U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLES WARD and DEPARTMENT OF THE NAVY, PHILADELPHIA NAVAL SHIPYARD, Philadelphia, PA

Docket No. 01-93; Submitted on the Record;
Issued September 13, 2001

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective July 18, 1999.

On July 24, 1991 appellant, then a 47-year-old tools and parts attendant, was riding the employing establishment shuttle which was hitting potholes and bouncing vigorously. Appellant claimed that he had pain in his back and lower legs due to the bus ride. The Office accepted appellant's claim for aggravation of lumbar strain. He received continuation of pay for the period July 25 through September 7, 1991. The Office began payment of temporary total disability compensation effective September 8, 1991.

In a July 14, 1999 decision, the Office terminated appellant's compensation effective July 18, 1999 on the grounds that the weight of the medical evidence established that appellant had no continuing disability as a result of the July 24, 1991 employment injury. Appellant requested a hearing before an Office hearing representative, which was conducted on December 28, 1999. In a July 3, 2000 decision, the Office hearing representative affirmed the Office's July 14, 1999 decision.

The Board finds that the Office properly terminated appellant's compensation.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. 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.[1]

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[1] *Jason C. Armstrong*, 40 ECAB 907 (1989).

In a July 29, 1991 report, Dr. Thomas A. Robinson, a family practitioner, stated that appellant had sustained a prior back injury on August 15, 1997 when he slipped and fell on a wet surface at work. He indicated that appellant complained of an acute exacerbation of his back pain with increasing radicular symptoms in his legs after the July 24, 1991 bus ride. Dr. Robinson diagnosed acute exacerbation of radiculopathy and lumbar disc herniation.

In a January 8, 1992 report, Dr. Daniel Gross, a Board-certified orthopedic surgeon, noted that appellant had two prior episodes of low back pain in 1985 and in 1987. Dr. Gross reported that the only objective finding was mild limitation in straight leg raising on the right side. He commented that appellant had a preexisting condition of low back pain which was probably degenerative in nature. Dr. Gross stated that appellant had an aggravation on July 24, 1991. He indicated that passive therapy, which had been given appellant, was not appropriate after six weeks. Dr. Gross recommended a magnetic resonance imaging (MRI) scan but stated that there were no objective findings that would prevent appellant from returning to work in his position as a tool parts attendant. A March 10, 1992 report on the MRI scan indicated that appellant had disc degeneration at L2-3 and disc degeneration with narrowing and annular disc bulging at the T12-L1 level.

In an October 12, 1992 report, Dr. Henry S. Wieder, a Board-certified orthopedic surgeon, noted that a 1988 MRI scan had reportedly shown an abnormality at the L5-S1 level which was interpreted to be a possible small extruded disc. He pointed out that there was no report of such a finding in the March 10, 1992 MRI scan. Dr. Wieder related that appellant complained of numbness in both legs, which was present during the day but not at night. He noted midline low back pain extending into the left leg. Dr. Wieder stated that the current examination findings were consistent with a diagnosis of chronic low back strain and sprain. He commented that the condition had been a recurring situation since the original injuries in 1985 and 1987 with symptoms aggravated by the July 24, 1991 episode. Dr. Wieder indicated that the current x-rays and MRI scan showed the presence of degenerative disc disease at the thoracolumbar level but the physical examination did not reveal any objective neurologic abnormality. He noted the dichotomy of the MRI scans, with the first MRI scan showing abnormality at the L5-S1 disc but did not mention degenerative changes at T12-L1 whereas the current MRI scan did not mention any abnormality at L5-S1 but demonstrated degenerative changes at T12-L1, consistent with x-rays. Dr. Wieder concluded that the degenerative changes had developed since the 1987 employment injury. He commented that he was unable to determine from the available information whether the degenerative changes were present prior to the July 24, 1991 employment injury.

In an April 2, 1998 report, Dr. Robinson stated that appellant still had back pain with numbness and weakness of the left leg. He indicated that appellant was unable to return to work. Dr. Robinson diagnosed chronic radiculopathy with lumbar disc herniation.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Donald F. Leatherwood, II, a Board-certified orthopedic surgeon, for an examination and second opinion. In an October 2, 1998 report, Dr. Leatherwood indicated that appellant had normal light touch sensation in the legs, intact motor strength in all major muscle groups, no atrophy in the leg muscles and negative straight leg raising test bilaterally. He

reported that appellant's range of motion was 60 percent of normal with complaints of comfort beyond those limits. Dr. Leatherwood noted that appellant complained of generalized lower back tenderness and lower lumbar regions of the sacral region, which did not appear reproducible in any point tender fashion. He reviewed the March 10, 1992 MRI scan, which he indicated showed disc degeneration at L2-3 and T12-L1 levels, but did not show any spinal cord compression or impingement. Dr. Leatherwood stated that the remaining discs were normal with no other abnormalities noted. He concluded that appellant sustained a lumbosacral strain or sprain in the July 24, 1991 employment injury. Dr. Leatherwood stated, with reasonable medical certainty, that appellant had no ongoing lumbosacral process of a pathological nature which would result in the symptoms he complained of. He indicated that the MRI scan showed appellant had some mild degenerative changes consistent with age with nothing further found on objective testing. Dr. Leatherwood stated appellant had completely recovered from any work-related injury he may have sustained in 1991 and could return to any and all activities he engaged in prior to the injury. He added that appellant did not require any further medical care as he was completely recovered from the employment injury with no sequelae.

