

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ADRIAN B. MOULTON, JR. and DEPARTMENT OF THE NAVY,
PORTSMOUTH NAVAL SHIPYARD, Portsmouth, N.H.

*Docket No. 96-730; Submitted on the Record;
Issued February 2, 1998*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective February 7, 1993 on the grounds that residuals of his August 16, 1976 employment injury had ceased.

On August 16, 1976 appellant sustained a herniated disc at the L4-5 level while in the performance of duty. He underwent a laminectomy the following month and unsuccessfully attempted to return to work about a year later. The Office paid monetary compensation for temporary total disability through the periodic compensation rolls.

An investigative memorandum from the United States Naval Investigative Service, with photographs included, indicated that appellant was able to squat, bend, lift and pull with no evidence of pain while performing yard work at his residence. The Office referred appellant, together with a statement of accepted facts, copies of medical records, and copies of the investigative memorandum and photographs, to Dr. Lawrence M. Leonard, a Board-certified orthopedic surgeon, for a second opinion.

In a detailed report dated July 8, 1992, Dr. Leonard related appellant's history, complaints and activities of daily living. He reported his findings on physical examination and diagnosed status post right L4-5 laminectomy and disc excision, September 1976, with chronic low back and right leg pain. He also diagnosed a history of L5-S1 spontaneous fusion, degenerative L4-5 facet joint disease with right L4 nerve root encroachment, and bilateral degenerative joint disease with neural foraminal encroachment. Dr. Leonard reported that appellant had disability limiting him to sedentary to light work eight hours a day. He stated:

"Note is made, of course, at the present time this gentleman is 69-years-old who, unfortunately, has been out of work since 1977 and accordingly prognosis of him returning to work is basically nil. This disability now is secondary to his

degenerative disc disease in the lumbosacral spine, ? mild radiculopathy, and chronic pain.”

Dr. Leonard noted that he was unsure whether appellant had a significant physical problem as he had not been evaluated objectively recently and as there were significant, positive Waddell signs and limitations on appellant’s part that made it impossible to ferret out any basic underlying physical deficits from nonorganic overlay.

Dr. Leonard reported that he had reviewed the investigative memorandum and photographs, which he stated were inconsistent with the history he obtained from appellant.

Dr. Leonard concluded that appellant’s problem was related to his August 16, 1976 injury, which aggravated his degenerative disc disease at L4-5. The L5-S1 degenerative disc disease and osteoarthritic changes at the neural foramen, he stated, together with osteoarthritic neural foraminal changes at L4-5 on the right, represented a basic disease process and probably had nothing to do with his injury of August 1976.

In a supplemental report dated September 9, 1992, Dr. Leonard carefully compared the investigative memorandum and photographs with appellant’s presentation on examination and the history given by appellant of his daily activities and physical capabilities. “My conclusions from the inconsistencies noted,” he stated, “are that the patient was not telling me the truth and that he could do more than he told me.” Dr. Leonard stated that appellant’s problem represented an aggravation of his degenerative disc disease by the incident of August 16, 1976. He continued:

“Whether or not this temporary aggravation has now completely resolved, of course, is what I was trying to find out with my history and examination. Basically, whether or not this temporary aggravation has completely resolved is dependent upon his history. According to the history, this temporary aggravation had not resolved. However, in looking at this whole problem, and assuming [the investigative report] and pictures reflect an accurate portrayal of this gentleman’s abilities, I feel that the aggravation was but a temporary problem and has resolved. For obvious reasons, including the fact that the aggravation occurred sixteen years ago, it is not possible to accurately define when the aggravation resolved.”

In a final report dated October 26, 1992, Dr. Leonard again explained that the determination of causal relationship was based upon the history obtained and examination performed. In this case, he stated, the examination revealed findings of degenerative disc disease and the history obtained from appellant was inconsistent with the objective information provided by the investigative report and photographs. “Accordingly,” he stated, “based on the exam findings of degenerative disc disease and the photographs depicting [appellant’s] ability to perform certain activities, it [is] my opinion the temporary aggravation of his degenerative disc disease which occurred on August 16, 1976 has resolved.” Dr. Leonard reiterated that it was his opinion that there was no residual disability from the aggravation of August 16, 1976.

The Office received an October 23, 1992 report from Dr. John D. Bloom, a Board-certified orthopedic surgeon. The Office had referred appellant to Dr. Bloom for a second opinion in 1981, but appellant continued to return to Dr. Bloom on a yearly basis for examination and completion of work restriction evaluations. Dr. Bloom reported on October 23, 1992 that appellant did have residual disability from his work injury in August 1976. He stated that he took issue somewhat with Dr. Leonard's assessment of the situation:

"I feel that the patient had a herniated disc; he underwent surgical resection of this. I believe that probably initiated the gradual deterioration of his lumbar spine and feel that the subsequent deterioration of his lumbar spine can be related to both increasing age and also to the specific injury and destabilization of the spine subsequent to his disc herniation and surgical excision of the disc. I feel that the patient's present spinal condition is related to his work-related injury of herniated lumbar disc and subsequent surgery and that he has undergone the natural consequence of this injury which is progressive degeneration of the lumbar spine with disc space narrowing, hypertrophic spurring, foraminal encroachment and nerve root irritation. I don't consider that his August 1976 injury would be considered temporary aggravation of an underlying degenerative disc disease."

