

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of OSWALD ACOSTA and DEPARTMENT OF THE NAVY,
SEA SYSTEMS COMMAND SHIPYARD, Vallejo, CA

*Docket No. 01-803; Submitted on the Record;
Issued June 7, 2002*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant had any disability or injury residuals that required further medical treatment on or after October 18, 1999, causally related to his February 23, 1988 lumbosacral contusion or his cervical, thoracic or lumbar muscular strains.

On February 23, 1988 appellant, then a 55-year-old pipefitter, sustained a lumbosacral contusion and cervical, thoracic and lumbar muscular strains when he stood up and bumped his back on an overhanging platform. Appellant stopped work on February 25, 1988, returned to modified duty on April 26, 1988 and had intermittent time away from work between November 7, 1989 and January 30, 1990. He returned to work on January 31, 1990 and was terminated from employment on May 10, 1990 due to insubordination and unauthorized absences.¹

Appellant was referred for vocational rehabilitation and he received training to prepare for work as a real estate appraiser. However, reemployment efforts failed and a wage-earning capacity determination was made. His compensation was reduced on April 3, 1995 to reflect his loss in wage-earning capacity. However, on November 7, 1996, it was determined that the position of real estate appraiser was outside of his medical restrictions and compensation for total disability was reinstated. An Office hearing representative directed that a second medical opinion be obtained to delineate appellant's disability status.

On August 21, 1997 the Office referred appellant, together with a statement of accepted facts, questions to be addressed for a second opinion examination to Dr. Thomas R. Dorsey, a Board-certified orthopedic surgeon.

¹ Appellant has degenerative disc disease, disc protrusions and lumbar spinal scoliosis, which are not conditions accepted by the Office of Workers' Compensation Programs as being employment related. His claim for an employment-related emotional condition, No 13-834077, was denied by the Office on February 22, 1988.

By report dated September 3, 1997, Dr. Dorsey reviewed appellant's factual and medical history, the medical records, described appellant's complaints, reported the findings and results of physical examination and objective orthopedic and neurological testing and provided answers to the specific questions of the Office. He noted that appellant had preexisting, nonindustrial conditions consisting of foraminal stenosis, as indicated by magnetic resonance imaging (MRI). Dr. Dorsey stated that appellant had no legitimate injury-related factors of disability at this time. He continued: "[Appellant] has no objective findings on examination, which can be reasonably related to the claimed event of February 23, 1988." Dr. Dorsey noted that appellant "does not have any significant residuals of the work injury of February 23, 1988. [Appellant] has no current condition which continues to be medically connected to the work injury...." Dr. Dorsey explained that his opinion was based on the "known history of contusion of the lumbar spine," for which the "maximum time course of symptomatology from a contusion would be six weeks. It is not medically reasonable to believe that [appellant's] MRI findings in any way resulted from the episode of February 23, 1988." Dr. Dorsey opined:

"I do not believe [appellant's] degenerative disc disease or protruding disc were in any way intrinsically affected by the work injury or event. I do not believe that the degenerative disc disease or associated disc protrusion or foraminal stenosis are in any way connected to any work-related factors."

* * *

"The conditions of protruding disc and foraminal stenosis are a result of the aging process. Additionally, I see no evidence of any significant aggravation of any preexisting condition. There would be no reasonable material change in [appellant's] underlying condition which would be related to the events listed on February 23, 1988."

Dr. Dorsey further opined that appellant had no current work-related condition and no physical limitations, which would be related to the work-related events of February 23, 1988. He opined that appellant's disability ended on April 26, 1988 when he returned to modified duty and that his current condition was not work related.

In support of his continuing disability, appellant submitted an October 3, 1997 report from Dr. Anthony H. Alter, a Board-certified orthopedic surgeon, which stated that appellant had no preexisting back problems and had lost no time from work prior to the February 23, 1988 injuries. Dr. Alter reported appellant's subjective complaints, noted physical examination results and diagnosed degenerative lumbar disc syndrome, bilateral leg pain syndrome, to rule-out sciatic radiculopathy and chronic musculoskeletal pain syndrome. He opined that appellant was permanent and stationary, that he had "preexisting degenerative lumbar disc syndrome which was associated with a 1984 complaint process prior to his 1988 event" and that "one record document[ed] some intervening muscular complaints post the 1984 event." Dr. Alter opined "I, therefore, feel that the event sustained February 23, 1988 aggravated his preexisting condition of degenerative lumbar disc syndrome," but added that "I am missing too many records to determine what time duration of the acute injury is reasonable to be at this juncture. It seems apparent to me that the injury started a chronic pain process from which there was no return." Dr. Alter opined that appellant was not employable, which dated from the time of his

