

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GLENN A. HOWSDEN and DEPARTMENT OF THE AIR FORCE,
BUCKLEY AIR NATIONAL GUARD, MARINE RADAR SITE, Aurora, CO

*Docket No. 00-2312; Submitted on the Record;
Issued June 26, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective May 23, 1998 on the grounds that his work-related disability causally related to a March 27, 1981 lumbar strain and aggravation of a preexisting spondylolisthesis had ceased.

The Office accepted that on March 27, 1981 appellant, then a 43-year-old truck driver, sustained a lumbosacral strain and an aggravation of a preexisting lumbar spondylolisthesis when he lifted a heavy radiator and trash can. Appellant resumed work on January 10, 1989 as a light-duty clerk. He was transferred to a medical data entry clerk position in January 1991, precipitating a recurrence of disability commencing July 26, 1991 due to prolonged sitting. Appellant was off work through November 24, 1992, when he assumed a light-duty mail clerk position. He sustained a recurrence of disability commencing July 20, 1993 and did not return to work.

Appellant submitted treatment notes from March 1981 through 1982 from Dr. Peter Gehret, an attending Board-certified orthopedic surgeon, who opined that the March 27, 1981 lifting injury aggravated appellant's preexisting degenerative disc disease. The Office obtained a second opinion from Dr. Martin E. Anderson, a Board-certified orthopedic surgeon, who also diagnosed a lumbar strain related to the March 27, 1981 lifting incident and severe degenerative lumbosacral arthritis.

On August 25, 1982 the Office referred appellant and the medical record to Dr. Arthur K. Strasburger, a Board-certified orthopedic surgeon, who submitted reports from September 9, 1982 through November 13, 1985, diagnosing degenerative lumbar arthritis, degenerative disc disease and a minimal L5-S1 degenerative spondylolisthesis. Dr. Strasburger opined that the

March 27, 1981 incident permanently aggravated appellant's preexisting degenerative lumbar arthritis, causing restricted lumbar motion, paraspinal muscle spasm and disability for work.¹

In a September 1, 1984 report, Dr. John H. Joshua, a Board-certified orthopedic surgeon and impartial medical examiner, found appellant totally disabled for work due to an unstable L5-S1 spondylolisthesis or spondylolysis, aggravated by the March 27, 1981 injury.

On October 1, 1986 the Office appointed Dr. Charles Rowland, a Board-certified orthopedic surgeon, as a second impartial medical examiner. In a November 3, 1986 report, Dr. Rowland diagnosed advanced, progressive degenerative disc disease at L5-S1, aggravated by the March 27, 1981 injury, causing a "continuing and irreversible change in [the] degenerative disc condition." He recommended lumbar surgery.

In progress notes from January 27 to March 11, 1987, Dr. Strasburger found that the L5-S1 spondylosis appeared to have resolved. In an April 9, 1987 report, Dr. Strasburger opined that the effects of the March 27, 1981 injury had ceased. He submitted periodic reports through May 6, 1991 noting continued lumbar pain, restricted motion and spasm due to the L5-S1 spondylolisthesis.

In a June 20, 1991 report, Dr. Richard C. Taylor, an attending Board-certified orthopedic surgeon, provided a history of injury and treatment. On examination, Dr. Taylor found limited range of lumbar motion, positive straight leg raising tests bilaterally and degenerative disc disease at L4-5 and L5-S1. He submitted periodic reports from July 29, 1991 through July 1993, holding appellant off work due to lumbar pain and spasm with objective signs of sciatica and a positive Gower's sign.² In reports from August 10, 1993 through February 1995, Dr. Taylor noted that appellant's lumbar condition improved, then worsened from November 1994 onward and that he remained disabled for work.³

In a May 23, 1996 report, Dr. Jeffrey B. Kleiner, an attending Board-certified orthopedic surgeon, provided a history of injury and treatment, and noted appellant's symptoms of lumbar pain, with radiation and dysesthesias into both feet. Dr. Kleiner obtained x-rays showing "facet arthrosis at L5-S1 with degenerative narrowing at L5-S1. He diagnosed severe degenerative disc disease at L5-S1 with spondylosis and a possible spondylolisthesis at L5, noting that appellant

¹ By decision dated February 17, 1983, the Office denied appellant's claims for compensation on and after September 9, 1982 due to a lack of medical evidence. Appellant then requested an oral hearing, held October 31, 1983. By decision dated November 23, 1983 and finalized November 28, 1983, the Office hearing representative set aside the February 17, 1983 decision and remanded the case to the Office for appointment of an impartial medical examiner. The record indicates that, based on Dr. Joshua's report, appellant's compensation was reinstated and his case replaced on the periodic rolls.