On the issue of whether appellant's injury of August 16, 1976 had resolved, Dr. Bloom stated that the information forwarded and the surveillance of appellant was actually quite enlightening and certainly seemed to be significantly at variance with the history that appellant had presented on a yearly basis and the physical findings elicited. Obviously, he stated, appellant had significantly more flexibility than he would demonstrate in the clinic on his yearly check ups. Dr. Bloom continued as follows:

"As to whether or not this indicates whether or not [appellant] has some ongoing back discomfort or his degree of disability, I think it is difficult to say. Actually the report from the investigators on the amount of landscaping that [apparently] has done in terms of lifting heavy rocks with a chainfall, moving large culvert pipes, etc, would indicate that he perhaps has a significant work capacity and that he was not entirely forthcoming in his interviews with us in relaying his medical history. I would have to say at the very least, based on this information, that [appellant] should be subjected to a work capacity evaluation to see whether or not there is any objective data to substantiate his present work capacity. Again, he is quite old at this point in time and I am not sure, even if he was able to do some landscaping at home, that he would be able to go back to work at the Shipyard. I believe he is already well passed retirement age."

* * *

"Again, as Dr. Leonard had noted, [appellant] continued to complain of progressive weakness and pain in his right leg and I believe he probably does indeed have a significant degree of degenerative disease in his lumbar spine. I feel it probably is related to his work-related injury a number of years ago and that this is the natural consequence of a herniated lumbar disc, subsequent surgery, destabilization of the lumbar spine, and progressive disc space narrowing

in the spaces above and below the operated disc with degeneration at these levels also. Perhaps a more thorough evaluation does need to be carried out and this has been offered to [appellant] in the past, in terms of a neurosurgical or neurologic evaluation to document the present status of his right lower extremity in regards to neurologic impairment as a result of his spinal condition.

“Basically, in summary, it would appear that [appellant] has been less than honest with us in describing his work capacity. It would appear that he does indeed have at least a light duty work capacity; the exact numbers for this work capacity, I’m sure could be obtained if [appellant] would cooperate in a functional capacity evaluation. He does have ongoing discomfort in his leg as he has described to me and perhaps, further neurologic or neurosurgical evaluation would be prudent to be carried out, again as suggested by Dr. Leonard.”

In a decision dated January 22, 1993, the Office terminated appellant’s compensation, including medical benefits, effective February 7, 1993 on the grounds that he had no residual disability from his employment injury of August 16, 1976. The Office found that the opinion of Dr. Leonard represented the weight of the medical opinion evidence.

Appellant submitted reports dated October 1 and November 17, 1993 from Dr. Frank A. Graf, II, a Board-certified orthopedic surgeon. Dr. Graf reported that appellant had a severe degenerative disc disease with bone proliferative and bone reactive change, central spinal stenotic change and right lower extremity radiculopathy with an L4-5 and S1 pattern of motor and sensory change in the right leg. He continued:

“His disability is total. His present disability is causally related to his 1976 thoracolumbar injury with progressive changes arising from that injury, continuing to evolve up through to the present. His prognosis is for continued disability and symptoms. I do not agree with Dr. Leonard that this patient has a sedentary to light work capacity. He is, in fact, totally disabled. His injury of August 1976, initiated an experience of chronic pain and chronic inflammation. Bone growth and bone reactive change has occurred in his spine as a consequence of that chronic change and chronic pain reaction. I do not agree with Dr. Leonard that this man’s present condition occurred without relationship to his work-related injury of 1976, but rather finds that his work-related injury that precipitated both surgery and injury which have combined to produce chronic inflammation which has produced a bone and soft tissue response caused by the initial injury but progressive throughout his life to the present.”

In decisions dated April 13, 1994 and November 24, 1995, the Office denied modification of its decision to terminate appellant’s benefits.

The Board finds that the Office has not met its burden of proof to justify termination of appellant’s compensation benefits.

Once the Office accepts a claim, it has the burden of proof to justify 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

In this case, the Office terminated appellant's compensation benefits on the basis of Dr. Leonard's opinion, which it found to constitute the weight of the medical opinion evidence. The Board finds, however, that a conflict in medical opinion exists between Dr. Leonard, the Office referral physician, and Dr. Bloom, appellant's physician, on the issue of continuing residuals of the accepted employment injury. Dr. Leonard concluded that the employment injury of August 16, 1976 aggravated appellant's degenerative disc disease at L4-5; however, given the investigative report and photographs depicting appellant's ability to perform certain activities, he concluded that the aggravation of the degenerative disc disease that occurred on August 16, 1976 was temporary and had resolved. Dr. Bloom, on the other hand, expressly took exception to Dr. Leonard's assessment of the situation. He explained that appellant's current spinal condition was related to his work-related injury of herniated lumbar disc and subsequent surgery, and that he had undergone the natural consequence of this injury, which was progressive degeneration of the lumbar spine with disc space narrowing, hypertrophic spurring, foraminal encroachment and nerve root irritation. He expressly disagreed with Dr. Leonard's opinion that the employment injury of August 16, 1976 caused only a temporary aggravation of an underlying degenerative disc disease. On the issue of resulting disability, however, Dr. Bloom found it difficult to assess without a work capacity evaluation to see whether there was any objective data to substantiate appellant's current work capacity. He reported that it would be prudent to carry out further neurologic or neurosurgical evaluation.

Because an unresolved conflict in medical opinion exists between the Office referral physician and appellant's physician, the Board finds that the Office failed to discharge its burden of proof to justify its termination of appellant's compensation benefits. The weight of the medical evidence rested with neither Dr. Leonard nor Dr. Bloom, whose conflicting opinions required referral to an impartial medical specialist pursuant to 5 U.S.C. § 8123(a).³

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

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

³ Although Dr. Graf's opinion on the issue of employment-related disability may be of diminished probative value given his failure to address the investigative report and photographs, his express disagreement with Dr. Leonard's opinion that appellant's current condition occurred without relationship to his work-related injury of 1976 reinforces the conflict that exists on the issue of continuing employment-related residuals.

The November 24, 1995 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, D.C.
February 2, 1998

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member