

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of EDDIE C. JACKSON and DEPARTMENT OF THE ARMY,  
TRAINING & DOCTRINE COMMAND, Fort Benning, Ga.

*Docket No. 96-2431; Submitted on the Record;  
Issued October 19, 1998*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits on June 25, 1995.

This is the second appeal before the Board in this case. By decision and order issued January 19, 1995,<sup>1</sup> the Board reversed the Office's decisions of March 9 and April 8, 1993. The Board found that there was an unresolved conflict in medical opinion pertaining to the medical opinion evidence of record as to the nature and extent of appellant's disability causally related to his December 14, 1989 employment-related injury. The Board found that the Office had not established that appellant's disability causally related to his accepted December 14, 1989 employment injury ceased by March 7, 1993, the date it terminated his compensation benefits. The law and facts as set forth in the Board's decision and order are incorporated by reference.

On remand the Office reinstated appellant's compensation for total disability and loss of wages effective March 7, 1993.

By letter dated February 13, 1995, the Office referred appellant, together with a statement of accepted facts, the complete case record and questions to be resolved, to Dr. Todd Kinnebrew, an orthopedic surgeon, for a referee opinion to resolve the conflict.

On February 28, 1995 appellant was evaluated by Dr. James Dawson Shortt, Jr., an orthopedic surgeon, who opined in a March 7, 1995 report, that the soft tissue injuries that appellant suffered on December 14, 1989, should have resolved by this time, including the aggravation of his preexisting cervical spondylosis. Dr. Shortt noted that appellant was involved in another motor vehicle accident on December 12, 1991. Dr. Shortt indicated that had appellant not been involved in the December 12, 1991 motor vehicle accident, his aggravation would have resolved within a year or two. Dr. Shortt stated that there were no objective findings to support

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<sup>1</sup> Docket No. 93-1668.

appellant's continuing symptoms solely related to appellant's 1989 accident. Dr. Shortt reviewed the job description of appellant's date-of-injury job, that of a [f]ire [i]nspector and opined that "...other than the clause which states that he may perform the duties of a fire fighter, I think he is capable of performing that job description. Any restrictions such as use of ladders, crawling, etc. would be related to his low back problem, which is not an accepted [w]orkmens' [c]ompensation claim and due to the results of the aggravation of his symptoms by the noncompensable December 1991 motor vehicle accident."

On March 29, 1995 the Office issued a notice of proposed termination of compensation finding that the weight of the medical evidence established that appellant no longer had continuing disability as a result of the accepted injury. The Office allowed appellant 30 days to respond.

In an undated letter, which the Office received on May 1, 1995, appellant stated that he disagreed with the proposed decision and additional information was forthcoming.

On April 21, 1995 the Office received a duplicate CA-20a dated February 9, 1995 from Dr. Jose Carlos Serrato, Jr., an orthopedic surgeon and medical documentation from West Central Health District, test results from Albany Regional Labs and National Health Lab and notes from the Georgia Department of Human Resources for the period April 21, 1994 to April 13, 1995. The notes from AMHC outline appellant's general treatment regimen and medication prescribed. In the notes, the therapist discusses appellant's depression, general problems and problems concerning compensation, individual counseling sessions and subjective complaints. Specific treatment in reference to the accepted condition was not noted, causal relationship of the present condition versus the work injury was not discussed and the extent of disability or objective findings were not addressed.

In a May 4, 1995 letter, the Office requested appellant's treating physician, Dr. Serrato, to address specific questions pertaining to continuing disability, causal relationship and objective findings. Dr. Serrato was also provided with copies of the evaluation reports from Dr. Jon H. Widener, a Board-certified orthopedic surgeon, and Dr. Shortt. The Office did not receive any response from Dr. Serrato.