² In an April 12, 1994 report, Dr. Duane J. Glatz, an attending Board-certified neurosurgeon, provided a history of injury and treatment, and diagnosed chronic mechanical low back pain. Dr. Glatz found appellant disabled for work.

³ In a September 21, 1994 report, Dr. Taylor noted that appellant sustained right ankle and left elbow fractures in July 1994 when he stepped in a hole and fell. Lumbar x-rays showed no acute injury attributable to the July 1994 fall. Dr. Taylor found a positive Gower's sign on examination.

had reached maximum medical improvement. Dr. Kleiner commented that the x-ray findings were indicative of a history of the traumatic March 27, 1981 injury, superimposed on preexisting degenerative arthritis. He opined that appellant could perform light-duty work if he were allowed to change position every 15 to 20 minutes. Dr. Kleiner proscribed climbing stairs or ladders, stooping, squatting, twisting, bending or lifting over 10 pounds.

Dr. Kleiner obtained September 25, 1996 x-rays showing “continued narrowing of the L5-S1 disc space, with “facet arthropathy and foraminal stenosis” at L5-S1.

In a May 7, 1997 letter to the Office, Dr. Kleiner stated that appellant’s symptoms remained unchanged since the initial December 8, 1995 examination. He noted “[o]bjective abnormalities” of decreased lumbar range of motion and an L5 spondylolisthesis requiring surgery. Dr. Kleiner opined that appellant’s “disability [was] due to his industrial injury of 1981.”

In a May 16, 1997 report, Dr. Kleiner stated that appellant’s L5-S1 spondylolisthesis required surgery to stabilize the structural abnormality and thus reduce his lumbar pain.

The Office then referred appellant, a portion of the medical record and a statement of accepted facts to Dr. John A. Reister, a Board-certified orthopedic surgeon, for a second opinion examination. In an August 27, 1997 letter, the Office asked Dr. Reister to specify if there were “current *objective findings of active and disabling residuals of a work-related lumbosacral strain and aggravation of preexisting spondylolisthesis; or, has [appellant’s] condition returned to the baseline of pathology or continued a normal progression had the work injury not occurred? ... Please explain whether the disability is due to a work-related condition or to other nonwork-related factors, such as age or preexisting spondylolisthesis.*” (Emphasis in the original.)

In a November 26, 1997 report, Dr. Reister provided a detailed history of injury and treatment, noted findings on examination of tenderness at the right lumbosacral junction and limited range of motion. He diagnosed symptomatic degenerative disc disease at L5-S1, a Grade I spondylolisthesis at L5-S1 and a “[w]ork-related aggravation of preexisting degenerative disease.” Dr. Reister opined that the March 27, 1981 lumbar strain had resolved but that the aggravation of the L5-S1 spondylolisthesis “clearly caused [appellant] not to be able to return to his preexisting functional level.” He explained that, although the aggravation had resolved, it “caused a permanent reduction in [appellant’s] functional level or a permanent increase in the number and episodes of back pain that [he] is currently experiencing.” Dr. Reister noted that appellant’s condition had not returned to baseline, as the accepted lumbar strain “caused a rapid progression of his degenerative disease over the short period of time that this strain was present. Therefore, his baseline never returned to his preinjury level.” Dr. Reister added that the “work-related injury exacerbated his degenerative spine disease and permanently aggravated his back pain complex,” and that therefore appellant’s disability for work was related to the March 27, 1981 injury. He noted that appellant could perform sedentary work with frequent changes of position.

In a February 12, 1998 letter, the Office requested that Dr. Reister clarify his November 26, 1997 opinion on causal relationship. The Office asked Dr. Reister to “describe the objective evidence to support that there was a material change in the spondylolisthesis due

to” the March 27, 1981 injury, to support Dr. Reister’s “opinion that [appellant’s] condition ha[d] not returned to the baseline of pathology had the work injury not occurred.”