February 23, 1988 injury, but noted that “I cannot say whether this is on an objective lumbar condition or whether it is on the basis of the chronic pain diagnosis....” He continued: “[T]he natural history of degenerative lumbar disease in occasional patients could lead to the same course but I am in no position to say that [appellant] would have ended up totally disabled without an injury.”

Appellant requested an oral hearing, which, when the record was reviewed by the Branch of Hearings and Review, resulted in the case being remanded to the Office for further development.

The Office thereafter determined that a conflict in medical opinion existed between Dr. Dorsey and Dr. Alter as to whether appellant had any condition causally related to his February 23, 1988 injuries. On July 26, 1999 the Office referred appellant, together with a statement of accepted facts, questions to be addressed and the relevant case record, for a second opinion examination to Dr. Donald F. Borden, a Board-certified orthopedic surgeon, for an impartial medical examination.

By report dated August 11, 1999, Dr. Borden reviewed appellant’s factual and medical history, the medical records, described his current complaints, reported the findings and results of physical examination and objective orthopedic and neurological testing and provided answers to the Office’s questions. He diagnosed degenerative lumbar disc disease, significant foraminal stenosis on the right at L5-S1, moderately severe stenosis of the foramina bilaterally at L4-5, diagnosed by an MRI scan done August 17, 1995 and lumbar contusion and abrasion of February 23, 1988, resolved. He opined that appellant’s accepted work-related lumbosacral contusion and his cervical, thoracic and lumbar strains were resolved at the time of his examination. Dr. Borden opined that appellant’s degenerative disc disease, scoliosis and foraminal stenosis were on a nonindustrial basis and stated:

“[Appellant’s] injury in February 1988 did somewhat aggravate a preexisting lumbar disc problem. It should be noted that this aggravation should probably have lasted no more than three to four months and that he should have been able to return to his usual occupation after that amount of time. Ultimately, because of [appellant’s] increase in degenerative disc problems, he would have had to stop working as a result of the natural progression of his preexisting degenerative disease.”

* * *

“At this time, there are no objective findings of injury-related factors dating back to February 1988. The subjective factors that [appellant] has, at this time and the mild objective factors seem to be related to his underlying degenerative disc problems.”

Dr. Borden opined that appellant needed further treatment for his lumbar disc disease and scoliosis but indicated that these conditions “do not appear to be due to an industrially-related situation.” He continued:

“It would be my impression that [appellant’s] total disability, as a result of his industrial accident should have lasted no more than three to six months from the time of the accident. As noted [appellant] did return to modified duty on April 26, 1988 and was able to work for more than one year at this modified duty. It is noted that he probably could have returned to his former occupation had he not had the underlying disc problems. Therefore, it would be my impression that he should have been allowed at least six months of temporary total disability as a result of his industrial accident [i]n February 1988. [Appellant’s] physical limitations resulting from his work injury of February 1988 are now resolved and he should have no physical limitations as a result of that accident, however, [appellant] does have restrictions attributable to his preexisting and subsequent conditions which indicates a further degeneration of his lumbar disc disease and he should be restricted from doing any work that would require any prolonged standing, lifting, bending or crawling.

On September 16, 1999 the Office issued a notice of proposed termination of compensation finding that the weight of the medical evidence of record established that appellant had no further disability due to his employment-related conditions and required no further medical treatment related to his February 23, 1988 injuries. The Office found that the report of Dr. Borden constituted the weight of the medical evidence. The Office gave appellant 30 days within which to submit evidence or argument if he disagreed with the proposed action, however, nothing was received by the Office within that time period.

By decision dated October 18, 1999, the Office terminated appellant’s compensation benefits effective that date on the grounds that the weight of the medical evidence of record established that appellant had no further injury-related disability for work and had no injury-related residuals requiring further medical treatment.

