

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GERALD JACKSON and DEPARTMENT OF THE NAVY,
BANGOR NAVAL SUBMARINE BASE, Silverdale, WA

*Docket No. 99-1341; Submitted on the Record;
Issued August 2, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation on the grounds that he no longer had any disability causally related to his November 7, 1996 employment injury.

The Board has duly reviewed the case record in this appeal and finds that the Office properly terminated appellant's compensation on the grounds that he no longer had any disability causally related to his November 7, 1996 employment injury.

On November 8, 1996 appellant, then a 47-year-old motor vehicle operator, filed a traumatic injury claim (Form CA-1) alleging that on November 7, 1996 he sustained a pinched nerve in his left arm and shoulder down to his fingers while in the performance of duty.

The Office accepted appellant's claim for an acute sternoclavicular strain.

In a May 5, 1998 letter, the Office advised appellant that he was being referred along with a statement of accepted facts, medical records and a list of specific questions to Dr. Kenneth David Sawyer, an orthopedic surgeon, for a second opinion examination to determine whether he had any residuals of his accepted employment injury. By letter of the same date, the Office advised Dr. Sawyer of the referral.

Dr. Sawyer submitted a June 5, 1998 medical report finding that appellant was no longer disabled due to the November 7, 1996 employment injury.

By letter dated June 23, 1998, the Office advised Dr. Michael S. McManus, Board-certified in preventive medicine and appellant's treating physician, to submit his comments regarding Dr. Sawyer's accompanying medical report. By letter dated March 17, 1999, the Office again advised Dr. McManus to comment on Dr. Sawyer's June 5, 1998 medical report.

By decision dated March 17, 1999, the Office terminated appellant's compensation on the grounds that he no longer had any disability causally related to his November 7, 1996 employment injury.¹

Once the Office has accepted a claim and pays compensation, it has the burden of proof of justifying termination or modification of compensation benefits.² 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.³

In this case, the Office referred appellant to Dr. Sawyer, an orthopedic surgeon, for a second opinion examination. In his June 5, 1998 medical report, Dr. Sawyer provided appellant's complaints, a history of appellant's November 7, 1996 employment injury, job duties, medical treatment and family background, a review of medical records, and his findings on physical, orthopedic and objective examination. He made the following diagnoses:

"(1) Marked hypertrophic cervical spondylolysis with large anterior osteophytes at multiple levels but in the absence of disc herniation, spinal stenosis, foraminal stenosis or radiculopathy. Cervical degenerative disease is preexisting and unrelated to the events of November 7, 1996.

"(2) History compatible with left upper extremity strain and/or muscle spasm causally related to work activity on November 7, 1996 and probably resolved.

"(3) Diffuse complaints of pain and paresthesias throughout the left half of the body with nonphysiologic findings and inconsistencies on examination. These findings could be voluntary (malingering) or a function of his mental health condition but are not causally related to the events of November 7, 1996, on a more probable than not basis."

In response to the Office's questions, Dr. Sawyer noted the above diagnoses and stated that his examination did not reveal evidence of the accepted condition of left sternoclavicular strain and that it was assumed it had resolved. He opined:

"The current diagnoses were not causally related to events of November 7, 1996. There is no anatomic explanation as to why symptoms would have spread throughout [appellant's] left body from what appears to have been a minor muscle strain approximately one and one half years ago. Examination findings are also

¹ The Board notes that, subsequent to the Office's March 17, 1999 decision terminating appellant's compensation, the Office received additional evidence. Further, on appeal, appellant has submitted additional evidence. The Board, however, cannot consider evidence that was not before the Office at the time of the final decision; *see Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35 (1952); 20 C.F.R. § 501.2(c)(1).

² *Curtis Hall*, 45 ECAB 316 (1994); *John E. Lemker*, 45 ECAB 258 (1993); *Robert C. Fay*, 39 ECAB 163 (1987).

³ *Jason C. Armstrong*, 40 ECAB 907 (1989).

inconsistent with any known pathology and could only be explained on the basis of a psychiatric condition or voluntary symptom magnification.”

