

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KENNETH R. BURROW and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Fort Lyon, CO

*Docket No. 03-2093; Submitted on the Record;
Issued December 9, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits effective March 22, 2003; (2) whether appellant met his burden of proof to establish that he had any residuals of his accepted September 23, 1989 lumbar strain on or after March 22, 2003; and (3) whether the Office erred on August 11, 2003 in refusing to reopen appellant's claim for further review of his claim under 5 U.S.C. § 8128(a).

On November 1, 1989 the Office accepted that on September 23, 1989 appellant, then a 39-year-old nursing assistant, sustained an employment-related lumbar strain. Appellant was intermittently disabled for work from October 3 until December 12, 1989, when he stopped work and did not return. The Office continued to develop the claim¹ and, by letter dated January 29, 2003, informed appellant that it proposed to terminate his compensation on the grounds that the medical evidence established that his accepted condition had resolved. In a decision dated March 5, 2003, the Office terminated appellant's benefits, effective March 22, 2003. In finding that his accepted condition had resolved, the Office relied upon the early medical evidence of record, including 1989 bone and computerized tomography (CT) scans, diagnostic testing performed in 1990 and medical reports dating from 1990 and 1991. Appellant requested reconsideration and, by decision dated May 30, 2003, the Office found the additional evidence submitted to be insufficient to warrant modification of the prior decision. Appellant again requested reconsideration and, by decision dated August 11, 2003, the Office found the newly submitted evidence and arguments insufficient to warrant further merit review. The instant appeal follows.

The Board finds that the Office failed to meet its burden of proof to terminate appellant's compensation.

¹ The Office referred appellant for second opinion evaluations in 1990, 1991 and 1998.

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation. After it has determined that an employee has disability causally related to his or her employment, the Office may not terminate compensation without establishing that the disability has ceased or that it was no longer related to the employment.²

Appellant has had a number of treating and consulting physicians since his 1989 employment injury. He was initially treated by Dr. Roger W. Narvaez, a general practitioner, who diagnosed low back pain and referred appellant to Dr. Harold M. Frost, a Board-certified orthopedic surgeon, for additional testing and evaluation. In a report dated October 30, 1989, he noted that x-rays revealed evidence of scoliosis, probably developmental, but no other diagnostic abnormalities apart from a spina bifida occulta at S1. Dr. Frost concluded that appellant appeared to have a combination of low back strain and some anxiety and ordered additional tests. By letter dated November 27, 1989, he informed the employing establishment that appellant had been diagnosed with a lumbosacral strain and was scheduled for a return visit, but was fit for his present work. In a follow-up report dated November 30, 1989, Dr. Frost noted that a bone scan and CT scan were normal and advised appellant to wear a body jacket for two months. In his final report of record, an attending physician's form report dated December 19, 1989, Dr. Frost diagnosed low back strain and anxiety, indicated by check mark that these conditions were causally related to appellant's employment injury and that appellant was totally disabled, beginning December 12, 1989, for an undetermined period.

On February 8, 1990 appellant was examined by Dr. Toni L. McLellan, a neurologist, to whom he was referred by Dr. Narvaez. Dr. McLellan noted that electrodiagnostic studies of the left lower extremity were entirely normal and diagnosed mechanical low back pain, probably due to sacroiliac dysfunction with possible piriformis spasm with intermittent sciatica. She referred appellant to Dr. John T. Lynn, a Board-certified internist and rheumatologist, who diagnosed lumbosacral strain and referred him for physical therapy, which he did not attend.

On May 17, 1990 appellant was examined by Dr. Robert A. Brumfield, a Board-certified orthopedic surgeon and Office second opinion physician. He diagnosed chronic lumbosacral strain with substantial functional overlay and recommended that appellant attend a reputable pain clinic for intensive physical therapy, psychological evaluation and behavioral modification.

On September 21, 1990 a repeat CT scan was performed which showed a mild diffuse disc bulge at L5-S1 without any evidence of herniation or displacement of the nerve roots or thecal sac. A spina bifida occulta was observed at S1 and the scan was otherwise normal. On September 24, 1990 appellant was examined by Dr. Timothy O. Hall, a Board-certified physiatrist, at the request of Dr. Narvaez. Dr. Hall examined appellant and reviewed the September 21, 1990 CT scan and stated that there was some question of perhaps a lateralizing disc herniation with questionable compression of the L5 nerve root, right side greater than left. He diagnosed fibrositis, bilateral piriformis, left greater than right, sleep disorder, possible L5 root irritation without evidence of radiculopathy on physical examination, reactive depression and a history of knee procedures. Dr. Hall felt that appellant would benefit from involvement in a chronic pain program.

