

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES R. MEADE, SR. and DEPARTMENT OF THE NAVY, NAVAL
RESEARCH LABORATORY, Washington, DC

*Docket No. 98-968; Submitted on the Record;
Issued January 7, 2000*

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective November 12, 1995 on the grounds that appellant's disability resulting from his December 12, 1984 employment injury ceased by and no later than November 12, 1995.

The Board has duly reviewed the case record in this appeal and finds that the Office properly terminated appellant's compensation effective November 12, 1995 on the grounds that appellant's disability resulting from the December 12, 1984 employment injury ceased by and no later than November 12, 1995.

On June 3, 1985 appellant, then a 59-year-old guard, filed a traumatic injury claim (Form CA-1) alleging that on December 12, 1984 he sustained a laceration to the right little finger,

head, shoulder and ankle pain when he fell on an uneven floor. Appellant did not stop work at that time.¹

The Office accepted appellant's claim for laceration to the first finger of the right hand, contusion of the right neck, low back and rib cage and right ankle strain.

By letter dated January 27, 1993, the Office referred appellant along with a statement of accepted facts, medical records and a list of specific questions to Dr. Donald E. Pearson, a Board-certified orthopedic surgeon, for a second opinion examination. By letter of the same date, the Office advised Dr. Pearson of the referral.

Dr. Pearson submitted a February 10, 1993 medical report revealing that appellant was able to perform the duties of a security guard. In letters dated March 5 and May 5, 1993, the Office advised Dr. Rida N. Azer, a Board-certified orthopedic surgeon and appellant's treating physician to comment on Dr. Pearson's medical report. In a letter dated May 18, 1993, Dr. Azer noted appellant's restrictions and opined that appellant's condition, treatment and residuals were caused by his December 12, 1984 employment injury.

The Office found a conflict in the medical opinion evidence and referred appellant along with a statement of accepted facts, medical records and a list of specific questions to Dr. John F. Schaeffer, a Board-certified orthopedic surgeon, for an impartial medical examination by letter dated November 1, 1994. By letter of the same date, the Office advised Dr. Schaeffer of the referral.

Dr. Schaeffer submitted a medical report dated November 28, 1994 providing that appellant had no residuals causally related to his December 12, 1984 employment injury and that he was capable of performing the duties of a guard.

In a notice of proposed termination dated January 13, 1995, the Office advised appellant that it proposed to terminate his compensation based on Dr. Schaeffer's November 28, 1994

¹ Subsequent to filing his June 3, 1985 Form CA-1, appellant filed a claim (Form CA-2a) on October 24, 1985 alleging that he sustained a recurrence of disability on September 10, 1985. Appellant stopped work on September 10, 1985 and returned to work on October 7, 1985. By decision dated January 24, 1986, the Office found the evidence of record insufficient to establish that appellant's disability commencing on September 10, 1985 resulted from his December 12, 1984 employment injury. In a February 3, 1986 letter, appellant requested an oral hearing before an Office representative. In a May 30, 1986 decision, the hearing representative affirmed the Office's decision. In a March 8, 1988 letter, appellant requested reconsideration of the Office's decision. In a June 9, 1988 decision, the Office, on its own motion, vacated the January 24, 1986 decision denying appellant's recurrence claim. The Office accepted appellant's claim for tarsal tunnel syndrome. By decision dated March 14, 1989, the Office reduced appellant's compensation to reflect his wage-earning capacity based on his actual earnings as a guard effective February 12, 1989, the date of his reemployment. On July 28, 1989 appellant filed a claim for a schedule award (Form CA-7). By decision dated January 18, 1990, the Office granted appellant a schedule award for a 15 percent permanent loss of use of his right lower extremity for the period September 24, 1989 through July 22, 1990. In a January 29, 1990 letter, appellant requested an oral hearing before an Office representative. In a November 3, 1990 letter, appellant requested a request for reconsideration. The record reveals that appellant wished to submit additional medical evidence to obtain a greater award. In a June 4, 1991 decision, the Office vacated its January 18, 1990 decision and awarded appellant a schedule award for a 27 percent permanent impairment of the right lower extremity for the period July 24, 1990 through March 22, 1991.

medical report. The Office also advised appellant to submit additional medical evidence supportive of his continued disability within 30 days.

By decision dated November 6, 1995, the Office terminated appellant's compensation effective November 12, 1995 on the grounds that appellant's disability resulting from the December 12, 1984 employment injury ceased by and not later than November 12, 1995. In a May 14, 1996 letter, appellant requested reconsideration of the Office's decision.

In a decision dated August 30, 1996, the Office denied appellant's request for modification based on a merit review of the claim.

The Office also denied appellant's subsequent requests for modification based on a merit review of the claim in decisions dated May 30, July 7 and October 9, 1997 and January 12, 1998.²

Once the Office has accepted a claim and pays compensation, it has the burden of proof of justifying termination or modification of compensation benefits.³ 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.⁴

Section 8123(a) of the Federal Employees' Compensation Act provides that if there is a 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 When there exists opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁶

In this case, Dr. Azer, a Board-certified orthopedic surgeon and appellant's treating physician, opined that appellant remained totally disabled from work due to his December 12, 1984 employment injury while Dr. Pearson, a Board-certified orthopedic surgeon and an Office second opinion physician, opined that appellant was no longer disabled due to his employment injury. The Board finds that there was a conflict in the medical opinion evidence between Drs. Azer and Pearson regarding the issue of whether appellant had any continuing disability due to his 1984 employment injury. The Office, therefore, properly referred appellant to

² Appellant's requests for reconsideration were dated May 14, 1996 and April 11, June 13, September 16 and November 17, 1997

³ *Curtis Hall*, 45 ECAB 316 (1994); *John E. Lemker*, 45 ECAB 258 (1993); *Robert C. Fay*, 39 ECAB 163 (1987).

