

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN A. TAKACS and DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, New York, NY

*Docket No. 03-1581; Submitted on the Record;
Issued September 4, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant's temporary aggravation of degenerative disc disease had ceased on April 15, 2002; and (2) whether appellant met his burden of proof to establish that he had any disability after April 15, 2002 causally related to his employment injury.

This case has previously been before the Board.¹ By decision dated December 21, 2001, the Board remanded the case to the Office, finding that a conflict in the medical opinion evidence existed between appellant's treating physicians, Dr. Martin Poliskin, an osteopathic physician, and Dr. Edward J. Reich, a Board-certified neurologist, and Dr. Ravi, Tikoo, Board-certified in neurology and who provided a second-opinion evaluation for the Office regarding whether appellant had a temporary aggravation of his preexisting degenerative disc disease caused by the January 23, 1998 work injury.² The law and facts as set forth in the previous Board decision is incorporated herein by reference.³ By letter dated March 14, 2002, the Office referred appellant, together with the medical record, a set of questions and an updated statement of accepted facts, to Dr. Martin Barschi, a Board-certified orthopedic surgeon, for an impartial medical evaluation. By decision dated April 15, 2002, the Office determined that appellant was entitled to wage-loss compensation for the period January 23, 1998 to April 15, 2002. The Office found, however, that he was not entitled to compensation after that date as Dr. Barschi

¹ On March 19, 1998 the Office accepted that on January 23, 1998 appellant, then a 46-year-old revenue agent, sustained temporary aggravation of preexisting degenerative disc disease, when he bent to reach for forms.

² Docket No. 00-757 (issued December 21, 2001).

³ The record also indicates that on January 18, 2001 appellant filed a Form CA-2, occupational disease claim, alleging that factors of employment caused depression. The record before the Board does not contain a final decision on this claim. The Board, therefore, cannot consider this claim as its jurisdiction is limited to review of the final decisions of the office; 20 C.F.R. § 501.2(c). The record also contains a March 6, 2003 decision, in which the Office approved attorney's fees in the amount of \$20,100.00. Appellant has not filed an appeal of this decision with the Board.

had opined on April 1, 2002 that appellant's temporary aggravation of degenerative disc disease had resolved. On January 13, 2003 appellant, through his attorney, requested reconsideration and submitted additional medical evidence. In a decision dated April 30, 2003, the Office denied modification of the April 15, 2002 decision. The instant appeal follows.

The Board finds that the Office met its burden of proof in determining that appellant was not entitled to compensation benefits after April 15, 2002.

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation. After it has determined that an employee has disability causally related to his or her employment, the Office may not terminate compensation without establishing that the disability has ceased or that it was no longer related to the employment.⁴ Furthermore, 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.⁵

In a report dated January 9, 2002, Dr. Reich diagnosed herniated lumbar disc and advised that, since appellant had a neurological deficit 3½ years after the employment injury, it was permanent. He concluded that appellant could not return to work. Dr. Reich also submitted an electromyography (EMG) report dated January 14, 2002, which he interpreted as abnormal, specifically finding that motor conduction studies of the left lower extremity revealed slowing of the conduction velocities with no sensory action potentials elicited for the left sural and left superficial peroneal nerves. He concluded that the findings were indicative of bilateral L5-S1 radiculopathy with an early peripheral neuropathy. A February 1, 2002 magnetic resonance imaging (MRI) scan of the lumbar spine demonstrated, *inter alia*, a broad-based posterior disc herniation at L5-S1 encroaching on the canal and degenerative changes at L4-5.

