U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FRANCIS S. DORNIK and DEPARTMENT OF VETERANS AFFAIRS, REGIONAL OFFICE, Manchester, NH

Docket No. 99-1154; Submitted on the Record;
Issued October 26, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant had any disability or related residuals after February 28, 1999, causally related to his accepted employment-related occupational back condition.

On November 26, 1996 the Office of Workers' Compensation Programs accepted that appellant, then a 45-year-old loan specialist, sustained "aggravation of lumbosacral strain" on or around April 4, 1996, due to "bending and sitting for long periods," getting up and down, and retrieving files. Concurrent conditions not due to injury included prior nonwork-related herniated discs of the cervical and lumbar spines, prior fusion surgery at C4-5, nerve impingement of both hands bilaterally, hypertension, mitral valve prolapse, shoulder tendinitis and diabetes mellitus. Appellant's preexisting injuries dated from a 1972 army accident; he underwent an anterior cervical discectomy and fusion in 1989. Appellant worked "inbound loans" at the employing establishment until July 1996 without documented problems, was thereafter transferred to "outbound loans" (foreclosures), where his duties changed and supposedly aggravated his back problems and thereafter he stopped work completely on December 3, 1996 and did not return. He was placed on the periodic roll for receipt of compensation benefits for total disability.

On April 4, 1996 appellant came under the care of Dr. Nate DeLisi, an osteopath, who opined that appellant's current work-related activities aggravated and exacerbated his original military service-connected injuries. By report dated April 18, 1997, Dr. DeLisi opined that appellant was 100 percent disabled.

The Office then referred appellant, together with appellant's job description and a statement of accepted facts, for an orthopedic second opinion evaluation.

By report dated April 21, 1997, Dr. William Kermond, a Board-certified orthopedic surgeon, examined appellant and noted that Waddell's testing revealed inappropriate responses and he opined that there appeared to be an extreme degree of overreaction. Dr. Kermond

diagnosed "Cervical disc herniation, status post cervical fusion, [and] low back strain, by history," and further opined that appellant's obvious nonorganic process was somewhat of a diagnostic dilemma, based on the relatively mild findings of his magnetic resonance imaging (MRI) scan and the extreme physical complaints. Dr. Kermond opined that appellant's response to pain appeared to be maladaptive.

By form report dated March 4, 1998, Dr. Coleman H. Levin, a Board-certified occupational medicine specialist concentrating in rheumatology, indicated that appellant was "[okay] for sedentary job," and could work for four hours per day. Dr. Levin also opined that he anticipated an increase in the number of hours per day appellant could work.

A May 12, 1998 physical capacity evaluation (PCE) noted a history of a work incident during which appellant felt his back pop, followed by immediate pain, which preceded his accepted employment-related condition of "aggravation of lumbosacral strain" by "a number of months." The evaluation concluded that, based on current level of appellant's activity, as well as the fact that he was able to attend an appointment the morning following the PCE, which required him to be out of the house for approximately three hours and the failed validity criteria and symptom exaggeration, he had at least a part-time sedentary light work capacity with limitations lifting below waist height.

Thereafter, the Office referred appellant for a neurological second opinion accompanied by a statement of accepted facts and specific questions to be addressed.

MRI scans of the cervical and lumbar spines performed on August 14, 1998 were reported, respectively, as revealing "degenerative disc disease at the C3-4, C5-6 and C6-7 interspaces, most pronounced at the C5-6 level," and "mild degenerative changes involving the last three interspaces with mild right facet degenerative changes at the L5-S1 interspace."

By report dated August 25, 1998, Dr. Richard L. Levy, a Board-certified neurologist, reviewed appellant's history and current complaints, performed a physical examination and noted that appellant manifested hardly any neck motion at all due to subjective limitations from pain and likewise limited back motion in any direction due to subjective pain. Dr. Levy noted that appellant seemed to tighten up the muscles when asked to go through a [range of motion] and that he manifested a lot of pain behavior, including moaning and groaning, which he identified as signs of symptom magnification and pain behavior. He noted that appellant had a giveaway pattern of weakness everywhere and he diagnosed "chronic pain syndrome of the cervical and lumbar spine." Dr. Levy opined:

> "In terms of causality, I cannot definitely identify the cause of this problem. I think that there is significant psychogenic overlay. In fact, one cannot tell how much of his pain is secondary to anatomical problems, such as degenerative arthritis of the cervical and lumbar spine, as opposed to psychogenic pain due to depression and secondary gain issues. There may also be a mix of these two entities. Again, I have no way of attributing the cause of his current condition to the lifting in his prior job in April of 1996 because he had chronic pain well established long before that event."

Dr. Levy opined that appellant was totally disabled due to his chronic pain. He also opined that no treatment was going to help appellant.

In response to the Office's request for further clarification, Dr. Levy provided an October 26, 1998 addendum to his report, noting, regarding the Office's specific question about residuals:

> "It was questioned as to whether or not there were any objective physical findings that would prevent [appellant] from doing sedentary work. The answer to that question is 'No.' There were no objective findings that would prevent [appellant] from doing a sedentary job. About the only thing that would prevent him from doing a sedentary job is his own personal self-declaration of chronic pain interfering with his ability to do the job.
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> "The other question was whether or not there was a biomechanical cause for [appellant's] chronic pain syndrome. The answer to that is also 'No.' All that I can say is that [appellant] has a chronic pain syndrome. He has arthritic changes in his neck and evidence of [a] fusion at C4-5. He has some spondylosis in the lumbar spine. His objective physical examination was highly inconsistent and I thought that there might be a significant psychogenic component to his pain syndrome. Frequently, in these situations there is a mix of causative factors.... [I]t is not possible to tell how much of the pain is secondary to anatomical problems as opposed to psychogenic factors related to depression and secondary gain. I would ... point out that I did not find any clear-cut biomechanical basis for such a severe chronic pain syndrome."

