

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LOGAN JOHNSON and U.S. POSTAL SERVICE,
POST OFFICE, Detroit, MI

*Docket No. 03-1992; Submitted on the Record;
Issued January 6, 2004*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant sustained a recurrence of disability as of July 22, 1997 causally related to his April 18, 1995 accepted lower back injury.

This is the second time this case has been before the Board. On April 18, 1995 appellant, a 52-year-old mail handler, injured his lower back while picking up a sack of mail. He filed a claim for benefits on April 19, 1995, which the Office of Workers' Compensation Programs accepted for lumbosacral strain/sprain and herniated disc at L3-5. Appellant returned to part-time limited duty on June 2, 1997 and commenced full-time limited-duty work on June 30, 1997. He filed a notice of recurrence of disability on August 8, 1997, after stopping work on July 22, 1997 and has not returned to work. By decision dated September 30, 1997, the Office denied appellant's claim, finding that the evidence of record was not sufficient to establish that appellant was totally disabled from performing his limited-duty job. By decisions dated February 25, 1998 and January 20, July 13 and October 1, 1999, the Office affirmed the denial of benefits based on a recurrence of disability.

In a decision dated June 15, 2001,¹ the Board set aside the October 1 and July 13, 1999 Office decisions. The Board found that the medical reports of Dr. Gary Chodoroff, Board-certified in physical medicine and rehabilitation and appellant's treating physician, were sufficient to raise an inference of causal relationship between appellant's alleged July 1997 recurrence of disability and his accepted employment injury to require further development of the medical evidence. The Board also found that the record required further development on the issue of whether there was a change in the nature and extent of his light-duty requirements. Appellant had alleged that his limited-duty job required him to engage in activities which exceeded his work restrictions. The employing establishment responded that appellant had performed the duties of the light-duty job as set forth in the position description without a complaint. The Board instructed the Office to further investigate appellant's specific contentions

¹ Docket No. 00-618 (issued June 15, 2001).

and ask his supervisor to comment on his allegations during the first 30 days following his return to work and then make specific findings regarding whether the nature and extent of his limited-duty position changed or exceeded the physical restrictions imposed by Dr. Chodoroff.

In order to determine whether appellant's claimed current condition was causally related to his accepted lower back condition, the Office referred appellant to Dr. John Corbett, a Board-certified orthopedic surgeon. In a report dated August 22, 2001, Dr. Corbett stated findings on examination and reviewed diagnostic testing from 1995 through 1999. He noted a magnetic resonance imaging (MRI) scan dated May 19, 1995 which showed degenerative changes with facet hypertrophy and bulging discs at L2-3 and L3-4; a computerized axial tomography scan dated August 3, 1995, which indicated a left paracentral disc herniation causing mild thecal sac effacement; a February 27, 1996 MRI scan which showed a small left-sided herniated central disc at L3-4 effacing the L3 nerve root as well as disc space narrowing and sclerosis at L2-3 and L3-4; a December 7, 1999 MRI scan which showed degenerative disc disease at L2-3 and L3-4 with moderate disc bulging with osteophytes at L2-3 and L3-4, more prominent at L3-4 with a bulge toward the right and no evidence of nerve root compression or displacement. Dr. Corbett noted that upon examination appellant walked slowly, groaned when he sat or got out his chair and cried out several times. He did not detect any lumbar paravertebral spasm in appellant, who showed no atrophy, inconsistent straight leg response and a nondermatomal pattern of sensation in both feet. Dr. Corbett noted that the patellar and Achilles reflexes could not be elicited on either side. He also noted that appellant cried out both when he was asked to lie down on the examining table on his back and when asked to turn onto his abdomen. He concluded that appellant's subjective symptoms far outweighed his objective symptoms. Dr. Corbett stated:

"I note that there was a problem, not related to the injury, of substance abuse, auditory hallucinations, psychotic disorder and anxiety. These complaints make it difficult to find out what is really happening as far as the ones and joints are concerned. The job of unloading trucks and lifting 50 [to] 100 pounds would seem to be impossible for [appellant] patient for the rest of his life, but I am not sure of this. If he was to lift very small loads and have sit/stand option, he may be able to work. I would say that increase physical activity of almost any kind would be good for his health. It would seem to me that the rehabilitation job requiring him to stand at a conveyor and collect mail might be very good for him."

