

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JIM DAVIS and U.S. CUSTOMS SERVICE,
DFW TERMINAL, Dallas, TX

*Docket No. 03-321; Submitted on the Record;
Issued June 3, 2003*

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly terminated authorization of appellant's chiropractic services.

On March 26, 2002 appellant, then a 50-year-old senior custom inspector, filed a notice of traumatic injury and claim for compensation (Form CA-1) alleging that while conducting a training session on handcuffing suspects he injured his back. Appellant wrote that after the training session he felt tightness in his back and by 1:00 a.m. that night he felt severe pain in his lower back and down his left leg.

In a March 27, 2002 attending physician's report (Form CA-20), Dr. Carl M. Naehritz, a chiropractor, diagnosed an L5-S1 disc syndrome, nerve compression based on findings by x-ray of pelvic imbalance, joint dysfunction, muscular spasm and nerve compression in the lumbar area. In a March 28, 2002 radiology report, Dr. Naehritz reported no evidence of any fractures, vertebral compressions or spondylolisthesis, mild to moderate degenerative disc narrowing at L4-5 and L5-S1 bilaterally. Postural/spinal biomechanical alterations are seen with subluxation and pelvic unleveling, lower on the left. He found a left lateral list of the lumbar spine suggestive of paracentral muscle spasm and subluxation present as well as antalgic flattening of the lumbar spine with subluxation and retrolistheisis at L5.

In a March 27, 2002 report, Dr. Miguel B. Banta, Jr., an anesthesiologist, wrote that appellant presented in low back pain radiating to his left leg. He indicated that appellant had a similar episode of back pain two years prior. He diagnosed a lumbar disc problem with radiculopathy at L5-S1 and low back spasm.

In an April 12, 2002 report, Dr. Banta found appellant with better range of motion and jolts of pain. He indicated that appellant wakes at night with throbbing pain in his left buttock, leg and calf.

In an April 17, 2002 letter, the Office requested more information from appellant including medical evidence that causally relates his medical condition to employment factors. In an April 24, 2002 report, Dr. Banta indicated that he gave appellant a lumbar facet injection.

In an April 30, 2002 letter, the Office informed appellant of the circumstances by which chiropractors are reimbursed for their services. In a May 1, 2002 report, Dr. Naehritz, after reading appellant's x-ray, diagnosed a subluxation of the lumbar spine, sacroiliac joint subluxation, lumbar disc syndrome, nerve root compression and mild fasciitis.

In a May 2, 2002 decision, the Office accepted appellant's claim for a lumbar strain.

In a June 4, 2002 report, Dr. Banta wrote that he gave appellant a second lumbar facet steroid injection, diagnosed traumatic facet arthritis. In a July 17, 2002 report, Dr. Banta indicated that appellant has pain in both sides of his back and recommended he see an orthopedic surgeon.

In a July 18, 2002 report, Dr. Mark J. Cwikla, a neurosurgeon, interpreted a magnetic resonance imaging scan and found degenerative changes at the bottom four disks with no nerve root impingement but foraminal narrowing on the left side. In a September 11, 2002 report, Dr. Farooq I. Selod, a Board-certified orthopedic surgeon, and Office's second opinion physician, interpreted an x-ray and diagnosed degenerative disc disease at L5-S1 and a lumbar strain. He wrote that all lumbar disc syndrome, nerve root compression, lumbar radiculopathy, subluxation of lumbar spine and sacroiliac joint do not exist and are not related to the degenerative disc disease.

In an October 3, 2002 decision, the Office terminated appellant's authorization to receive chiropractic services finding Dr. Naehritz provided inconsistent diagnosis without an explanation.

The Board finds that the Office has not met its burden to justify terminating appellant's chiropractic services due to a conflict in the medical evidence.¹ Under the Federal Employees' Compensation Act,² once the Office has accepted a claim it has the burden of justifying termination or modification of compensation benefits.³ The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁴ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵

¹ *Laura H. Hoexter (Nicholas P. Hoexter)*, 44 ECAB 987, 994 (1993); *Alphonso Walker*, 42 ECAB 129, 132-33 (1990), *petition for recon. denied*, 42 ECAB 659 (1991); *Beth A. Quimby*, 41 ECAB 683, 688 (1990); *Roseanna Brennan*, 41 ECAB 92, 95 (1989); *Daniel E. Phillips*, 40 ECAB 1111, 1118 (1989), *petition for recon. denied*, 41 ECAB 201 (1990).

² 5 U.S.C. §§ 8101-8193.

³ *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

⁴ *Id.*

⁵ See *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

Section 8123(a) of the Act provides in pertinent part: "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."⁶ When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.⁷

In terminating appellant's authorization of chiropractic services, the Office relied on the September 11, 2002 report of Dr. Selod, who diagnosed degenerative disc disease at L5-S1 and a lumbar strain. Dr. Selod also wrote that all lumbar disc syndrome, nerve root compression, lumbar radiculopathy, subluxation of lumbar spine and sacroiliac joint do not exist and are not related to the degenerative disc disease.

Dr. Naehritz diagnosed subluxation by x-ray in his reports dated March 27, 28 and May 1, 2002.

The Board finds that there is a conflict in the medical evidence between Dr. Selod, who served as an Office referral physician, and Dr. Naehritz, appellant's attending chiropractor, regarding whether appellant's x-rays reveal a subluxation. As the reports of Drs. Naehritz and Selod are in conflict, the Office has not met its burden of proof to terminate appellant's authorization of chiropractic services.

The October 3, 2002 decision by the Office of Workers Compensation Programs is reversed.

Dated, Washington, DC
June 3, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

⁶ 5 U.S.C. § 8123(a).

⁷ *William C. Bush*, 40 ECAB 1064, 1975 (1989).