In conjunction with the Office's neurological referral to Dr. Levy, it also referred appellant for an orthopedic second opinion.

By report dated August 27, 1998, Dr. Leonard Popowitz, a Board-certified orthopedic surgeon, reviewed appellant's history, reported the results of his physical examination and diagnostic studies and diagnosed "Chronic cervical arthritis and disc disease and also low back derangement." Dr. Popowitz opined:

> "With a certain degree of medical certainty, I feel that [appellant's] symptoms are a natural progression of symptoms that occurred from his injury while in the armed forces in 1988 and 1989. The upper extremity symptoms are directly related to his previous injury and surgery. There are no acute findings at the present time which demonstrate that any acute pathology has developed other than that of natural progression of cervical irritation due to arthritis of his neck.
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> "As far as his back is concerned, [appellant] has marked limitation of motion and does not allow you to very truthfully examine his lower extremities because of discomfort. Based upon the MRI that [he] brings in and is reviewed, there is no large significant herniation of disc material which would state that there was any sudden occurrence of discomfort secondary to any recent injury.

> "I feel that the injury sustained while in the armed forces in 1988 and 1989 from his accident, that his present symptoms are directly related to these symptoms. Based upon the job that [appellant] performed from 1991 to 1996, I think that his symptoms were that of preexisting injury. I do not feel that any acute pathology occurred on April 4, 1996, which would state that the present symptoms are directly related to a work injury dated April 4, 1996.…
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> "I do not feel, based upon the findings, that any acute pathology occurred at the present job in 1996 to state that this is a [w]orkers' [c]ompensation incident relative to a new injury but that this is a preexisting condition."

Dr. Popowitz opined that appellant had reached maximum medical improvement, but that he did not feel appellant was able to return to any gainful employment.

However, appellant's treating physician, Dr. DeLisi, continued to opine that appellant remained totally disabled, citing the Social Security guidelines.

On December 30, 1998 the Office issued appellant a notice of proposed termination of compensation, indicating that the weight of the medical evidence demonstrated that appellant's work-related condition had resolved. In an accompanying memorandum, the Office noted that Dr. Levy found no objective physical findings which would prevent appellant from doing sedentary work, that there was no biomechanical cause for appellant's chronic pain syndrome and that the only thing preventing appellant from doing sedentary work was his own personal self-declaration of chronic pain interfering with his ability to do the job. The Office further noted that Dr. Popowitz determined that there was no pathology relateable to the occupational injury. The Office advised appellant that he had 30 days within which to submit further evidence or argument against the proposed termination.

Appellant responded by letter dated January 20, 1999, disagreeing with the proposed action and arguing that he heard something pop in his lower back which happened at work. Attached medical progress notes identified the date of treatment for the "pop" and subsequent lower back pain as March 29, 1992.

By decision dated February 4, 1999, the Office finalized the proposed termination effective February 28, 1999 finding that the weight of the medical evidence of record lay with the second opinion specialists and established that appellant no longer had disability or residuals, causally related to his accepted condition of aggravation of lumbosacral strain.

The Board finds that this case must be reversed.

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

[1] *Harold S. McGough*, 36 ECAB 332 (1984).

employment.[2] Further, 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 establish that appellant no loner has residuals of an employment-related condition that require further medical treatment.[4]

The Office has not met its burden in this case.

In termination cases, the Office bears the burden of proof in establishing that appellant is no longer disabled due to his accepted "aggravation of lumbosacral strain," or has no medical residuals which require further medical treatment.[5] The Office has not met this burden due to the insufficient reports from Drs. Levy and Popowitz, which do not directly address the threshold questions in the case.

In the present case, neither of the Office's second opinion specialists directly address the relevant issues of whether appellant continued to be disabled by the accepted condition, "aggravation of lumbosacral strain," and if not, when the aggravation ceased, and the issued of whether appellant had any residual of the accepted condition, "aggravation of lumbosacral strain" which required further medical treatment. Dr. Levy, in his August 25, 1998 report and the October 26, 1998 addendum, only addressed the issues of causal relation and appellant's ability to perform sedentary work, neither of which are the relevant issues in this case. Dr. Popowitz, in his August 27, 1998 report, also only addressed the issue of causal relation, finding that appellant's present symptoms were as a result of his 1988 to 1989 armed services injuries and, contrary to the Office's findings, opining that no acute pathology occurred in his April 4, 19996 traumatic employment injury which the Office had accepted for "aggravation of lumbosacral strain." As neither of these physicians provided a well-rationalized report addressing whether appellant continued to be disabled by the accepted condition, "aggravation of lumbosacral strain," and if not, when the aggravation ceased, or the issue of whether appellant had any residuals of the accepted condition, "aggravation of lumbosacral strain," which required further medical treatment, these physicians' report are of diminished probative and are, therefore, insufficient to establish that appellant has no further disability due to "aggravation of lumbosacral strain," or has no residuals of the "aggravation" which required further medical treatment.

As the reports of Drs. Levy and Popowitz are insufficient to establish that appellant has no further disability due to the accepted condition of "aggravation of lumbosacral disease," and has no residuals of the "aggravation" which require further medical treatment, the Office has failed to meet its burden of proof to terminate compensation and medical benefits.

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[2] *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).

[5] *See Harold S. McGough*, 36 ECAB 332 (1984) *supra* note 1.

Accordingly, the decision of the Office of Workers' Compensation Programs dated February 4, 1999 is hereby reversed.

Dated, Washington, DC
October 26, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member