⁴ *Jason C. Armstrong*, 40 ECAB 907 (1989).

⁵ 5 U.S.C. § 8123(a); *see also Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

⁶ *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

Dr. Schaeffer, a Board-certified orthopedic surgeon, for an impartial medical examination pursuant to section 8123(a) of the Act.

In terminating appellant's compensation, the Office relied on Dr. Schaeffer's November 28, 1994 medical report. In this medical report, he noted appellant's chief complaints and a history of appellant's December 12, 1984 employment injury and medical treatment. Dr. Schaeffer indicated his findings on physical and objective examination. He diagnosed status-post laceration of the right small finger, chronic right ankle pain with etiology undetermined, no evidence of tarsal tunnel syndrome and low back pain with etiology undetermined. Dr. Schaeffer noted that he reviewed the medical evidence of record and the statement of accepted facts and stated that he could not state with certainty that appellant's tarsal tunnel syndrome was related to his December 1984 employment injury. Dr. Schaeffer opined that appellant was capable of gainful employment, particularly as a security guard as outlined in the statement of accepted facts and job duties. He concluded that he had no further treatment to offer appellant and that his examination of appellant was essentially normal. The Board finds that Dr. Schaeffer's medical opinion that appellant is no longer disabled due to his December 12, 1984 employment injury is rationalized and based on an accurate factual and medical background.

In support of his continued employment-related disability, appellant submitted the January 28, 1997 medical treatment notes of Dr. Stephen M. Reed, a Board-certified orthopedic surgeon, which revealed his complaints, his findings on physical examination, a diagnosis of lumbar spine syndrome, right ankle pain and status-post tarsal tunnel surgery performed in 1985. Dr. Reed opined that appellant had continuing limitations and disability secondary to the December 12, 1984 employment injury. He also noted appellant's physical limitations. In further support of his continued employment-related disability, appellant submitted Dr. Reed's June 3, 1997 medical treatment notes indicating his complaints, a history of the 1984 employment injury and Dr. Reed's findings on physical examination. Dr. Reed reiterated his previous diagnoses and included the diagnosis of degenerative disc disease at L5-S1. He opined that appellant had no change in his status over the past several years regarding his workers' compensation claim and that there was no change in his restrictions. Appellant also submitted Dr. Reed's September 8, 1997 medical report reiterating a history of his December 12, 1984 employment injury and medical treatment, noting his complaints and his findings on physical examination. Dr. Reed reiterated his previous diagnoses and noted that appellant had status-post tarsal tunnel surgery, which was performed in 1985 with residual neuropathy of the right lower extremity. He opined that appellant continued to have extensive limitations regarding his ability to perform work-related activities in light of his advancing age and poor condition. Dr. Reed further opined that appellant continued to have significant permanent impairment based on the condition of the right ankle along with the associated condition of the lumbar spine. Further, appellant submitted Dr. Reed's November 7, 1997 medical report. In this report, he opined that there was a direct relationship between the December 12, 1984 employment injury and appellant's ongoing complaints regarding his right foot, right ankle and his lumbar spine. Dr. Reed further opined that in addition to his right ankle and back injuries, appellant had an advancing degenerative condition in both areas which compounded the problem. His medical reports are insufficient to establish continued disability because they failed to explain how or why appellant's disability was causally related to his December 12, 1984 employment injury.

The Office received Dr. Azer's December 2, 1994 and January 25, 1995 medical treatment notes regarding appellant's right wrist and ankle and back. Dr. Azer's notes failed to address whether appellant had any continuing disability causally related to his December 12, 1984 employment injury.

The Office also received Dr. Reed's March 10, 1995 medical report revealing appellant's complaints, a history of appellant's 1984 employment injury and medical treatment and his findings on physical examination. He diagnosed chronic low back pain with degenerative disc disease of the lumbar spine and residual tarsal tunnel syndrome. Dr. Reed noted appellant's future medical treatment and goals. His medical report failed to explain how or why appellant continued to suffer from residuals of his December 12, 1984 employment injury.

In addition, the Office received the treatment notes of John E. Breitenbruck, a physical therapist, which covered the period March 13 through 31, 1995. The Board finds that the treatment notes of appellant's physical therapist is of no probative value inasmuch as a physical therapist is not a physician under the Act and therefore is not competent to give a medical opinion.⁷

Inasmuch as Dr. Schaeffer's November 28, 1994 medical report constitutes the weight of the medical opinion evidence in this case, the Office properly terminated appellant's compensation effective November 12, 1995 on the grounds that he no longer had any disability causally related to his December 12, 1984 employment injury.

The January 12, 1998 and May 30, July 7 and October 9, 1997 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, D.C.
January 7, 2000

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

⁷ 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).