U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NORMAN A. BRILLHART and DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, Bremerton, Wash.

Docket No. 97-2347; Submitted on the Record;
Issued April 14, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS, BRADLEY T. KNOTT

The issue is whether appellant had disability after May 11, 1995 due to his August 3, 1993 employment injury.

The Board finds that appellant did not have disability after May 11, 1995 due to his August 3, 1993 employment injury.

Under the Federal Employees' Compensation Act,[1] when employment factors cause an aggravation of an underlying physical condition, the employee is entitled to compensation for the periods of disability related to the aggravation.[2] However, when the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased.[3] Once the Office of Workers' Compensation Programs has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.[4] The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[5] After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that he or she had an employment-related disability which continued after termination of compensation benefits.[6]

---

[1] 5 U.S.C. §§ 8101-8193.

[2] *Richard T. DeVito,* 39 ECAB 668, 673 (1988); *Leroy R. Rupp,* 34 ECAB 427, 430 (1982).

[3] *Ann E. Kernander,* 37 ECAB 305, 310 (1986); *James L. Hearn,* 29 ECAB 278, 287 (1978).

[4] *Charles E. Minniss,* 40 ECAB 708, 716 (1989); *Vivien L. Minor,* 37 ECAB 541, 546 (1986).

[5] *Id.*

[6] *Wentworth M. Murray,* 7 ECAB 570, 572 (1955).

In the present case, the Office accepted that appellant sustained right shoulder and lateral cervical strains when he was prying basalt loose with a crowbar at work on August 3, 1993. By decision dated May 11, 1995, the Office terminated appellant's compensation effective May 11, 1995 on the grounds that he had no disability after that date due to his August 3, 1993 employment injury. The Office based its termination on the September 8, 1994 report of Dr. Richard P. McCullough, a Board-certified orthopedic surgeon to whom it referred appellant for a second opinion.

The Board notes that the Office, in a decision dated June 24, 1996 denying modification of the May 11, 1995 merit decision, met its burden of proof to terminate appellant's compensation. The Office determined that the weight of the medical evidence rested with the well-rationalized opinion of the second opinion physician, Dr. McCullough. The Board has carefully reviewed the opinion of Dr. McCullough and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. McCullough's opinion is based on a proper factual and medical history in that he had the benefit of an accurate and up-to-date statement of accepted facts, provided a thorough factual and medical history and accurately summarized the relevant medical evidence. Moreover, Dr. McCullough provided a proper analysis of the factual and medical history and the findings on examination, including the results of diagnostic testing, and reached conclusions regarding appellant's condition which comported with this analysis.[7] Dr. McCullough provided medical rationale for his opinion by explaining that appellant no longer had objective residuals of his August 3, 1993 soft-tissue injury. He noted that appellant's continuing problems were due to his preexisting conditions of right acromion arthritis and cervical degenerative disc disease; he also noted that appellant had a chronic pain syndrome which was not related to the August 3, 1993 employment injury. Dr. McCullough's opinion was supported by that of Dr. Jonathan P. Bacon, an attending Board-certified orthopedic surgeon, who indicated on December 12, 1994 that he agreed with Dr. McCullough's opinion that appellant no longer had residuals of his August 3, 1993 injury. On appeal, appellant alleged that the reports of Dr. Lynn L. Staker, an attending Board-certified orthopedic surgeon, created a conflict with the opinion of Dr. McCullough such that the case should be referred to an impartial medical examiner for resolution of the conflict.[8] The Board has reviewed Dr. Staker's reports from late 1994 and early 1995 and notes that there is no report of Dr. Staker containing a rationalized medical opinion that appellant had continuing residuals of his August 3, 1993 employment injury after May 11, 1995; at the time of the referral to Dr. McCullough, there was no conflict in the medical evidence requiring referral to an impartial medical examiner.

After the Office's May 11, 1995 decision terminating appellant's compensation effective that date, appellant submitted additional medical evidence which he felt showed that he was entitled to compensation after May 11, 1995 due to residuals of his August 3, 1993 employment

[7] *See Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

[8] Section 8123(a) of the Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." 5 U.S.C. § 8123(a). When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence. *William C. Bush*, 40 ECAB 1064, 1075 (1989).

injury. Given that the Board has found that the Office properly relied on the opinion of Dr. McCullough in terminating appellant's compensation effective May 11, 1995, the burden shifts to appellant to establish that he is entitled to compensation after that date. The Board has reviewed the additional evidence submitted by appellant and notes that it is not of sufficient probative value to establish that he had residuals of his August 3, 1993 employment injury after May 11, 1995.

Appellant submitted a January 5, 1996 report in which Dr. James D. Krueger, a Board-certified internist for the employing establishment, indicated that appellant had occupational right impingement syndrome and torn fibers of the right shoulder. In a report dated January 24, 1996, Dr. William J. Stump, an attending Board-certified neurologist, noted that appellant had a "cervical/shoulder straining injury of the right upper extremity" secondary to his August 3, 1993 employment injury. In a report dated March 8, 1996, Dr. Kent P. VanBuecken, an attending Board-certified orthopedic surgeon, stated that appellant had clinical impingement and acromion joint arthritis "by history, work related." These reports, however, are of limited probative value on the relevant issue of the present case in that they did not contain adequate medical rationale in support of their conclusions on causal relationship.[9] None of these physicians described the August 3, 1993 injury in any detail or explained the medical process through which such a soft-tissue injury, consisting of right shoulder and lateral cervical strains, could have been responsible for disability after May 11, 1995. Appellant's claim was not accepted for impingement syndrome or acromion arthritis and the medical evidence does not otherwise support a finding of an employment-related cause for these conditions.

[9] *See Leon Harris Ford*, 31 ECAB 514, 518 (1980) (finding that a medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship which is unsupported by medical rationale).

The decision of the Office of Workers' Compensation Programs dated June 24, 1996 is affirmed.[10]

Dated, Washington, D.C.
April 14, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

[10] Appellant submitted additional evidence after the Office's June 24, 1996 decision, but the Board cannot consider such evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c).