By decision dated June 5, 1995, the Office terminated appellant's compensation, effective June 25, 1995, as the evidence failed to demonstrate a causal relationship between appellant's employment injury and continuing disability. The Office concluded that the weight of the medical opinion evidence rested with Dr. Shortt, as the impartial medical examiner and his report was well reasoned and rationalized.<sup>2</sup>

By letter dated September 12, 1995, appellant requested reconsideration and submitted an August 2, 1995 report from Dr. Serrato, which was written in response to the Office's request for additional information. In his report, Dr. Serrato disagreed with the findings and opinions

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<sup>2</sup> On June 5, 1995 the Office also advised appellant that an overpayment for the period March 7, 1993 through March 4, 1995 had been found and was being computed. Inasmuch as the record does not contain an overpayment decision from the Office, this issue is not before the Board.

expressed by Dr. Widener, and Dr. Shortt and opined that appellant suffers from continuing disability causally related to his employment injury on December 14, 1989. Dr. Serrato stated:

“...I have also had the opportunity to review the circumstances of this patient’s problems and opinion of independent medical examiners. The facts of this case are that, in my opinion, this patient is 100 percent incapacitated and disabled to work. He is presently in the process of applying for Social Security disability as it relates to cervical spondylosis. Cervical spondylosis, as you and your independent examiners may not be aware of, as they are not spine surgeons, is a condition which progresses, never stops, continues to irritate and create subjectively, pain and discomfort and stiffness, for which there is no cure, no surgery and only symptomatic treatment. In truth it was an aggravation of this patient by the auto accident of 1991, which was primarily a soft tissue ligament type of injury, which subsided in a reasonable length of time with proper treatment and left this patient purely and strictly back where he was prior to the auto accident and under the same circumstances of the existing pathology of the accident of 1989.”

In a May 8, 1996 decision, the Office denied modification of the June 5, 1995 decision. The Office stated that the weight of the evidence rested with the well-rationalized opinions expressed by Drs. Widener and Shortt, in which they negate any continuing disability due to the employment injury sustained on December 14, 1989.

The Board finds that the Office did not meet its burden of proof to terminate appellant’s compensation due to an unresolved conflict in medical opinion evidence.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened before it may terminate or modify compensation benefits.<sup>3</sup>

In the present case, the Office accepted that appellant sustained a cervical strain and an aggravation of preexisting spondylosis in the performance of duty on December 14, 1989. In its first decision in this matter, the Board found that a conflict in medical opinion existed between Drs. Yarbrough and Serrato, appellant’s physicians, and Dr. Widener, an Office referral physician. To resolve this conflict, the Office referred appellant to Dr. Todd Kinnebrew, an orthopedic surgeon selected under the Office’s rotation method of selecting an impartial medical examiner.<sup>4</sup>

However, appellant was examined and evaluated by Dr. Shortt, an associate of Dr. Kinnebrew, who was not selected by the Office to act as an impartial specialist in accordance with the procedures established by the Office for the selection of an impartial specialist.<sup>5</sup> His

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<sup>3</sup> *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

<sup>4</sup> The procedures contemplate that impartial medical specialists will be selected on a strict rotating basis in order to negate any appearance that preferential treatment exists between a particular physician and the Office. *Leonard W. Waggoner*, 37 ECAB 676 (1986).

<sup>5</sup> *Leonard W. Waggoner*, *supra* note 4.

report is, therefore, not entitled to the special weight given to the report of an impartial specialist and does not resolve the existing conflict in medical opinion evidence.<sup>6</sup> Therefore, an unresolved conflict in medical evidence remains as to whether appellant is still disabled from employment due to his December 14, 1989 employment injury. Because a conflict still exists, the Office has not met its burden to terminate appellant's compensation benefits.

Consequently, the decision of the Office of Workers' Compensation Programs dated May 8, 1996 is hereby reversed.

Dated, Washington, D.C.  
October 19, 1998

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>6</sup> *Id.* The report, however, cannot be excluded from consideration as part of the record because the Office is not responsible for the fact that an associate of the selected specialist actually performed the examination and wrote the report. *Jason C. Armstrong*, 40 ECAB 907 (1989).