In a report dated April 1, 2002, Dr. Barschi provided an impartial medical evaluation for the Office, noted his review of the records and appellant's complaints. On examination, he noted that appellant could get up from a chair easily and walked with a normal gait without support and was able to stand on his toes and heels actively with a negative Trendelenburg test. Leg lengths were equal bilaterally. Dr. Barschi elicited no pain on palpation of the vertebra from the neck to the coccyx and no paraspinal muscle spasm was detected. Straight leg raising was 70 degrees bilaterally with hamstring tightness only and knee and ankle jerks were depressed bilaterally with intact motor power of the lower extremities. Dr. Barschi noted appellant's complaints of decreased sensation along the lateral aspect of his left leg and thigh. Midcalf and thigh measurements were equal bilaterally and appellant could dorsiflex his large toes and ankles against resistance. Dr. Barschi concluded that appellant's hips, knees, ankles and feet did not have any positive relevant orthopedic findings. He stated:

“[Appellant] sustained a temporary aggravation of a lumbosacral radiculopathy on January 23, 1998. His previous history of a lumbosacral radiculopathy as well as

⁴ See *Patricia A. Keller*, 45 ECAB 278 (1993).

⁵ See *Kathryn Haggerty*, 45 ECAB 383 (1994); *Edward E. Wright*, 43 ECAB 702 (1992).

his history of a cervical disc problem, in addition to his history of cirrhosis of the liver, hypertension, glaucoma, sinusitis, carpal tunnel syndrome by history, as well as smoking a pack of cigarettes a day and depression requiring medication all materially and substantially have increased the length of time that he has had any symptoms and needed [more] treatment than one would have expected from his January 23, 1998 injury alone. Based on the clinical evaluation on today's orthopedic examination, [appellant] has reached status *quo ante*. This is evidenced by his numerous medical conditions as well as the fact that he had been treated for a lumbosacral radiculopathy and pain management with epidural injections up until a very short time prior to January 23, 1998, when he simply aggravated that previous condition. [Appellant] does have a mild partial disability relating to his back, but not relating to the accident of January 23, 1998, which as mentioned, was a temporary aggravation to that previous condition. [He] is not able to return to work that would require heavy lifting or carrying, frequent bending or long-standing. These conditions would be considered permanent in nature. No further orthopedic treatment of physical therapy, however, is indicated. It is my opinion, based on a degree of medical certainty after reviewing the medical evidence and examining [appellant], that he suffered a temporary aggravation of his preexisting underlying degenerative disc disease.”

In an attached work capacity evaluation, Dr. Barschi advised that appellant was permanently limited in his physical activities and that maximum medical improvement had been reached.

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Barschi, the impartial medical specialist. He found that the temporary aggravation of appellant's degenerative disc disease had ceased. While appellant submitted additional evidence, the Board finds that in his January 2, 2002 report, Dr. Reich, who had been on one side of the conflict in the medical opinion that the impartial medical examiner resolved, essentially repeated his earlier findings and conclusions. It is thus, insufficient to overcome the weight accorded to Dr. Barschi's comprehensive report.⁶ Likewise, the EMG and MRI reports are nondispositive as they fail to provide an opinion regarding the contribution of the January 23, 1998 employment injury. As Dr. Barschi provided thorough, well-rationalized reports, in which he explained his findings and conclusions, the Board finds that appellant had no employment-related disability on or after April 15, 2002. The Office, therefore, properly determined that he was not entitled to compensation benefits after that date.

The Board further finds that the case is not in posture for a decision regarding whether appellant had an employment-related disability after April 15, 2002.

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 injury.⁷ To establish a causal relationship between the condition, as well as any attendant

⁶ See *Thomas Bauer*, 46 ECAB 257 (1994).

⁷ See *George Servetas*, 43 ECAB 424 (1992).

disability claimed and the employment injury, an employee must submit rationalized medical evidence, based on a complete factual and medical background, supporting such a causal relationship.⁸ Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.⁹ Rationalized medical evidence is medical evidence which includes a physician's rationalized medical 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.¹⁰

The evidence relevant to continuing disability includes a July 8, 2002 report from Dr. Steven J. Schwartz, Board-certified in psychiatry and neurology. He noted the history of injury and appellant's complaints of pain and stiffness. On neurologic examination, Dr. Schwartz noted normal gait and that appellant could walk on his heels and toes but not tandem walk. Deep tendon reflexes were hypoactive. Leg extension and straight leg raising caused pain and pinprick was dull on the soles of the feet and along the gastrocnemius muscles. Dr. Schwartz concluded:

“[Appellant] has developed progression condition [sic] of his lumbar spine since 1997. At that time, despite his being symptomatic and having a disc herniation, he had a normal EMG. The EMG has progressively become more pathologic.... [Appellant's] condition has worsened and he is restricted in his ability to bend and move. He has decreased sensation in the feet corresponding to the L5 dermatome.”

