

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of RAUL J. DONOSO and DEPARTMENT OF VETERANS AFFAIRS,  
MEDICAL CENTER, Seattle, Wash.

*Docket No. 96-2105; Submitted on the Record;  
Issued September 24, 1998*

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DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's benefits effective June 23, 1996.

On February 20, 1987 appellant, then a 58-year-old mail clerk, filed a notice of traumatic injury and claim for continuation of pay/compensation alleging that on February 6, 1987 he stumbled over a mail container and fell while in the performance of duty. Appellant alleged that he injured his left foot, left ankle, and the left side of his leg, that he twisted and banged his knee, and that he banged his head. The Office subsequently accepted appellant's claim for left foot, left knee, and left back sprain, and he was placed on the periodic rolls to receive compensation for total temporary disability.

On May 12, 1987 appellant wrote to indicate that on February 20, 1987 he hit his head on the floor and injured both his head and neck.

On March 10, 1988 Dr. Matthew L. Wong, a Board-certified otolaryngologist, recommended middle ear surgery to determine whether appellant had a post-traumatic perilymphatic fistula due to his head injury.

In a report dated June 30, 1988, Dr. Stewart J. Teppner, a Board-certified psychiatrist and neurologist, indicated that appellant suffered significant trauma to his inner ear as a result of his head injury. Dr. Teppner indicated that the injury resulted in otologic residuals, with associated vestibular residual, explaining appellant's trouble with walking, falling, headaches, dizziness, and neck pain.

On August 3, 1988 the Office medical adviser indicated that a possible post-traumatic perilymphatic fistula should be added as an accepted condition and that a surgical procedure regarding this possible condition was authorized. The Office subsequently authorized surgical exploration of appellant's left middle ear for the possibility of a perilymphatic fistula.

On January 4, 1989 Dr. Tepper indicated that appellant also suffered a cervical condition when he fell on February 20, 1987. He indicated that, although this condition preexisted the accepted injury, the blow to appellant's head and neck "lit up" pain related to the arthritis. Dr. Tepper requested a neurological examination.

On January 24, 1989 the Office medical adviser reviewed the medical evidence and found no evidence of a neck or head injury.

On September 7, 1989 Dr. Tepper indicated that the Office had accepted the claim for a fistular problem in the ear, but that he still believed that the blow to the head and the neck "lit up" pain related to the arthritis.

The Office subsequently found that a conflict existed between the opinion of its medical adviser and Dr. Tepper, and referred the case to Dr. James M. Haynes, a Board-certified psychiatrist and neurologist, for an independent medical examination, along with a statement of accepted facts. In the statement of accepted facts, the Office indicated that the claim was accepted for a left perilymphatic fistula.

On October 17, 1989 Dr. Haynes indicated that he found no evidence of significant neck or back injury. Dr. Haynes indicated that there was no evidence of a head injury.

On October 19, 1989 Dr. Loy E. Cramer, a Board-certified orthopedic surgeon, diagnosed appellant as status post sprain, ankle, left, and status post strain, lumbar spine. Dr. Cramer also diagnosed degenerative disc changes to the cervical and lumbar spine, but found that they were preexisting and unrelated to appellant's employment.

On October 19, 1989 Dr. John E. Hamm, a Board-certified psychiatrist, found that there was no evidence of a psychiatric condition causally related to appellant's February 20, 1987 injury.

By letter dated November 29, 1989, the Office indicated that it did not accept charges for appellant's vertigo, cause undetermined. The Office stated that it did not accept that there was any injury to the head, hearing, or ears on February 20, 1987.

By letter dated February 8, 1990, the Office proposed to terminate benefits because disability resulting from appellant's accepted injuries had ceased. The Office indicated that it relied on the opinions of Drs. Cramer and Hamm in reaching its determination. The Office further indicated that the claim had been accepted for left foot, leg, knee, ankle, and low back strains and also for perilymphatic ear fistula. Appellant was given 30 days to respond.

Appellant subsequently submitted treatment records which discussed his back and neck problems, but which did not address whether the conditions were related to his accepted employment injury.

On March 3, 1990 appellant's treating physician Dr. Richard G. McCollum concluded that he agreed with the Office's conclusion that appellant did not need further treatment.

By decision dated March 14, 1990, the Office finalized its proposed termination of benefits. It again found that the reports of Drs. Cramer and Hamm constituted the weight of the evidence.