On October 19, 1999 the Office received an October 15, 1999 rebuttal to the notice of proposed termination of compensation in which appellant argued that he had objective foraminal stenosis, that the February 23, 1988 injury aggravated and worsened his preexisting condition, that the statement of accepted facts was not accurate and that Dr. Dorsey and Dr. Borden disregarded his complaints.

Also on October 19, 1999 the Office received a copy of an August 17, 1999 report from Dr. John J. O’Hara, a Board-certified orthopedic surgeon, which noted appellant’s version of his factual and medical history, presented his present physical complaints, reported physical examination results and concluded that appellant had residuals of degenerative disc disease and facet joint arthropathy in the lumbar spine. He opined that these conditions were present at the time of the February 23, 1988 injury and that appellant had sustained a lumbosacral spine contusion as well as lumbosacral spine strain. Dr. O’Hara opined that appellant’s preinjury condition was “tenuous, to say the least, with significant changes in the lumbar spine present at the time of the incident.” He stated: “The incident which injured [appellant] in the presence of

preexistent degenerative process was enough to cause what can be reasonably accepted as a chronic pain syndrome secondary to the injury and to the preexistent degenerative disease process in the lumbar spine.” Dr. O’Hara opined that appellant permanently aggravated his preexistent condition by the February 23, 1988 incident.

By letter dated October 29, 1999, the Office advised appellant that it had reviewed Dr. O’Hara’s report. The Office advised that Dr. O’Hara’s report was not within the framework of the statement of accepted facts, that he ignored the fact that the contemporaneous medical reports of record indicated that the 1988 injuries were soft-tissue muscular strain injuries and that, although he stated that he agreed with Dr. Alter, who stated that too many of appellant’s medical records were missing to answer all of the relevant questions.

On November 15, 1999 appellant requested an appeal before the Board. The appeal was docket as No. 00-923 and was subsequently dismissed at appellant’s request.²

Appellant requested reconsideration before the Office and submitted an August 18, 2000 report from Dr. Lawrence W. Kneisley, a Board-certified neurologist, who reviewed appellant’s history but noted incorrectly the date of appellant’s accepted employment-related injuries,³ noted that Dr. O’Hara gave appellant a five percent whole body impairment due to his thoracolumbar spine limitations, reported the results of neurological testing and opined that the neurologic deficits in appellant were mild, with atrophy of his extensor digitorum brevis. He noted that appellant’s atrophy was symmetric and not specifically right sided, that he had some evidence of nerve root irritation in the abductor hallucis muscles bilaterally and that fasciculations of his intrinsic foot muscles might be due to trauma, normal aging or S1 radiculopathies. Dr. Kneisley noted that he could not say with certainty that appellant’s right-sided L5-S1 foraminal stenosis and compromise, evident on x-ray, was responsible for the fasciculations or the bilateral extensor digitorum brevis muscular atrophy. He concluded that appellant had low back pain and an L5-S1 neural foraminal compromise and he opined that, “[I]t is possible that [appellant’s] symptoms of back pain are related to the disc degeneration as well as to arthritic change which is not uncommon in patients of this age. It is not clear that he has a specific neurologic injury such as lumbar radiculopathy causing any focal weakness or focal sensory loss.”

By decision dated November 29, 2000, the Office denied modification of the October 18, 1999 decision. The Office found that Dr. Kneisley’s report was not based on an accurate factual and medical history and lacked medical rationale.

The Board finds that appellant has no disability or injury residuals that required further medical treatment on or after October 18, 1999, causally related to his February 23, 1988 soft tissue lumbosacral contusion or his cervical, thoracic or lumbar soft tissue muscular strain injuries.

² Docket No. 00-923 (issued October 19, 2000).

³ He stated that appellant was injured on February 23, 1998 instead of February 23, 1988.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.⁴ 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.⁵ Further, the right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for wage loss.⁶ 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.⁷

The Office met its burden of proof to terminate appellant's wage-loss compensation and medical benefits in this case, with the thorough and well-rationalized report of Dr. Borden, the impartial medical examiner.

