of 30 days for a musculoligamentous sprain/strain resolution derived from medical literature or practice, rather than from any examination or objective evidence from appellant.

Dr. Dorsey opined that appellant had no legitimate injury-related factors of disability at that time and required no further medical treatment for the events of October 6, 1997. He opined that appellant was no longer totally disabled, and he provided work restrictions.

As Dr. Dorsey disagreed with the multiple reports from Dr. Esposito on the issues of whether or not appellant was totally disabled for work and whether he required further medical treatment, causally related to the October 6, 1997 incident, a conflict in medical opinion evidence arose.¹⁵

As a conflict in medical opinion evidence arose but remained unresolved by a referral to an impartial medical specialist, the Office has not met its burden of proof to terminated appellant's wage-loss compensation and medical benefits.

Thereafter another report from Dr. Esposito and two further reports from Drs. Dorsey and Jurkowitz were submitted. Dr. Jurkowitz provided a somewhat conclusory report and found multiple objective symptoms but he failed to provide a rationalized opinion on causal relation, merely stating that appellant's back problem was nonwork related. As this report was unrationalized and conclusory, it was of diminished probative value.¹⁶

Dr. Dorsey indicated that after reviewing Dr. Jurkowitz's report he needed to reexamine appellant, which the Office told him was impossible. Even though Dr. Dorsey expressed some

¹⁵ The Board finds that Dr. Esposito's multiple reports, when taken together, include some rationale and include physical examination results, and are therefore sufficient to create a conflict with the single report from Dr. Dorsey. See *Aubrey Belnavis*, 37 ECAB 206, 212 (1985).

¹⁶ See *Vicky L. Hannis*, 48 ECAB 538 (1997); *Jacquelyn L. Oliver*, 48 ECAB 232 (1996); *Jennifer L. Sharp*, 48 ECAB 209 (1996).

question about his findings which were inconsistent with those of Dr. Jurkowitz and which needed resolution by another examination, the Office instructed him to issue a report from the material he had. As Dr. Dorsey's report was incomplete and not final, as he expressed a need to reexamine appellant and to clarify his findings, it is also of diminished probative value.¹⁷

As the Office failed to resolve this conflict in medical opinion evidence, it did not meet its burden of proof to terminate compensation and medical benefits.

However, the Board finds that the record supports that appellant sustained an acceleration of neuroforaminal spinal stenosis causally related to his housekeeping duties. This condition, which was first diagnosed in Dr. Dorsey's March 4, 1999 report, is indeed compensable as it was a separate injury diagnosed after the March 31, 1997 suitable work 5 U.S.C. § 8106(c) termination decision. The fact that the exposure which produced it ended before the March 31, 1997 penalty decision is not controlling, as it was not diagnosed at that time.¹⁸ Therefore, a new claim for an occupational disease should be filed for acceleration of neuroforaminal spinal stenosis by housekeeping duties for the entire period appellant performed some of those duties.

Accordingly, the decision of the Office of Workers' Compensation Programs dated June 23, 1999 is hereby affirmed in part regarding the acceptance of appellant's neuroforaminal spinal stenosis, but is reversed with respect to the termination of compensation effective November 6, 1998, and the denial of compensation for the accelerated spinal stenosis.

Dated, Washington, DC
January 9, 2002

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member

¹⁷ See *Anna C. Leanza*, 48 ECAB 115 (1996); *Clara T. Norga*, 46 ECAB 473 (1995).

¹⁸ The Board notes that appellant was still performing some housekeeping duties as of December 22, 1995 when he was injured while wringing out a mop. The Board further notes that section 8122(b) of the Act states that in latent disability cases, time limitations do not begin to run until the claimant is aware of the causal relationship between the condition and his employment.