Dr. Reister responded in a February 18, 1998 report, stating that “[n]o objective evidence existe[d] that shows ‘material change’ of spondylolisthesis. The only objective findings are decreased range of motion of the lumbosacral spine and tenderness. Subjectively, he has more pain and a decreased functional capacity.” Dr. Reister found appellant able to work eight hours per day light duty.

By notice dated March 26, 1998, the Office advised appellant that it proposed to terminate his compensation benefits based on Dr. Reister’s December 30, 1997 and February 18, 1998 reports. The Office noted that there was no persuasive evidence supporting causal relationship since Dr. Strasburger’s April 9, 1987 and April 25, 1988 reports. The Office posited that Dr. Reister found “no objective findings of a condition or active and disabling residuals to support work-related disability” resulting from the March 27, 1981 injury.

Appellant responded by March 31 and April 24, 1998 letters, asserting that Dr. Reister supported a continuing causal relationship between his disability for work, lumbar condition and the accepted March 27, 1981 injuries. He also alleged a conflict of medical opinion between Drs. Reister and Kleiner. Appellant submitted additional evidence.

In an April 10, 1998 report, Dr. Kleiner stated that appellant’s symptoms were caused by “spondylolisthesis and degenerative disc disease at the L5-S1 area,” with disabling pain precipitated by the March 27, 1981 injury. He found appellant permanently disabled.

By decision dated April 30, 1998, the Office terminated appellant’s compensation benefits effective May 23, 1998 on the grounds that his lumbar condition was no longer related to the accepted March 27, 1981 injury. The Office found that Dr. Kleiner’s April 10, 1998 report was unrationalized and therefore of no probative value. The Office found that, while Dr. Reister “reported a decreased range of motion and subjective complaints of pain, this is solely due now to the preexisting spondylolisthesis which has returned to the baseline of pathology.” The Office elaborated that Dr. Reister reported no “material change” in appellant’s spondylolisthesis, “which is necessary to support an opinion that an aggravation of [the] preexisting spondylolisthesis has not returned to the baseline of pathology had the work injury not occurred.”

In a May 4, 1998 letter, appellant requested an oral hearing, held December 9, 1998. At the hearing, he asserted that Dr. Kleiner found that the work-related aggravation of the preexisting degenerative joint disease and spondylolisthesis permanently reduced his level of functioning, rendering him disabled for work. Appellant also asserted that Dr. Reister noted objective findings.

By decision dated April 21, 1999 and finalized April 22, 1999, the Office hearing representative affirmed the April 30, 1998 decision.

In a March 27, 2000 letter, appellant requested reconsideration. He submitted additional evidence.

In a May 20, 1998 report, Dr. Kleiner explained that isthmic spondylolisthesis developed due to an early childhood fatigue fracture in the neural arch, causing fibrocartilaginous material instead of bone to heal across the fracture site. He noted that spondylolisthesis usually remained asymptomatic until a trauma, then “the symptoms tend to never disappear.” Dr. Kleiner stated that the March 27, 1981 lifting injury caused appellant’s previously undetected L5-S1 spondylolisthesis to become symptomatic and that his condition was unchanged since that injury. He noted that the March 27, 1981 injury, superimposed on the preexisting degenerative disc disease, caused additional symptoms.

In a May 28, 1999 report, Dr. Kleiner stated that appellant remained disabled for work due to sequelae of the March 27, 1981 injury.

In a July 16, 1999 report, Dr. Eric R. Jamrich, a Board-certified orthopedic surgeon specializing in treatment of the spine, noted reviewing appellant’s medical records. On examination, Dr. Jamrich found tenderness to palpation from L4-S1, “pain over bilateral sciatic nerves posteriorly and ... posterior superior iliac spines bilaterally,” and bilaterally positive straight leg raising tests. He diagnosed degenerative disc disease and an L5-S1 spondylolisthesis. Dr. Jamrich stated that the March 27, 1981 injury aggravated appellant’s underlying degenerative disc disease and spondylolisthesis, as “he had no history of previously existing pain. His pain was therefore secondary to the work-related injury and his pain has continued throughout as a result of this.... [Appellant’s] actual disability is secondary to the injury experienced at work....” He recommended L5-S1 fusion.

