

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID FREEMAN, JR. and U.S. POSTAL SERVICE,
SOUTH OZONE PARK STATION, Jamaica, NY

*Docket No. 00-2067; Submitted on the Record;
Issued January 15, 2002*

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 disability compensation effective October 14, 1998.

On August 23, 1975 appellant, then a letter carrier, was lifting a parcel and a sack of mail when he developed low back pain. He stopped working on August 26, 1975 and received continuation of pay through October 9, 1975. The Office accepted his claim for a low back strain. Appellant returned to limited-duty, part-time work on November 21, 1975 and full-time work on May 19, 1976. He stopped working again on July 16, 1976 and filed a claim for a recurrence of disability. The Office began payment of disability effective October 9, 1976.

In a July 26, 1996 decision, the Office terminated appellant's compensation effective August 18, 1996 on the grounds that he no longer had a disability causally related to his August 23, 1975 employment injury. In a November 20, 1996 merit decision, the Office denied appellant's request for modification of the prior decision.

In a December 14, 1996 letter, the Office made a preliminary determination that appellant had received a \$6,004.62 overpayment in compensation because he had continued to receive compensation after his compensation had been terminated. Appellant requested a hearing before an Office hearing representative. In an October 23, 1997 decision, the Office hearing representative reversed the Office's overpayment decision on the grounds that the Office had not met its burden of proof in terminating appellant's compensation.

In an October 14, 1998 decision, the Office terminated appellant's compensation on the grounds that he was no longer suffering from any work-related disability and was capable of returning to his preinjury employment. Appellant requested a hearing before an Office hearing representative, which was held on April 19, 1999.

In an August 20, 1999 decision, the Office hearing representative affirmed the Office's decision terminating appellant's compensation. Appellant requested reconsideration. In a

March 20, 2000 decision, the Office denied his request for reconsideration on the grounds that the evidence submitted in support of the request was cumulative, repetitive, irrelevant, or immaterial and, therefore, insufficient to warrant review of the prior decision.

The Board finds that the Office has not met its burden of proof in terminating appellant's compensation.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. 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.¹

In a series of reports, Dr. C. Akin Phillips, an orthopedic surgeon, stated that appellant was totally disabled due to a chronic lumbosacral sprain with inguinal hernia. In a July 23, 1997 report, Dr. Richard J. Radna, a Board-certified neurosurgeon, stated that appellant had chronic compressive lumbosacral and radicular pain syndrome with probable cervical compressive radicular pain and bilateral radiculopathy. He commented that appellant's lumbosacral derangement, by history, appeared to be related to his work at the employing establishment. Dr. Radna concluded that appellant was totally disabled for work. He referred appellant for a magnetic resonance imaging (MRI) scan. In a July 24, 1997 report, Dr. Amarjit S. Gill stated that an MRI scan showed degenerative arthritis and disc desiccations with small central posterior disc herniations at L2-3, L3-4 and L4-5.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Edward A. Toriello, a Board-certified orthopedic surgeon, for an examination and second opinion. In a January 30, 1998 report, Dr. Toriello stated that, on examination, appellant had a decreased range of motion of the lumbosacral spine. He noted that appellant ambulated fully and normally. Dr. Toriello reported that straight leg raising was bilaterally full and pain free. He found no motor or sensory deficits in the legs. Dr. Toriello concluded appellant's low back strain had resolved. He stated that appellant had no objective findings on the MRI scan or other diagnostic tests, which would suggest appellant had more than a resolved low back strain. Dr. Toriello concluded that appellant had no current objective findings of the accepted condition of low back. He stated that appellant could return to the full duties of his prior employment.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Sanford R. Wert, a Board-certified orthopedic surgeon, to resolve the conflict in the medical evidence. In a June 23, 1999 report, he indicated that appellant complained of pain in the lumbar spine, radiating to both legs and occasional numbness of the toes of both feet. Dr. Wert reviewed the July 27, 1997 MRI scan and interpreted it as showing degenerative disease at L2-3, L3-4 and L4-5. He noted limitation of motion of the lumbar spine but reported that appellant was voluntarily guarding his movement by actively contracting his muscles. Dr. Wert stated that appellant refused to allow a straight leg raising examination because it would be too painful. He indicated that he attempted the straight leg raising test with appellant's knee bent, explaining that bending the knee would eliminate the pressure on the sciatic nerve.