Dr. Corbett also noted that appellant had sustained an automobile accident which also aggravated his lower back condition.

In a supplemental report dated October 22, 2001, Dr. Corbett stated:

"[Appellant's] current medical condition is probably aggravation of accepted back condition. But the [numerous] inconsistent findings in my examination and most other physicians' findings, make it almost impossible to answer this question. Accurately, most of his complaints have nothing to do the work injury in 1995. Most of his complaints are subjective with no objective findings."

By decision dated November 2, 2001, the Office denied appellant compensation for a recurrence of his accepted lower back condition. The Office found that the report of Dr. Corbett,

represented the weight of the medical evidence. The Office noted that the employing establishment had refuted appellant's contention that the nature and extent of his limited-duty position changed or exceeded the physical restrictions imposed by Dr. Chodoroff.

By letter dated September 18, 2002, appellant's attorney requested reconsideration.

By decision dated October 7, 2002, the Office denied modification of the November 2, 2001 decision.

By letter dated June 3, 2003, appellant requested reconsideration.

By decision dated July 31, 2003, the Office denied modification of its prior decision.

The Board finds that the case is not in posture for decision.

There is a conflict in the medical evidence between the opinions of Drs. Chodoroff and Corbett regarding whether appellant's alleged recurrence of disability as of July 22, 1997 was causally related to his April 18, 1995 accepted lower back injury. The Board found, in its June 15, 2001 decision, that Dr. Chodoroff's medical reports were sufficient to raise an inference of causal relationship between appellant's alleged July 1997 recurrence of disability and his accepted employment injury to require further development of the medical evidence. The Office referred appellant to Dr. Corbett, who opined, in an August 22, 2001 report and an October 2, 2001 supplemental report, that most of appellant's complaints had nothing to do with the 1995 work injury, as they were subjective with no objective findings. He further indicated that the numerous inconsistent findings in his examination and that of the other physicians made it almost impossible to determine whether appellant's current medical condition was caused, aggravated or precipitated by his 1995 accepted lower back condition.

When such conflicts in medical opinion arise, 5 U.S.C. § 8123(a) requires the Office to appoint a third or "referee" physician, also known as an "impartial medical examiner."² In order to resolve the conflict of medical opinion, the Office should, pursuant to 5 U.S.C. § 8123(a), refer appellant, the case record, a statement of accepted facts to an appropriate, impartial medical specialist or specialists for a reasoned opinion to resolve the aforementioned conflict regarding whether appellant has established that on July 22, 1997 he sustained a recurrence of his disability causally related to the accepted employment injury.³ 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.⁴ After such development as it deems necessary, the Office shall issue a *de novo* decision.

² Section 8123(a) of the Federal Employees' Compensation Act provides 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." *See Dallas E. Mopps*, 44 ECAB 454 (1993).

³ *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

⁴ *Aubrey Belnavis*, 37 ECAB 206 (1985).

The Board notes that appellant failed to establish that the nature and extent of his limited-duty position changed or exceeded the physical restrictions imposed by Dr. Chodoroff. In response to the Office's request for further information regarding whether appellant's light-duty job exceeded his work restrictions, the employing establishment submitted an August 21, 2001 statement from the supervisor of distribution operations during the period in question, Lois Lee, who asserted that appellant was assigned to the residue belt, where his job was sorting machinable and nonmachinable letters and placing the letters in a tray. This required no lifting, but did require standing. Every 30 minutes appellant sat in the break area for 5 minutes; the break area was located approximately 100 steps from the work area. The employing establishment noted that all of the supervisors who were in appellant's work unit at the time in question had retired. Based on this additional evidence provided by the employing establishment, the Office properly found, in its November 2, 2001 decision, that the employing establishment rebutted appellant's contention that the nature and extent of his limited-duty position changed or exceeded the physical restrictions imposed by Dr. Chodoroff.

The Office of Workers' Compensation Programs decision of October 7, 2002 is therefore set aside and the case is remanded to the Office for further action consistent with this decision of the Board.

Dated, Washington, DC
January 6, 2004

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member