In a July 20, 1999 report, Dr. Michael R. Moore, a Board-certified orthopedic surgeon specializing in treatment of the spine, noted a 50 percent loss of lumbar range of motion and a Grade I spondylolisthesis at L5-S1 “with disc space narrowing and apparent foraminal stenosis.” Dr. Moore diagnosed “[s]ymptomatic degenerative disc disease, possible spinal stenosis; onset with a work-related injury in 1981.” Regarding causal relationship, he opined that, as appellant reported “no significant back symptoms” prior to the March 27, 1981 injury, it was “most likely that his problems were initiated by the lifting injury....”

In a March 8, 2000 report, Dr. Moore noted reviewing appellant’s medical records back to March 31, 1981. He stated that, based on that review and his examination of appellant, appellant’s “current symptoms in the spine and his possible candidacy for surgery or other ongoing spinal treatment is related to the lifting injury in 1981.” Dr. Moore noted that, in his experience as an evaluator of medical records on the question of causation, appellant’s case was “clear cut and inarguable.... There is simply no evidence that [he could] find in any of the old medical records that would bring that into question.”

By decision dated June 26, 2000, the Office denied modification of the April 22, 1999 decision. The Office found Dr. Jamrich’s opinion to be “insufficient” as it was not based on the “entire medical file” or the statement of accepted facts and did not explain his support for causal relationship. The Office found that Dr. Moore’s opinions were similarly defective as they did not provide medical rationale supporting causal relationship or objective findings “to support [appellant] suffered a material change in his preexisting condition,” noting that appellant had “no back condition” prior to the 1981 injury. The Office noted that as Dr. Kleiner’s prior reports were insufficient to create a conflict with Dr. Reister’s opinion, his May 20, 1998 and May 28,

1999 reports were of no probative value. The Office found that the weight of the medical evidence continued to rest with Dr. Reister's opinion.

The Board finds that the Office improperly terminated appellant's compensation benefits effective May 23, 1998.

Under the Federal Employees' Compensation Act,⁴ when employment factors cause an aggravation of an underlying condition, the employee is entitled to compensation for the periods of disability related to the aggravation.⁵ Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.⁶

In this case, the Office based its termination of appellant's compensation benefits on the February 18, 1998 report of Dr. Reister, a Board-certified orthopedic surgeon and second opinion physician. However, the Board finds that this opinion is insufficient grounds on which to terminate appellant's compensation benefits.

The medical record from late March 1981 onward, with the sole exception of Dr. Reister's February 18, 1998 report, supports a causal relationship between the accepted March 27, 1981 lumbosacral strain and aggravation of preexisting L5-S1 spondylolisthesis and appellant's continuing lumbar condition and disability for work. Appellant's attending physicians and the Office's physicians, all Board-certified in their specialties, supported such a causal relationship.

Dr. Gehret, an attending Board-certified orthopedic surgeon, submitted reports from March 1981 through March 1982 finding an aggravation of appellant's preexisting degenerative disc disease and the March 27, 1981 injury. Dr. Anderson, a Board-certified orthopedic surgeon and second opinion physician, echoed this opinion in an August 3, 1982 report. Dr. Strasburger, a Board-certified orthopedic surgeon consulting to the Office, submitted reports from September 9, 1982 through April 9, 1987 noting continuous lumbar spasm, pain and restricted range of motion due to the L5-S1 spondylolisthesis and degenerative disc disease aggravated by the March 27, 1981 injury.

Dr. Joshua, a Board-certified orthopedic surgeon and impartial medical examiner, submitted a September 1, 1984 report finding an unstable L5-S1 spondylolisthesis attributable to the March 27, 1981 injury. In an October 1, 1986 report, Dr. Rowland, a Board-certified orthopedic surgeon and impartial medical examiner, found that the March 27, 1981 injury caused a "continuing and irreversible change in [the] degenerative disc condition," requiring stabilization surgery. Dr. Taylor, an attending Board-certified orthopedic surgeon, submitted reports from June 20, 1991 through February 1995 finding increasing objective signs of sciatica, lumbar spasm, limited lumbar range of motion and bilaterally positive straight leg raising tests, in addition to degenerative disc disease at L5-S1.

