U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONALD W. HARDY and FEDERAL DEPOSIT INSURANCE CORPORATION, DEPARTMENT OF BANKING, New York, NY

Docket No. 01-459; Submitted on the Record;
Issued March 22, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits effective August 16, 1997; and (2) whether appellant has met his burden of proof in establishing any continuing employment-related condition or disability on or after August 16, 1997.

On April 8, 1992 appellant, then a 47-year-old bank auditor, filed a claim alleging that he sustained lower back pain when he took down his bag from an overhead rack inside a train while traveling for work on February 6, 1992. He further alleged that he aggravated his injury on March 27, 1992, when he placed his audit bag in his car while on another assignment. The Office accepted appellant's claim for lumbar sacral strain and paid appropriate compensation.

By decision dated January 30, 1996, the Office reduced appellant's compensation effective February 4, 1996 on the grounds that appellant had a wage-earning capacity of an internal auditor. By decision dated January 27, 1997, an Office hearing representative reversed the January 30, 1996 decision and remanded the case to the Office for further development as the evidence indicated that appellant was capable of doing his date-of-injury job. The hearing representative further found that the evidence failed to show that the job of internal auditor was performed in sufficient numbers so as to be reasonably available to appellant. Accordingly, the hearing representative ordered reinstatement of appellant's benefits retroactive to the institution of the reduced compensation.

By decision dated July 29, 1997, the Office terminated compensation benefits effective August 16, 1997 on the basis that the weight of the medical opinion evidence, as represented by Dr. Owen Young, a Board-certified orthopedic surgeon and Office referral physician, established that appellant's injury-related disability had ceased.

Appellant requested an oral hearing, which was conducted on June 23, 1998. By decision dated September 11, 1998, an Office hearing representative affirmed the July 29, 1997

termination decision. He requested reconsideration on August 31, 1999 and by decision dated November 4, 1999, the Office denied modification of its September 11, 1998 decision.

The Board finds that the Office properly terminated appellant's compensation benefits effective August 16, 1997, as the evidence establishes that his employment-related residuals ceased.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[1] 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.[2] However, the right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for wage loss.[3] To terminate authorization for medical treatment, the Office must further establish that appellant no longer has residuals of an employment-related condition that requires further medical treatment.[4]

In this case, the Office accepted appellant's claim for a lumbar sacral strain. In its January 27, 1997 decision, an Office hearing representative found that the position of auditor fell within appellant's physical restrictions as indicated by a January 29, 1996 OWCP-5 form report from Dr. Timothy J. Collard, a Board-certified orthopedic surgeon. Accordingly, the Office undertook further development of the case.

On April 17, 1997 the Office issued a notice of proposed reduction of compensation finding that appellant's compensation could be reduced for the reason that the position of an auditor was both medically and vocationally suitable. The Office noted that a recent labor market study confirmed the availability and wage rate of an auditor. The Office further noted that the auditor position was consistent with the restrictions indicated by Dr. Collard in his OWCP-5 form report.

In a letter dated May 14, 1997, appellant's attorney disagreed with the proposed reduction on the grounds that appellant did not have an accounting degree, which he alleged appellant needed in order to be qualified for such a position. Appellant's attorney further argued that an auditor's job required prolonged sitting which the report of Dr. Collard plus a November 5, 1996 report from vocational expert Joseph Higgins indicated that appellant could not do.

In order to determine the nature and extent of appellant's current disability, the Office referred appellant for a second opinion evaluation with Dr. Owen Young, a Board-certified

[1] *David W. Green*, 43 ECAB 883 (1992); *Jason C. Armstrong*, 40 ECAB 907 (1989).

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

[3] *Marlene G. Owens*, 39 ECAB 1320 (1988).

