

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RUSSELL F. ALEXANDER and DEPARTMENT OF TREASURY,
INTERNAL REVENUE SERVICE, Martinsburg, WV

*Docket No. 03-763; Submitted on the Record;
Issued June 2, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

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

On December 8, 1999 appellant, then a 51-year-old computer operator, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that, on December 7, 1999, he slipped on some water and fell, sustaining injuries to his neck, back, legs, hip and right foot. The Office accepted appellant's claim for cervical sprain and compensation was paid.

On December 29, 1999 appellant underwent a magnetic resonance imaging (MRI) scan of his cervical spine. Dr. Christopher Ladd, a radiologist, interpreted the MRI scan as showing small left paracentral disc herniation at C6-7 causing no significant spinal stenosis, degenerative disc disease and otherwise normal.

Appellant received treatment for his injuries from Dr. John S. Palkot, a family practitioner. In attending physician's reports dated March 29 and April 10, 2000, Dr. Palkot diagnosed cervical myositis and post-traumatic syndrome. He also noted degenerative disc disease and disc herniation at C6-7. Dr. Palkot checked a box indicating that he believed these conditions were caused or aggravated by an on-the-job injury.

On March 31, 2000 Dr. Michael M. Rezaian reviewed appellant's case at the request of Dr. Palkot and indicated that his impression was that of spinal inflammation, most likely related to an underlying seronegative arthritis. In a letter dated May 8, 2000, Dr. Rezaian reiterated that his impression was seronegative spondyloarthropathy.

On August 15, 2000 the Office referred appellant to Dr. Robert Cirincione, a Board-certified orthopedic surgeon, for a second opinion. In a medical report dated September 21, 2000, Dr. Cirincione opined:

“I do not believe that the slip and fall of December 7, 1999 permanently aggravated the patient’s underlying conditions. It certainly has no effect on his elbow fracture and certainly there is nothing in his clinical examination that would support an aggravation of his condition. I have reviewed the [s]tatement of [a]ccepted [f]acts and have commented upon it. The diagnosed condition in this case it should be remembered, based on my examination and history, is that there is no diagnosis that can be made. His clinical examination and findings are so inconsistent that a diagnosis to within a degree of medical certainty is impossible to make; therefore, it is also impossible to relate that diagnosis to be an aggravation of a preexisting condition. There are no objective findings that support injury[-]related factors of disability. The prognosis for this gentleman is poor. He states that nothing has helped his back since he slipped and fell almost a year ago. I have reviewed the *Waddell’s Inappropriate Questionnaire*. He has obviously significant evidence of ‘illness behavior’ based on that questionnaire. Based on a review of the records, I do not find anything in the records that would support any ongoing disability for this gentleman certainly extending beyond six to eight weeks, which would be the normal healing time for soft tissue injuries. I have reviewed the OWCP-5 and have filled this out. I have filled this out given the history and Dr. Rezaian’s note, taking into account those notes. If this patient does not have seronegative spondyloarthropathy, which frankly is a constellation of subjective complaints with no objective findings, then the restrictions that I have described would be appropriate. However, again, based on my examination and Dr. Rezaian’s examination, a firm diagnosis cannot be made on objective findings. The diagnosis and my opinions today are based on a reasonable degree of medical certainty. The patient’s inconsistent examination and responses to questions limit my ability to provide definitive answers based on the standard of reasonable degree of medical certainty.” (Emphasis in the original.)

In a work capacity evaluation form accompanying his report, Dr. Cirincione indicated that appellant was able to stand, reach and twist 4 hours a day, reach above his shoulder, squat, kneel and climb 2 hours a day and could push, pull and lift up to 10 pounds for 8 hours a day.

On March 1, 2001 the Office issued a notice of proposed termination of compensation and medical care based on Dr. Cirincione’s report.

In a March 7, 2001 report, Dr. Palkot indicated:

“[Appellant] was injured while working on December 7, 1999. He has multiple diagnosis of post[-]traumatic syndrome, ankylosing spondylolisthesis, paracentral disc herniation and cervical myositis.

“His neck remains stiff, with limited motion. His gait is unstable due to pain in his neck and low back.

“After extensive physical therapy, to try to improve [appellant’s] range of motion and help decrease his pain, he showed very little improvement.”

By medical report dated March 21, 2001, Dr. Palkot indicated that he strongly disagreed with Dr. Cirincione’s assessment of appellant. He indicated that it was inappropriate to determine a patient’s disability by referring to Waddell’s symptoms and questions as the only criteria for the patient’s symptoms. He further indicated:

“This patient has severe post[-]traumatic neuralgia with limitation on physical exam[ination].