⁴ 5 U.S.C. §§ 8101-8193 (1974).

⁵ *Raymond W. Behrens*, 50 ECAB 221 (1999).

⁶ *Linda Blue*, 50 ECAB 227 (1999).

In December 1995, appellant sought treatment from Dr. Kleiner, an attending Board-certified orthopedic surgeon, who submitted a May 23, 1996 report noting the L5-S1 spondylolisthesis, degenerative joint disease and opined that x-ray findings showed the traumatic effect of the March 27, 1981 lifting injury, causing a destabilizing change in the L5-S1 spondylolisthesis and degenerative disc disease. In May 7 and 16, 1997 reports, Dr. Kleiner opined that the L5-S1 spondylolisthesis required surgical stabilization due to the effects of the March 27, 1981 injury.

Following the receipt of Dr. Kleiner's opinion, the Office then referred appellant to Dr. Reister to obtain a further opinion. The Board notes that Dr. Reister was not provided with the complete medical record. He was provided with a packet of selected medical records. There is no indication of record as to what criteria the Office used in selecting the reports provided to Dr. Reister or if an Office medical adviser or other physician was involved in the winnowing process. Thus, the Office's finding that Dr. Reister's opinion should be accorded special weight as it was based on the complete medical record is erroneous.

Dr. Reister submitted a November 26, 1997 report diagnosing a "work-related aggravation of preexisting degenerative disease" at L5-S1 and a Grade I L5-S1 spondylolisthesis. He opined that this work-related aggravation "clearly caused [appellant] not be able to return to his preexisting functional level." Dr. Reister stated that appellant's condition could not return to his preinjury baseline, as the accepted lumbar strain "caused a rapid progression of his degenerative disease over the short period of time that his strain was present." He added that the March 27, 1981 injury "exacerbated [appellant's] degenerative spine disease and permanently aggravated his back complex, causing continuing disability for work. Thus, Dr. Reister diagnosed a permanent, disabling aggravation of the L5-S1 spondylolisthesis caused by the March 27, 1981 injury, stating explicitly that appellant's condition would never return to his preinjury baseline.

Despite the definite nature of Dr. Reister's report and his detailed explanations, the Office requested, in a February 12, 1998 letter, that Dr. Reister clarify his opinion. He was asked to "describe the objective evidence to support that there was a material change in the spondylolisthesis due to" the March 27, 1981 injury such that appellant's condition could not return to its preinjury baseline. In response to the February 12, 1998 letter, Dr. Reister submitted his February 18, 1998 report, stating: "[n]o objective evidence existe[d] that shows 'material change' of spondylolisthesis. The only objective findings are decreased range of motion of the lumbosacral spine and tenderness." Based on this report, the Office issued its April 30, 1998 decision terminating appellant's compensation benefits.

The Board finds that, at the time the Office issued its April 30, 1998 decision terminating appellant's compensation benefits, there was a conflict of medical opinion between Dr. Reister, for the Office, and Dr. Kleiner, for appellant. Dr. Kleiner's May 23, 1996 report described in detail how the March 27, 1981 injury caused the preexisting L5-S1 spondylolisthesis to become unstable, causing severe lumbar pain and decreased lumbar motion. In his May 16, 1997 report, Dr. Kleiner again stated that appellant's L5-S1 spondylolisthesis required surgical stabilization

to counteract the effects of the March 27, 1981 injury. In contrast, Dr. Reister opined in his February 18, 1998 report that there was no “material change” of the spondylolisthesis.⁷

Section 8123 of the Act provides, “If there is 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.”⁸ However, in this case, the Office did not appoint an impartial medical examiner, but instead terminated appellant’s compensation benefits. Therefore, the termination of compensation was improper and must be reversed.

The June 26, 2000 decision of the Office of Workers’ Compensation Programs is hereby reversed.

Dated, Washington, DC
June 26, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁷ The Board notes that there is also a conflict of opinion between Dr. Reister’s November 26, 1997 report, which supported a causal relationship between the March 27, 1981 injury and a permanent aggravation of the L5-S1 spondylolisthesis and his February 18, 1998 report stating that there was no “material change” of spondylolisthesis.”

⁸ 5 U.S.C. § 8123.