¹ *Jason C. Armstrong*, 40 ECAB 907 (1989).

Dr. Wert commented that appellant continued to resist this test, resulting in a positive confusion test. He found no atrophy in the legs.

Dr. Wert diagnosed an acute low back strain and degenerative disc disease. He stated that, on examination, he found appellant's responses to be extremely excessive or more likely exaggerated, particularly as the employment injury had occurred 23 years previously. Dr. Wert commented that appellant's positive confusion test which was indicative of someone trying to influence the examination. He stated that he found no objective findings on physical examination of any accident-related orthopedic disability. Dr. Wert indicated that the degenerative disease found on the MRI scan was not caused by the employment injury but developed over time. He commented that the findings did not necessarily cause any real orthopedic related disability and should not preclude appellant from pursuing gainful employment. Dr. Wert concluded that appellant could return to his preinjury employment without restrictions or limitations.

Appellant's attorney submitted an October 14, 1998 report from Dr. Radna, who stated that the MRI scan showed severe desiccative changes at every level of the lumbar spine. He noted severe central disc herniations at L3-4 and L4-5. Radna reported that appellant had a discogenic and osseous lateral recess stenosis at the L4-5 level with probable disc extrusion on the left side. Dr. Radna diagnosed a lumbosacral musculoskeletal and radicular pain syndrome. He concluded appellant's lumbosacral derangement appeared to be occupational in nature. Dr. Radna stated that appellant's condition was permanent.

In a March 16, 1999 report, Dr. Morton Finkel, a Board-certified neurologist, stated that he had first examined appellant on October 23, 1998 and had been treating him since that time. He noted that the history of the other physicians who had treated appellant was that he had continuous pain since the employment injury. Dr. Finkel contended that appellant's condition had been misdiagnosed by his original physicians, noting that appellant continued to have lumbar muscle spasm, positive straight bilateral leg raising tests and loss of temperature and vibration sensation in the right leg laterally to the mid leg. He indicated that appellant had objective evidence of lumbar radiculopathy consistent with the employment injury in 1975.

Dr. Finkel noted that the MRI showed herniated nuclei pulposi at two levels, L3-4 and L4-5, consistent with this diagnosis. He concluded that appellant's history and findings were consistent with his sustaining an injury caused by heavy lifting and frequent bending, with the herniated nuclei pulposi and some degenerative changes caused by the original injury persisting to the present. Dr. Finkel stated that the findings were consistent with herniated nuclei pulposi being present from 1975, noting that no MRI scans were taken at that time. He indicated that appellant's lumbar radiculopathy was due to the degenerative disc disease and herniated nuclei pulposi caused by the 1975 employment injury.

In situations when there exist opposing medical reports of virtually equal weight and rationale 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, must be given special weight.²

In this case, Dr. Wert based his opinion on an accurate history. However, his opinion was not based on a proper factual background. He interpreted the July 27, 1997 MRI scan as only showing degenerative disease in the lumbar spine. The other physicians who reviewed the same MRI scan, Drs. Gill, Radna and Finkel, concluded that the MRI scan showed herniated lumbar discs. Dr. Gill concluded that appellant had three herniated discs, at L2-3, L3-4 and L4-5 while Drs. Radna and Finkel stated that appellant had two herniated discs, L3-4 and L4-5.

Dr. Finkel, in a well-reasoned report, concluded that appellant's history of continuous back pain since the employment injury, radiculopathy and loss of temperature in the right leg, showed that appellant's condition had been misdiagnosed and that he actually had sustained herniated discs as a result of the August 23, 1975 employment injury. The record shows that no MRI scan was performed before the July 27, 1997 MRI scan so there were no prior tests to contradict Dr. Finkel's conclusion. The MRI scan and Drs. Radna and Finkel reports directly contradict Dr. Wert's statement that appellant had no objective findings to support his complaints. His report, therefore, has reduced probative value and is insufficient to establish that appellant's disability due to the August 23, 1975 employment injury has ceased.

The decisions of the Office of Workers' Compensation Programs, dated March 20, 2000 and August 20, 1999, are hereby reversed.

Dated, Washington, DC
January 15, 2002

David S. Gerson
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member

² *James P. Roberts*, 31 ECAB 1010 (1980).