The Office referred appellant, together with a statement of accepted facts, questions to be addressed and the relevant case record, for a second opinion examination to Dr. Dorsey. In a well-reasoned opinion, based upon an accurate factual and medical background, Dr. Dorsey determined that appellant had preexisting, nonindustrial degenerative disc disease and related foraminal stenosis and no objective injury-related findings at that time. He opined, after a thorough examination, that appellant had no significant injury-related residuals and no condition that was medically connected to his work and he opined that appellant's work-related injuries would have resolved within six weeks of occurrence. Dr. Dorsey further opined that appellant's preexisting degenerative disc disease and protruding disc were not affected by the February 23, 1988 work injury and that appellant's present conditions were the result of the aging process. He opined that appellant's work-related disability ended as of April 26, 1988.

However, appellant's examining physician, Dr. Alter, provided an October 3, 1997 report in which he stated that appellant had no preexisting back problems, but then contradicted himself and stated that appellant had "preexisting degenerative lumbar disc syndrome which was associated with a 1984 complaint process prior to his 1988 event" and that "one record document[ed] some intervening muscular complaints post the 1984 event." Dr. Alter opined, that the February 23, 1988 event aggravated appellant's preexisting degenerative lumbar disc syndrome. The Office found that Dr. Alter's report created a conflict in medical opinion with the report of Dr. Dorsey.

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."

⁴ *Harold S. McGough*, 36 ECAB 332 (1984).

⁵ *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

⁶ *Marlene G. Owens*, 39 ECAB 1320 (1988).

⁷ See *Calvin S. Mays*, 39 ECAB 993 (1988); *Patricia Brazzell*, 38 ECAB 299 (1986); *Amy R. Rogers*, 32 ECAB 1429 (1981).

In this case, a conflict in medical opinion evidence was properly identified and the case was appropriately referred to Dr. Borden for an impartial medical examination to resolve the existing conflict.

Dr. Borden provided a comprehensive and well-rationalized report, based upon a detailed and thorough examination of appellant and a complete and accurate factual and medical background, which diagnosed degenerative lumbar disc disease, significant foraminal stenosis on the right at L5-S1, moderately severe stenosis of the foramina bilaterally at L4-5 and lumbar contusion and abrasion February 23, 1988, resolved. He found, in a well-rationalized opinion based upon physical examination findings, that appellant's accepted work-related lumbosacral contusion and his cervical, thoracic and lumbar muscle strains were resolved at that time and he opined that appellant's degenerative disc disease, scoliosis and foraminal stenosis were on a nonindustrial basis. Dr. Borden opined that appellant's injury-related aggravation of his preexisting lumbar disc problem should have lasted no more than three to four months and that he should have been able to return to his usual occupation after that amount of time. Dr. Borden noted that there were no objective findings of injury-related factors dating back to February 1988 and that the subjective factors that appellant complained of were mild and seemed to be related to his underlying degenerative disc problems. Dr. Borden opined that appellant needed further treatment for his lumbar disc disease and scoliosis but indicated that these conditions did not appear to be due to an industrially-related situation. He opined that appellant's total disability, as a result of his industrial accident should have lasted no more than three to six months from the time of the accident, as demonstrated by the fact that appellant returned to modified duty on April 26, 1988 and was able to work successfully for more than one year at this modified-duty position. Dr. Borden opined that appellant probably could have returned to his former occupation had he not had his underlying disc problems; he noted that appellant's physical limitations resulting from his work injury of February 1988 were now resolved and that he should have no physical limitations as a result of that accident.

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.⁸

In this case, Dr. Borden's report is well rationalized and is based upon a proper factual background, such that it is entitled to special weight. Accordingly, the opinion of Dr. Borden represents the weight of the medical opinion evidence of record in establishing that appellant had no disability or injury residuals that required further medical treatment on or after October 18, 1999, causally related to his February 23, 1988 soft tissue lumbosacral contusion or his cervical, thoracic or lumbar soft tissue muscular strain injuries.

After appellant's compensation was terminated based on the weight of the medical evidence of record, the Office received an August 17, 1999 report from Dr. O'Hara, a physician selected by appellant. Dr. O'Hara reported appellant's version of his factual and medical history,⁹ noted his present complaints, indicated that appellant had residuals of degenerative disc

⁸ *Aubrey Belnavis*, 37 ECAB 206, 212 (1985).