Appellant requested an examination of the written record on April 13, 1990. In support, he submitted an April 11, 1990 report from Dr. Tepper who again concluded that appellant suffered from cervical degenerative arthritis causally related to the blow on the head he experienced on February 20, 1987. Dr. Tepper indicated that the blow to appellant's head and neck made the preexisting arthritis symptomatic. Moreover, Dr. Tepper stated that Dr. Cramer's report failed to address appellant's significant vestibular problem which resulted from his documented head injury. He requested that this problem be accepted so that Dr. Wong could complete the required surgery. Appellant also submitted an April 7, 1990 report from Dr. Wong who indicated again the need for exploratory ear surgery.

By decision dated July 17, 1990, the Office hearing representative, vacated the Office's July 17, 1990 decision dated March 14, 1990. The hearing representative noted that the case was not in posture for a decision due to an unresolved issue regarding whether appellant suffered a head injury on February 20, 1987, if so, whether appellant was disabled from such injuries. The hearing representative requested the Office to clarify whether appellant suffered a blow to the head on February 20, 1987 and to provide rationale regarding the accepted condition of left ear perilymphatic fistula.

On March 20, 1996 the Office referred appellant to Dr. Kenneth Briggs, a Board-certified orthopedic surgeon, for a second opinion evaluation. Despite the hearing representative's instructions, the Office informed Dr. Briggs that it did "not accept that claimant sustained a head injury on February 20, 1987. Evaluation of conditions not related to the low back or lower left extremity is neither requested or authorized."

On April 4, 1996 Dr. Briggs examined appellant and the record prior to concluding that there were no objective findings to support appellant's symptomology. Dr. Briggs' examination was limited to appellant's back and left lower extremity.

On April 25, 1996 the Office again proposed termination of compensation. The Office indicated that Dr. Briggs' opinion, bolstered by the March 5, 1990 opinion of Dr. McCollum, failed to indicate any objective evidence of continuing disability arising from his employment injury. Appellant was given 30 days to respond, but he failed to do so.

By decision dated February 20, 1987, the Office finalized its proposal to terminate appellant's compensation benefits.

The Board has reviewed the case record and concludes that this case is not in posture for a decision.

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 a disability causally related to his federal employment, the Office may not terminate compensation without

establishing that the disability has ceased or that it is no longer related to employment.<sup>1</sup> Moreover, proceedings under the Federal Employees. Compensation Act are not adversarial in nature and the Office shares the responsibility in the development of the evidence so that justice is done.<sup>2</sup>

In the instant case, the Office indicated on August 3, 1998 that a possible post-traumatic perilymphatic fistula should be added as an accepted condition and that a surgical procedure regarding this possible condition was authorized. The record is devoid of any evidence establishing that such surgery was performed. The Office later indicated in a statement of accepted facts sent to Dr. Haynes, a Board-certified psychiatrist and neurologist, for an independent medical examination that the claim had been accepted for a left perilymphatic fistula. Nevertheless, by letter dated November 29, 1989, the Office stated that it did not accept that appellant suffered any injury to the head, hearing, or ears on February 20, 1987. However, in its February 8, 1990 proposal to terminate benefits, the Office stated that appellant's claim was accepted for perilymphatic fistula. The Office finalized its proposal to terminate compensation on March 14, 1990.

Following appellant's request for review of the written record, the Office hearing representative vacated the Office's March 14, 1990 decision and remanded the case for the Office to clarify whether appellant suffered a disabling head injury on February 20, 1987 and to provide additional rationale regarding the accepted condition of left ear perilymphatic fistula.

The Office, however, ignored the hearing representative's instruction and instead referred the case to Dr. Briggs, a Board-certified orthopedic surgeon, for a second opinion with specific instructions that the Office did "not accept that [the] claimant sustained a head injury on February 20, 1987." Evaluations of conditions not related to the low back or lower left extremity is neither requested or authorized." Following receipt of Dr. Briggs' opinion, the Office again terminated benefits on the basis that there was no objective evidence of continuing disability. The Office, however, erred in failing to resolve whether it had accepted that appellant suffered a head injury or left ear perilymphatic fistula causally related to the February 20, 1987 employment injury and whether the condition remained disabling. Because the record contains conflicting evidence on whether the Office accepted appellant's claim for a left ear perilymphatic fistula and head condition, and there is no indication of whether the condition, if accepted, is disabling, the Board hereby set aside the Office's March 14, 1990 decision terminating benefits and remands this case to the Office to resolve this issue.

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<sup>1</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989).

<sup>2</sup> *Elaine Pendleton*, 40 ECAB 1143 (1989).

The March 14, 1990 decision of the Office is hereby set aside and the case remanded for further development and a *de novo* opinion consistent with this decision.

Dated, Washington, D.C.  
September 24, 1998

George E. Rivers  
Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member