Dr. Schwartz concluded that clinically and on an electrodiagnostic basis, appellant had a progressive condition which, worsened after the January 23, 1998 employment injury, with a moderate disability.

Dr. Reich provided reports dated September 16 and 25, 2002. He noted his review of Dr. Barschi's report and objected with his findings, specifically noting that appellant's neurological examination before the work injury demonstrated no muscle weakness with a normal EMG. He advised that subsequently, appellant's examination demonstrated neurological deficits. Dr. Barchi concluded that the January 23, 1998 employment injury caused further damage and permanent disability.

In a report dated December 11, 2002, Dr. Sean E. McCance, a Board-certified orthopedic surgeon, described his examination of appellant that day, his review of the medical records, including an October 23, 1997 EMG and appellant's complaints. On examination he noted slow, but normal gait with smooth lumbar range of motion, trace reflexes and decreased sensation on

⁸ See 20 C.F.R. § 10.110(a); *Kathryn Haggerty*, 45 ECAB 383 (1994).

⁹ *Elizabeth Stanislav*, 49 ECAB 540 (1998).

¹⁰ *Gary L. Fowler*, 45 ECAB 365 (1994); *Victor J. Woodhams*, 41 ECAB 345 (1989).

the left lateral calf and foot. Dr. McCance diagnosed chronic radiculopathy secondary to disc herniation and spondylolisthesis and concluded:

“[Appellant’s] history is such that he has underlying spondylolisthesis and developed an acute exacerbation at work on January 23, 1998. Since then he has had chronic persistent and mildly progressive symptoms. This is consistent with his EMG findings and studies. [Appellant’s] MRI findings are compatible with chronic nerve compression and chronic symptoms. My overall assessment is that [he] has chronic symptoms secondary to [a] work-related injury and he has not recovered. I do not think he has obtained his preinjury status.”

While Dr. Reich had been on one side of the conflict in medical opinion that Dr. Barschi resolved, in his September 25, 2002 report, Dr. Reich explained that appellant’s neurological examination before the work injury demonstrated no muscle weakness with a normal EMG and since subsequent EMGs were abnormal, the January 23, 1998 employment injury permanently exacerbated appellant’s back condition. Drs. Schwartz and McCance concurred with this analysis and Dr. McCance specifically stated that he reviewed an October 23, 1997 EMG study. The record before the Board contains reference to an October 23, 1997 report, in which Dr. Reza Khatib, a Board-certified neurosurgeon, reported a normal EMG. However, the EMG study is not in the present case record. While Dr. Barschi noted that he reviewed Dr. Khatib’s report that noted a normal EMG and also the abnormal findings on the January 14, 2002 EMG,¹¹ Dr. Barschi did not specifically discuss the significance of these findings. The case will, therefore, be remanded to the Office. The Office should obtain a copy of the October 1997 EMG study and then forward it to Dr. Barschi, asking that he furnish a supplemental report regarding the significance of appellant’s neurological and EMG findings before and after the January 23, 1998 employment injury.¹² After such development as it deems necessary, the Office shall issue a *de novo* decision.

¹¹ The record also contains an EMG dated November 24, 1998, that was reported as abnormal.

¹² The Board notes that, when the impartial medical specialist’s statement of clarification or elaboration is not forthcoming to the Office; or if the physician is unable to clarify or elaborate on the original report; or if the physician’s report is vague, speculative or lacks rationale, the Office must refer the employee to another impartial specialist for a rationalized medical opinion on the issue in question. *Id.*

The decision of the Office of Workers' Compensation Programs dated April 30, 2003 is hereby affirmed, in part, and set aside, in part, and remanded to the Office for proceedings consistent with this opinion.

Dated, Washington, DC
September 4, 2003

Alec J. Koromilas
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member