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

orthopedist. In a report dated June 10, 1997, he discussed appellant's history of injury, physical complaints, the results of objective tests predominately performed in 1992 and listed findings on physical examination. Dr. Young diagnosed lumbar intervertebral disc derangement with a possibility of protusion at L5-S1. He stated that appellant has an injury date of February 6, 1992 and his magnetic resonance imaging (MRI) scan is dated April 6, 1992. Dr. Young advised that the changes present on the MRI scan are chronic in nature and cannot achieve this appearance on this study within a two-month period. He, therefore, opined that appellant had an aggravation of a latent condition precipitated by the factors of his employment and that this aggravation was temporary as based on the comment of Dr. Walter Grand, a Board-certified neurosurgeon, in his last report that appellant had achieved remission of his problem. Dr. Young further stated that the underlying condition, which preexisted the aggravation of the work injury, continues and is the cause of appellant's residual symptoms. He advised that appellant's disability was due to a temporary aggravation of a preexisting condition and, since he has achieved remission as of Dr. Grand's report in December 1994, appellant has returned to his preinjury status.[5] Dr. Young further felt that appellant was able to work and, since appellant finds that excessive sitting and lifting bothers him, he recommended appellant seek employment which would allow him to sit, stand or walk alternatively as necessary during a normal workday. He further recommended that appellant have a 20- to 25-pound weight restriction for intermittent activity.

In *Naomi Lilly*,[6] the Board stated:

> "In assessing the medical evidence, the number of doctors supporting one position or another is not controlling; the weight of such evidence is determined by its reliability, its probative value, its convincing quality. The opportunity for and thoroughness of examination, the accuracy and completeness of the doctor's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the doctor's opinion are factors which enter into such evaluation."[7]

In the present case, the report of Dr. Young, the second opinion specialist, constitutes the weight of the rationalized medical evidence because it is convincing, it is based upon a complete and well-documented factual and medical history of appellant and of the condition[8] and a thorough and comprehensive examination of appellant, it is consistent with objective physical

[5] In a December 7, 1994 report, Dr. Grand, a Board-certified neurosurgeon, advised that, although appellant has some back pain and left hip pain, he exhibited excellent mobility of the low back on examination, straight leg raising was 90 degrees, ankle jerks are trace bilaterally and all muscle groups are strong. Dr. Grand stated that appellant seemed to be in remission from his problem. He further opined that there was no dramatic change, surgery was not indicated and appellant could return to work with limitations.

[6] 10 ECAB 560, 573 (1959).

[7] Similar factors noted in the Office's procedure manual include the qualifications of the specialist, rationale, factual basis, consistency with physical findings, comprehensiveness and equivocalness; *see Melvina Jackson*, 38 ECAB 443 (1987) (addressing factors that bear on the probative value of medical opinions).

[8] *William Nimitz, Jr.*, 30 ECAB 567 (1979).

findings and of reasonable medical certainty[9] and was well rationalized and supported by physical evidence noted in the record.[10]

In contrast, the most current report of record from Dr. Collard, a Board-certified orthopedic surgeon, dated January 18, 1996, advised that he last saw appellant on March 2, 1993 and appellant has been in vocational rehabilitation in 1994. He noted appellant's complaints and set forth his physical examination findings. Dr. Collard further noted that he has a copy of Dr. Grand's reports and that Dr. Grand noted that appellant's symptoms are recurrent but are decreased. Dr. Collard opined that appellant has subjective complaints of a disc herniation. He further opined that appellant has a mild disability which would allow him to do a light-duty type of job. In a January 28, 1996 OWCP-5 form, Dr. Collard advised that appellant could work eight hours a day with three hours a day intermittent sitting and standing. In an earlier report dated April 5, 1993, Dr. Collard noted the history of injury and appellant's job requirements, of which he had been out of work since April 6, 1992. He set forth his examination findings and noted that an April 6, 1992 MRI scan showed evidence of a herniated disc at L5-S1 and a computerized tomography (CT) scan dated May 19, 1992 showed the possibility of a small focally herniated disc at L5-S1 on the left. Dr. Collard stated that, after reviewing the history, physical and reports, appellant's herniated disc with sciatica at L5-S1 was causally related to the February 6, 1992 work injury. He further opined that appellant could do light-duty work with certain qualifications regarding sitting and traveling.

Dr. Collard's January 18, 1996 evaluation or earlier April 5, 1993 evaluation of appellant does not support continuing disability or the presence of significant residuals. In his January 18, 1996 evaluation, Dr. Collard failed to discuss the objective test results and his clinical examination showed only minimal findings. Similarly, in his April 5, 1993 evaluation, Dr. Collard failed to provide any medical rationale or explanation as to how or why a herniated disc at L5-S1 was causally related to the work injury. Therefore, Dr. Collard's reports do not support that appellant had continuing disability or injury residuals due to the February 6, 1992 lumbar sacral strain.