² *Gloria J. Godfrey*, 52 ECAB 486 (2001); *Patricia A. Keller*, 45 ECAB 278 (1993).

On June 19, 1991 appellant was evaluated by Dr. Rachel L. Basse, a Board-certified physiatrist, for participation in a pain clinic. Following a physical examination, a psychological evaluation performed at her request and a review of the available medical records, Dr. Basse diagnosed chronic low back pain related to the work injury of September 23, 1989, lumbosacral fibromyalgia also related to the employment injury, somatoform pain disorder and moderate dysthymia. On July 8, 1991 appellant began a three-week outpatient pain rehabilitation program under the direction of Dr. Basse. He completed the program on July 26, 1991 with a discharge diagnosis of lumbar myofascial pain syndrome secondary to his work injury, posture and gait abnormalities secondary to his work injuries, major depression, moderate and somatoform pain disorder secondary to his work injury, opioid dependency and avoidant and suspicious personality features. It was recommended that appellant enter a formal inpatient detoxification program and then return for a final evaluation and discussion of work capabilities. He declined to enter the detoxification program.

On October 2, 1991 the Office referred appellant, together with a statement of accepted facts and a list of questions for resolution, to Dr. Randolph W. Pock, a Board-certified psychiatrist, for psychological testing and evaluation. In a report dated November 21, 1991, he reviewed the psychological testing results and discussed his own evaluation of appellant. Dr. Pock concluded that appellant suffered from: (1) major depression, causally related to his September 23, 1989 back injury; (2) psychological factors affecting his physical condition, also related to his employment injury; (3) personality disorder with mixed features; and (4) probable organic impairment, also related to his employment injury. He concluded that appellant was totally disabled and in need of further psychological treatment.

On November 21, 1991 at the request of the Office, appellant was examined by Dr. David L. Crosson, a Board-certified orthopedic surgeon. He examined appellant and reviewed the medical records and test results, noting that the September 21, 1990 CT scan results were within normal limits for a man of appellant's age. Dr. Crosson diagnosed lumbar sprain, resolved, with marked symptom magnification, probably related to the September 23, 1989 employment injury. He stated that appellant had reached maximum medical improvement and could return to work as a nursing assistant.

On November 1, 1995 appellant was examined by Dr. Raul Zayas, a Board-certified family practitioner and associate of Dr. Narvaez. In a report dated October 30, 1996, Dr. Zayas diagnosed chronic low back pains and insomnia. In an accompanying work capacity evaluation Form OWCP-5, Dr. Zayas indicated that appellant could work two to four hours a day, with restrictions and referred the reader to Dr. Narvaez for a more complete report.

On May 11, 1998 appellant was examined by Dr. Thomas E. Alost, Jr., a Board-certified orthopedic surgeon and second opinion physician. He reviewed the statement of accepted facts, questions for resolution and relevant medical evidence provided by the Office. Following his physical examination, Dr. Alost diagnosed chronic lumbosacral paraspinal muscular strain with lumbar discogenic syndrome. He stated that appellant's work-related strain had not resolved and that appellant still manifested painful limited motion with palpable tenderness and spasm in his paralumbar musculature. In response to the Office's inquiry as to why appellant's work-related strain had not resolved after nine years, Dr. Alost stated that he did not have a good explanation, but that a review of the medical records revealed that appellant had never been placed in an

aggressive back exercise program that involved McKenzie and other back strengthening exercises. He stated that, until this was undertaken, he could not determine when appellant's condition would resolve. Dr. Alost stated that appellant was not capable of performing the duties of a nursing assistant and that this was predominantly related to his chronic lumbosacral strain. He concluded that, while there might also be a psychological component to appellant's disability, he was not qualified to make that determination.

On October 8, 1998 a repeat CT scan was performed. The report noted that, in comparison with the September 1990 CT scan, which was noted to have been essentially negative, the October 1998 CT scan revealed a new left-sided L5-S1 subligamentous disc herniation causing posterior displacement of the left S1 nerve root and lateral recess stenosis.

Pursuant to a November 13, 2001 request by the Office for updated medical information, appellant submitted a narrative report and work capacity evaluation form from Dr. Danilo J. Calderon, an internist. He listed his findings on physical examination and reviewed the CT results. Dr. Calderon diagnosed a herniated disc with nerve compression at L5-S1 and degenerative joint disease of the right knee, stated that appellant was not a good surgical candidate and indicated that he could work one hour a day, with restrictions. Following a November 7, 2002 Office request for a medical update, appellant submitted a narrative report and accompanying work capacity evaluation Form OWCP-5, dated December 5, 2002, from Dr. Ronald S. Reodica, his treating Board-certified internist. He diagnosed low back pain with a herniated disc at L5-S1, with left nerve root compression and degenerative joint disease of the right knee. Dr. Reodica also noted that appellant did not want any back surgery due to having experienced failed knee surgeries and concluded that he could work one hour a day, with restrictions.