⁹ *See Joseph M. Popp*, 48 ECAB 624 (1997) (to be probative, medical opinions must be based on a complete and accurate factual and medical history).

disease and facet joint arthropathy in the lumbar spine, but opined that these conditions were present at the time of the February 23, 1988 injury. Dr. O'Hara opined that appellant's preinjury condition was "tenuous, to say the least, with significant changes in the lumbar spine present at the time of the incident" and that "the incident which injured [appellant] in the presence of preexistent degenerative process was enough to cause what can be reasonably accepted as a chronic pain syndrome secondary to the injury and to the preexistent degenerative disease process in the lumbar spine." He opined that appellant permanently aggravated his preexistent condition by the February 23, 1988 incident, however, the Board notes that Dr. O'Hara did not provide pathophysiological or biomechanical explanation of the aggravation process in support of his conclusion on permanent aggravation. Dr. O'Hara provided insufficient medical rationale which addressed how appellant's soft tissue muscle strain injuries caused or contributed to a chronic pain syndrome related to appellant's preexisting degenerative disc disease. As Dr. O'Hara's report was conclusory in its opinions, it is of diminished probative value.¹⁰ Further, as his report provides insufficient explanation to support his opinion on aggravation or causal relation, it is unrationalized and of diminished probative value.¹¹ Dr. O'Hara's unrationalized report is insufficient to overcome the special weight accorded Dr. Borden's report.

Appellant also submitted an August 18, 2000 report from Dr. Kneisley which reviewed appellant's history, reported neurological examination results, noted his bilateral atrophy and fasciculations and indicated that he could not say with certainty that appellant's right-sided L5-S1 foraminal stenosis and nerve root compromise were related to either the bilateral atrophy or fasciculations. He further speculated that "[I]t is possible that [appellant's] symptoms of back pain are related to the disc degeneration as well as to arthritic change which is not uncommon in patients of this age. It is not clear that he has a specific neurologic injury such as lumbar radiculopathy causing any focal weakness or focal sensory loss." The Board notes that Dr. Kneisley did not opine that any of appellant's current conditions were causally related to his February 23, 1988 soft tissue muscular strain or contusion injuries. It further notes that Dr. Kneisley is relating appellant's current back symptomatology to two conditions, disc degeneration and arthritis, which are not accepted by the Office as being employment related. This opinion, therefore, does not support appellant's claim of ongoing muscle strain injury-related disability or the need for further injury-related medical treatment and, moreover, it is speculative and unrationalized, which greatly diminishes its probative value. Therefore, this report is not only insufficient to overcome the special weight accorded the impartial medical examiner's report, but it is also insufficient to even create a conflict with it.

After the Office has met its burden of proof to terminate a claimant's compensation, the burden of proof shifts to appellant to prove that he still has injury-related disability and/or the need for medical treatment of injury-related residuals.¹²

¹⁰ See *Vicky L. Hannis*, 48 ECAB 538 (1997); *Jacquelyn L. Oliver*, 48 ECAB 232 (1996).

¹¹ *Id.*

¹² See generally *Steven R. Piper*, 39 ECAB 312 (1987); *Mary J. Briggs*, 37 ECAB 578 (1986); *Ausberto Guzman*, 25 ECAB 362 (1974).

Appellant has the burden of establishing by the weight of reliable, probative and substantial evidence that the disability claimed and need for medical treatment is related to his original accepted injuries. As part of this burden, appellant must submit a rationalized medical opinion, based upon a complete and accurate factual and medical background, showing a causal relationship between the ongoing disability and need for medical treatment claimed and his accepted employment-related injuries.¹³ Causal relationship is a medical issue that can be established only by medical evidence.¹⁴ The Board notes that mere conclusions without supporting rationale are of little probative value.¹⁵

As none of the medical evidence submitted by appellant, after his compensation and medical benefits were terminated, contained rationalized medical opinion which explained how and why appellant's February 1988 soft tissue contusion and muscular strain injuries resulted in ongoing orthopedic disability and/or the need for further medical treatment, appellant has not met his burden of proof to establish further disability in this case.

Accordingly, the decision of the Office of Workers' Compensation Programs dated November 29, 2000 is hereby affirmed.

Dated, Washington, DC
June 7, 2002

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹³ *Steven R. Piper, supra* note 12.

¹⁴ *Mary J. Briggs, supra* note 12; *Ausberto Guzman, supra* note 12.

¹⁵ *See Richard Giordano, 36 ECAB 134 (1984).*