In an October 26, 1996 report, Dr. Donald J. Nenno, a Board-certified orthopedic surgeon, noted that appellant's clinical examination findings revealed a mild right thoracolumbar scoliosis off balanced to the left, an altered and limited range of motion, decreased neurologic sensation over the dorsum of the left foot, positive left straight leg raising and tenderness at the L5-S1 junction. X-ray studies including CT, myelograms and MRI scans were noted to demonstrate disc displacements at L5-S1 with bulges at L4-5 and some questionable lateral disc protrusion at L3-4. Dr. Nenno opined that appellant could perform some light sedentary type of work and recommended a functional capacity examination. Although Dr. Nenno indicated that appellant's back problems began when he was reaching for baggage on an overhead rack and pain started in his lower back area in February 1992 and reported that appellant had disc displacements and protrusions, he did not explain how or why this happened, what anatomical or physiological process was involved and whether this was due to appellant's thoracolumbar

[9] *See Morris Scanlon*, 11 ECAB 384 (1960).

[10] *See William E. Enright*, 31 ECAB 426 (1980).

scoliosis or was related to the February 6, 1992 work injury. Therefore, this report does not support that appellant had continuing disability due to the February 6, 1992 lumbar sacral strain.

The Board finds that, at the time the Office issued its July 29, 1997 decision, the weight of the medical opinion evidence rested with Dr. Young, the Board-certified orthopedist. Therefore, the Office has discharged its burden of proof to justify termination of appellant's compensation and entitlement to medical benefits effective August 16, 1997.

The Board further finds that the case is not in posture for decision regarding whether appellant has any continuing condition or disability causally related to his employment.

As the Office met its burden of proof to terminate appellant's compensation benefits, the burden shifted to appellant to establish that he had disability causally related to his accepted employment injury.[11] To establish a causal relationship between the condition, as well as any disability claimed and the employment injury, the employee must submit rationalized medical opinion evidence, based on a complete factual background, supporting such a causal relationship.

Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[12]

Following the Office's July 29, 1997 decision, appellant submitted additional new medical evidence. In an August 19, 1997 report, Dr. Richard Dobson, a Board-certified physiatrist, noted a history of injury, a review of appellant's medical records, which included Dr. Young's report and set forth his examination findings. In pertinent part, Dr. Dobson concluded that appellant did injure his disc with a torsional strain and twisting movement on February 6, 1992. He advised that that type of injury could result in accelerated deterioration of the disc, but noted that appellant has not had any imaging since 1992. Dr. Dobson stated that appellant's complaints of pain with bending forward are consistent with significant dysfunction in the lumbar spine and/or significant spinal stenosis. He noted that Dr. Young had indicated that there was disc derangement at the L5-S1 which was consistent with his opinion that appellant has dysfunction in the lower lumbar spine. Dr. Dobson opined that further imaging and testing were warranted to fully assess this problem. He indicated that the April 6, 1992 MRI scan showed some loss of hydration which indicated some deterioration of the L5-S1 level. Dr. Dobson indicated that the deterioration in the appearance would have occurred prior to the

[11] *George Servetas*, 43 ECAB 424, 430 (1992).

[12] *James Mack*, 43 ECAB 321 (1991).

injury of February 6, 1992. However, he noted that appellant was having no back symptoms prior to the February 6, 1992 injury. Therefore, the condition seen on the MRI scan (apart from the herniation) is an asymmetric preexisting condition. This type of abnormality can be seen in approximately 15 percent of the teenagers. Therefore, it is not a good marker of underlying abnormality. Dr. Dobson stated that he believes sequential changes in the disc are more indicative of an injury and was why he was recommending further imaging. Dr. Dobson further indicated that appellant could perform some light or sedentary work, but indicated that a functional capacity evaluation was needed.