“Further, I have examined this patient before these traumatic episodes, and after. There is definitely degeneration and limited [range of motion] with increase in verbal complaints.”

By decision dated April 3, 2001, the Office terminated appellant’s compensation benefits. In its decision, the Office noted that the weight of the evidence was represented by the opinion of the “independent examiner,” Dr. Cirincione.

By letter dated April 17, 2001, appellant requested a review of the written record.

In a medical report dated April 23, 2001, Dr. Palkot indicated that appellant had severe post-traumatic neuralgia, with severely limited cervical range of motion and constant neck and low back pain. He noted:

“[Appellant’s] condition continues to deteriorate. He is very limited in his movements and in constant pain, but due to financial difficulties, [appellant] will be returning back to work on April 26, 2001, very light duty, mostly sitting, answering phones, etc. No lifting or bending, reaching above his head. This will be on a trial basis, to see if his conditions will tolerate sitting and standing for prolonged periods of time.”

On April 23, 2001 Dr. Palkot completed an attending physician’s report indicating that appellant had degenerative disc disease, paracentral disc herniation and cervical myositis. He listed his diagnoses as degenerative disc disease, low back pain, post-traumatic syndrome -- ankylosing, spondylitis, paracentral disc herniation and cervical myositis. Dr. Palkot indicated that he believed that these conditions were caused by appellant’s employment. He then indicated that appellant was returning to work, even though he advised against it, due to financial difficulties.

By decision dated August 17, 2001, the hearing representative found that the weight of the medical evidence rested with Dr. Cirincione’s well-reasoned report that supported that appellant no longer demonstrated objective findings of residuals of the work incident. Accordingly, the hearing representative affirmed the April 3, 2001 decision.

On September 14, 2001 the Office found that an overpayment occurred in the amount of \$10,201.90 because appellant continued to receive compensation benefits from April 22 to

September 28, 2001 after his benefits were terminated. This overpayment determination was finalized on October 23, 2001. Appellant paid back the full amount.

By letter dated April 15, 2002, appellant, through his attorney, requested reconsideration. Appellant contended that, at the time he was examined by Dr. Cirincione, appellant had been without sleep for 36 hours and was disoriented. He also noted that, although Dr. Cirincione was a Board-certified orthopedic surgeon, there was no indication that he was an expert in the spine. Appellant further contended that Dr. Cirincione only saw him once, whereas Dr. Palkot had seen him several times over the course of time. Finally, appellant argued that the Office erred in terminating compensation of appellant because it had not met its burden of proof.

By decision dated May 9, 2002, the Office denied appellant's request for reconsideration for the reason that the arguments submitted in support of the claim were insufficient to warrant modification of the previous decision.

The Board finds that the Office improperly terminated appellant's benefits.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.¹ After it has been determined that a claimant had disability causally related to his federal employment, the Office may not terminate compensation without establishing that disability has ceased or that it is no longer related to employment.² To terminate authorization for medical treatment, the Office has the burden of establishing that appellant no longer has residuals of the employment-related condition that requires further medical treatment.³

In the instant case, Dr. Palkot, appellant's treating physician, was of the opinion that appellant had continuing severe traumatic neuralgia with limitation. He also noted post-traumatic syndrome, ankylosing spondylitis, paracentral disc herniation and cervical myositis. Dr. Cirincione, the physician to whom the Office referred appellant for a second opinion,⁴ stated that, based on a review of the records, there was nothing which would support ongoing disability. He noted that a firm diagnosis could not be made on objective findings and that the patient's inconsistent examination limited his ability to provide definitive answers based on the standard of reasonably certainty.

Title 5 U.S.C. § 8123(a) states in pertinent part: "[I]f 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." In this case, Dr. Cirincione disagreed with appellant's treating physician as to whether appellant continued to suffer from residuals from his December 7, 1999 injury. As an unresolved conflict in medical

¹ *Theodore Parker*, 50 ECAB 542, 547 (1999).

² *Id.*

³ *Jose Hernandez*, 47 ECAB 288, 295 (1996).

⁴ The Office's characterization of Dr. Cirincione, in its April 3, 2001 opinion, as the "independent examiner" was in error.

opinion evidence exists, the Office has failed to meet its burden of proof to terminate appellant's benefits and the termination must be reversed.⁵

The decision of the Office of Workers' Compensation Programs dated May 9, 2002 is hereby reversed.

Dated, Washington, DC
June 2, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

⁵ See *Craig M. Crenshaw, Jr.*, 40 ECAB 919, 922 (1989).