Regarding appellant’s work restrictions, Dr. Sawyer stated that he did not find any objective evidence to indicate the need for any specific work restrictions causally related to the November 7, 1996 employment injury. He further stated that appellant had some cervical degenerative changes that obviously predated the employment injury with marked abnormalities seen on x-rays taken within a few days that might affect his ability to look upward for prolonged periods or perform repetitive neck movements. Dr. Sawyer concluded that appellant did not need any additional medical treatment for residuals of his work-related injury. He further concluded that there was no pathology to treat. Dr. Sawyer then concluded that the treatment appellant was receiving appeared to be an attempt to treat his symptoms as he described them and that there would be no way to quantitate any future improvement. The Board finds that Dr. Sawyer’s opinion is rationalized to satisfy the Office’s burden and based on an accurate factual and medical background.

The Office received treatment notes from appellant’s physical therapists covering the period December 1, 1996 through April 7, 1998. The Board finds that the treatment notes of appellant’s physical therapists are of no probative value inasmuch as a physical therapist is not a physician under the Federal Employees’ Compensation Act and therefore is not competent to give a medical opinion.⁴

The Office also received medical treatment notes from Dr. David Franklin Hogness, a Board-certified family practitioner, dated November 18 and December 6, 1996, January 2, 1997 and March 3, 1998, Dr. B. Paschal dated March 3 and April 7, 1998 and Steven M. Savlov, Ph.D. and a licensed psychologist, dated March 17 through April 7, 1998. These treatment notes failed to address whether appellant had any disability causally related to his November 7, 1996 employment injury.

Further, the Office received several medical reports and treatment notes from Dr. McManus whose January 9 and 30, 1997 medical reports indicated that appellant’s left thoracic outlet syndrome versus cervical brachial neuropathy (C-8 or C-8 and T1/lower trunk) was work related on a “more probable than not” basis. His reports are of little probative value inasmuch as they are speculative as to the cause of appellant’s condition.⁵ Dr. McManus’ treatment notes dated January 9 and 13, and February 19 and 20, 1997, fail to address whether appellant had any disability caused by his employment injury. Similarly, his February 13, 1997 medical report providing a diagnosis of new onset complaints of left-sided body pain and parasthesias/dysesthesias with associated symptomatology, ruling out somatoform or conversion disorder and indicating that appellant’s complaints were disproportionate to objective findings fails to address whether appellant had any disability causally related to his employment injury. Dr. McManus’ February 19, 1997 attending physician’s report (Form CA-20) indicated the history of appellant’s November 7, 1996 employment injury and reiterated the diagnosis as provided in his February 13, 1997 medical report. He further indicated that appellant’s conditions were related to an employment activity by placing a checkmark in the box marked

⁴ 5 U.S.C. § 8101(2); *see also* *Jerre R. Rinehart*, 45 ECAB 518 (1994); *Barbara J. Williams*, 40 ECAB 649 (1989); *Jane A. White*, 34 ECAB 515 (1983).

⁵ *See Jennifer Beville*, 33 ECAB 1970 (1982); *Leonard J. O’Keefe*, 14 ECAB 42 (1962).

“yes.” Inasmuch as Dr. McManus failed to provide any medical rationale explaining how or why appellant’s conditions were caused by the November 7, 1996 employment injury, his report is insufficient to establish continued employment-related disability.⁶ His February 20 and 27, 1997 disability certificates are insufficient to establish continued employment-related disability because they failed to indicate a diagnosis and to discuss whether or how the diagnosed condition was caused by appellant’s November 7, 1996 employment-related injury.⁷ Dr. McManus’ February 20, 1997 medical report ruled out right thrombotic chronic villous arthritis/other with central pain syndrome and left hemiparesis with intermittent dysesthesias and somatoform disorder. His February 27, 1997 medical report ruled out left cervical brachial neuropathy (intermittent) versus myofascial pain syndrome, and somatoform disorder and/or anxiety disorder with panic episodes.

The February 5, 1997 emergency room treatment notes of Dr. Bernard M. Greenfeld, Board-certified in emergency medicine, provided his opinion that appellant had recurrent neck pain after an on-the-job injury with intermittent left arm weakness that was resolving at that time.

The Board, therefore, finds that Dr. Sawyer’s opinion that appellant is no longer disabled due to his November 7, 1996 employment injury constitutes the weight of the medical opinion evidence of record in this case. Accordingly, the Office properly terminated appellant’s compensation based on Dr. Sawyer’s rationalized June 5, 1998 medical report.

The March 17, 1999 decision of the Office of Worker’s Compensation Programs is hereby affirmed.

Dated, Washington, D.C.
August 2, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom

⁶ *Lucrecia M. Nielson*, 42 ECAB 583, 594 (1991).

⁷ *Daniel Deparini*, 44 ECAB 657, 659 (1993).

Alternate Member