In a December 8, 1998 report, Dr. Corey K. Ruth, an orthopedic surgeon, stated that a March 2, 1998 MRI scan showed a herniated L5-S1 herniated nucleus pulposus while the March 10, 1992 MRI scan showed a T12-L1 bulging disc. Dr. Ruth indicated that neurological, sensory and motor examinations showed no abnormalities. He reported appellant complained of radiation of pain and hypothesia into both legs. Dr. Ruth diagnosed L5-S1 herniated nucleus pulposus and T12-L1 bulging disc with bilateral radiculopathy.

In a February 24, 1998 report, Dr. Michael Martin Cohen, a Board-certified neurologist, stated that a March 2, 1998 MRI scan showed an L5-S1 disc to the left of center. The disc condition was not present on the March 19, 1992 MRI scan. Dr. Cohen reported that an electromyogram (EMG) and nerve conduction studies were abnormal and consistent with primarily chronic left L5-S1 radiculopathy, maximal at the L5 level. He concluded that there was evidence of ongoing left lumbosacral radiculopathy. Dr. Cohen reported that a previous EMG and nerve conduction studies performed in 1988 were also abnormal but could not be located. He stated that, nevertheless, appellant's symptoms, focal neurologic findings and abnormalities on EMG and nerve conduction studies were consistent with an ongoing lumbosacral radiculopathy on the left, maximal at L5.

To resolve the conflict in the medical evidence between Drs. Robinson and Ruth on the one hand and Dr. Leatherwood on the other hand, the Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Edward J. Resnick, a Board-certified orthopedic surgeon. In a March 9, 1999 report, Dr. Resnick stated that appellant had constant complaints of neck and back pain throughout the examination. He reported appellant had a full range of motion in all joints of the legs. Dr. Resnick noted variable and inconsistent responses to pin prick testing in both legs but pinprick sensation was grossly normal throughout. He stated that motor power and deep tendon reflexes were normal, symmetrical and equal. Dr. Resnick reported that leg lengths and the circumference at the thigh and calf were equal. He reviewed the other medical reports of record and pointed out that Dr. Ruth's report had a typographical error in reference to a March 2, 1998 MRI scan, which actually was the March 2, 1988 MRI scan. Dr. Resnick diagnosed back strains of 1985, 1987, 1988 and 1991 resolved. He commented that

the current objective orthopedic examination was normal with no clinical evidence of physical impairment of the back nor of any radiculopathy or neuropathy. Dr. Resnick stated that appellant's current symptoms were primarily subject without objective basis and did not indicate any objective impairment.

In a December 1, 1999 report, Dr. Cohen stated that in his February 24, 1999 examination of appellant there was weakness of the left foot dorsiflexors and hypesthesia of the left L5 distribution. He also found tenderness with palpable spasm over the left lumbosacral paravertebral musculature from L4 through S1 and point tenderness of the left sciatic notch. Dr. Cohen noted that the EMG and nerve conduction study were abnormal and consistent with chronic left L5-S1 radiculopathy. He stated that appellant's objective physical findings and abnormalities on the EMG and MRI scans were consistent with an injury to the lumbar spine on July 24, 1991. Dr. Cohen noted that he was not aware of any other injuries that would contribute to the chronic left lumbosacral radiculopathy. He concluded that the evidence was overwhelming in favor of an injury to the spine well beyond that of a sprain and strain. Dr. Cohen stated appellant suffered an injury to the spine, including the discs and nerves emanating from the spine, which were permanent.

The Office based its decision on the report of Dr. Resnick, acting as the impartial medical specialist. He performed a thorough examination and did not find any objective foundation to appellant's symptoms. Dr. Resnick concluded that appellant had recovered from the accepted July 24, 1991 back strain. In situations when there exists opposing medical reports of virtually equal weight and rationale 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, must be given special weight.[2] Dr. Resnick's history of appellant's condition and course was accurate. His opinion was rationalized and rooted in a complete examination of appellant. Dr. Resnick's report is, therefore, entitled to special weight and, in the context of this case, constitutes the weight of the medical evidence.

Drs. Ruth and Cohen stated that the March 2, 1988 MRI scan showed a herniated L5-S1 disc. Both physicians also stated that appellant had radiculopathy. The Office, however, did not accept that appellant had a herniated lumbosacral disc. Appellant, therefore, has the burden of proof in establishing that he has a herniated disc due to his employment injuries. The medical evidence of record is not sufficient to establish that appellant's herniated disc is employment related as neither Drs. Ruth nor Cohen explained the absence of any evidence of a herniated disc in the March 19, 1992 MRI scan and, therefore, did not relate an accurate history of appellant's condition.

[2] *James P. Roberts*, 31 ECAB 1010 (1980).

The decision of the Office of Workers' Compensation Programs, dated July 3, 2000, is hereby affirmed.

Dated, Washington, DC
September 13, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member