In this case, the Office accepted that appellant's September 23, 1989 employment injury resulted in a lumbar strain and authorized compensation benefits. The Office, however, found that the effects of this condition ceased by March 22, 2003, based apparently upon the early medical evidence of record. In its notice of proposed termination, incorporated by reference into the final termination decision, the Office noted that the 1989 bone and CT scans were normal. The Office stated that Dr. Brumfield noted in 1990 that appellant had lumbosacral strain, but with substantial functional overlay and symptom magnification, Dr. McLellan's 1990 electrodiagnostic testing was normal, Dr. Crosson reported in 1990 that appellant could return to his job and that Dr. Basse also noted in 1991 that appellant had symptom magnification. The Office further noted that, while the 1998 CT scan showed a herniated disc at L5-S1, this was in comparison to a normal CT scan performed shortly after the work injury. Finally, the Office noted that, while Dr. Reodica stated in 2002 that appellant was unable to work for more than two hours a day, this opinion appeared to be based on the newly developed nonemployment-related herniated disc and not on the original work injury. The Office concluded that appellant's accepted back strain had resolved and that his current condition was due to a nonemployment-related herniated disc. In its final decision terminating benefits, the Office reviewed additional medical evidence submitted by appellant, which consisted of an undated report from Spaulding Rehabilitation Center, Dr. McLellan's 1990 report and Dr. Hall's 1990 report, all previously of record. The Office concluded that as these reports were all based on subjective complaints of pain and did not support a diagnosis of lumbar strain and, in addition, dated from 1990 they were insufficient to support continuing benefits. In contrast, the Office

noted that the current medical evidence revealed a new herniated disc and a 2002 medical report from Dr. Reodica advised that appellant's current disability was due to this herniated disc.

The Board finds that the Office did not address the fact that the record contains additional medical evidence from Dr. Frost dated after November 27, 1989, in which he found appellant totally disabled or the fact that, in addition to finding significant symptom magnification Dr. Basse also diagnosed chronic low back pain related to the work injury of September 23, 1989. In a May 11, 1998 report, Dr. Alost, an Office second opinion physician, stated that appellant's employment-related lumbosacral strain had not resolved, but was still active and disabling and required additional treatment. Dr. Pock, an Office referral physician, who opined in 1991 that appellant had developed disabling major depression causally related to his 1989 work injury. Finally, the Office suggested that appellant's disability after March 22, 2003 was due to his newly developed nonwork-related herniated L5-S1 disc, but it did not provide adequate support for this position.

While the record does contain several reports characterizing the prior 1990 CT scan as essentially negative or normal, the record also contains reports suggesting that appellant's newly demonstrated herniated disc at L5-S1 is merely a worsening of his injury-related condition. The 1990 CT report itself states that appellant had a mild diffuse disc bulge at L5-S1, although without any evidence of herniation and Dr. Hall interpreted the CT report in 1990 as showing a possible lateralizing disc herniation with questionable compression. In addition, while Dr. Reodica stated in his 2002 report that appellant's current condition was due to his herniated disc, he did not opine that the herniated disc was unrelated to appellant's 1989 employment injury and the record does not contain any medical evidence showing that appellant's disability after March 22, 2003 was solely due to nonwork-related factors or conditions.

The Office has not established that appellant no longer had disability after March 22, 2003 due to his employment-related lumbar strains. Once the Office determined that the medical evidence submitted by appellant was sufficient to establish that his employment injury of September 23, 1989 caused his back strains and his disability for employment; and in light of the 1991 psychiatric second opinion report obtained from Dr. Pock; and 1998 orthopedic second opinion report obtained from Dr. Alost, the Office should have developed the medical evidence to determine the duration and extent of appellant's employment-related disability, whether he has an additional employment-related psychiatric condition and whether his current condition is causally related, either by aggravation, precipitation or acceleration, to his accepted lumbar strain.³ For these reasons, the Office did not meet its burden of proof to terminate appellant's compensation effective March 22, 2003. Therefore, the Office's May 30, 2003 decision denying modification of its prior decision and August 11, 2003 denial of appellant's request for further merit review are moot.

³ See *Arthur Sims*, 46 ECAB 880, 886 (1995); *George J. Hoffman*, 41 ECAB 135 (1989).

The decisions of the Office of Workers' Compensation Programs dated August 11, May 30 and March 5, 2003 are reversed.

Dated, Washington, DC
December 9, 2003

Colleen Duffy Kiko
Member

David S Gerson
Alternate Member

Michael E. Groom
Alternate Member