In a September 12, 1997 report, Dr. Dobson advised that the x-rays show significant retrolisthesis of L5 on S1. This results in impingement in the L5-S1 neuroforamen. There is increased narrowing of the L5-S1 disc when he bends forward. There is also rotatory scoliosis. Anterior spurs were noted on several levels in addition to the rotatory scoliosis. Dr. Dobson indicated that he did not have all the films for comparison and it was difficult to see if these had progressed since the previous imaging. Based on the reports, it would appear that the retrolisthesis is a new finding. Dr. Dobson noted that the radiologist commented that it was due to arthritis in the facet joints pulling the L4 vertebral body backwards or pushing the S1 segment forward. The May 19, 1992 myelogram did not suggest any evidence of facet arthritis. Thus, the arthrosis (arthritis) has developed since the x-ray of May 19, 1992. Dr. Dobson stated that the current knowledge of the mechanics of the spine would suggest that segmental instability at the disc results in increased strain on the facet joints and subsequent development of focal arthritis such as that seen in appellant. He further stated that it was very unusual to see degenerative arthritis of the facet joints causing this degree of listhesis unless there was an associated mechanical dysfunction in the intervertebral disc. Dr. Dobson opined that all of appellant's arthritis and the foramenal stenosis seen on the x-rays were consistent with the events that have occurred since the disc herniation at L5-S1. That herniation, he opined, was due to the injury which occurred when appellant reached to get the materials off of the train. Dr. Dobson opined that appellant was totally disabled from his work injury and that the arthritis at L5-S1 and the listhesis at L5-S1 were the result of the injury that occurred on the above-listed date. He further opined that there was some listhesis of L4 on L5 in addition to the L5-S1 listhesis.

A September 12, 1997 MRI scan provided an impression of degenerative disc disease with L5-S1 posterior bulging discs with left lateralization. Left S1 nerve root was suspected to be compressed within the lateral recess. L5-S1, L2-3 and L3-4 discs were also noted to be desiccated.

In an October 1, 1997 report, Dr. Dobson noted that appellant had underwent a needle EMG study in his left lower extremity. He related that the results indicated fairly good motor nerve conduction. There was evidence consistent with some mild irritation of the left S1 nerve root. Dr. Dobson continued to opine that appellant was totally disabled as a result of his work injury.

In an October 9, 1997 report, Dr. Dobson advised that he reviewed appellant's MRI scan, which showed disc herniation at the L5-S1 level. There was some decrease in water content at multiple levels. The L5-S1 level appeared to be the most impaired. Dr. Dobson further indicated that he reviewed several reports appellant had and the issue seems to be about whether

the condition predated the injury to his back which occurred in 1992. Dr. Young's report indicated that appellant had a "latent condition." To the best of his knowledge, Dr. Dobson advised that a latent condition is one that, in fact, is not causing any symptoms and, in appellant's case, was clearly not disabling him. Another term for "latent" would be "dormant" or "inactive." Dr. Dobson opined that by Dr. Young's description, appellant was, in fact, free of any active disability prior to the injury of 1992. Dr. Dobson advised that appellant clearly has some "degenerative changes" in the MRI scan based on the information available. He stated that it did not appear that those "degenerative changes" have progressed since the time of injury. Dr. Dobson stated that the disc herniation, however, was clearly related to the injury that occurred in 1992. He opined that the MRI scan clearly supports the diagnosis that appellant did, in fact, suffer an injury to his back. Appellant had preexisting "degenerative changes" that were, in fact, inactive and in fact have not changed significantly since that time. He continues to have evidence of mechanical impairment in the back and has a total disability because of that impairment.

Section 8123(a) of the Federal Employees' Compensation Act,[13] provides, "[i]f 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." In this case, there is a conflict of medical opinion evidence between the second opinion physician, Dr. Young, a Board-certified orthopedist, who found no continuing employment-related condition or disability and appellant's attending physician, Dr. Dobson, a Board-certified physiatrist, who found based on a diagnostic test not used by Dr. Young that although appellant's degenerative changes had not changed significantly since the time of the injury, appellant's arthritis and the foramental stenosis seen on x-rays were consistent with the events that have occurred since the disc herniation at L5-S1 and the herniation was due to the injury which occurred when appellant reached to get the materials off the train.

In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background must be given special weight.[14] On remand the Office should refer appellant, a statement of accepted facts and a list of specific questions to an appropriate Board-certified physician to determine whether appellant's disc herniation and subsequent arthritis at L5-S1 and the listhesis at L5-S1 is related to his employment duties and whether he continues to be totally disabled due to this condition. After this and such other development as the Office deems necessary, the Office should issue an appropriate decision.

[13] 5 U.S.C. §§ 8101-8193, 8123(a).

[14] *Nathan L. Harrell,* 41 ECAB 401, 407 (1990).

The November 4, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed in part and set aside in part and the case is remanded for further development consistent with this opinion.

Dated, Washington, DC
March 22, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member