

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MICHAEL D. BIBEY and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS HOSPITAL, Bay Pines, FL

*Docket No. 98-1309; Submitted on the Record;  
Issued January 20, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,  
DAVID S. GERSON

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's medical benefits; and (2) whether appellant has established that he sustained a recurrence of total disability on October 2, 1991 causally related to his accepted employment injury.

The Board has duly reviewed the case on appeal and finds that the Office failed to meet its burden of proof to terminate appellant's medical benefits.

Appellant filed a claim on July 11, 1991 alleging that on July 7, 1991 he injured his back in the performance of duty. Appellant did not stop work, performing light duty until October 5, 1991. The Office accepted appellant's claim for somatic dysfunction of the thoracic spine on March 23, 1992. By decision dated March 7, 1994, the Office terminated appellant's compensation benefits finding that he refused suitable work. Appellant requested an oral hearing and by decision dated September 8, 1994, the hearing representative vacated the Office's March 7, 1994 decision and remanded for further development of the medical evidence. By decision dated August 20, 1996, the Office found that appellant had not sustained a recurrence of disability on October 5, 1991 and that he had no medical residuals causally related to his accepted employment injury. Appellant requested an oral hearing. He testified at his oral hearing on May 6, 1997. By decision dated July 11, 1997, the hearing representative affirmed the Office's August 20, 1996 decision finding that appellant had not sustained a recurrence of disability on October 5, 1991 and that appellant did not require further medical treatment after August 20, 1996.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.<sup>1</sup> After it has determined that an employee has disability causally related to his or her federal

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<sup>1</sup> *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.<sup>2</sup> Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.<sup>3</sup> To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.<sup>4</sup>

The Office referred appellant for a second opinion evaluation with Dr. William R. Greenberg, a Board-certified neurologist, who in a report dated April 1, 1996, noted appellant's history of injury and medical history. He performed a physical examination noting that straight leg raising caused no discomfort, no weakness on motor examination and normal sensory examination. Dr. Greenberg diagnosed thoracolumbar strain "solely based upon the subjective complaints." He attributed this condition to appellant's employment injury. Dr. Greenberg recommended a home exercise program and stated, "I would not expect any further hands on therapy would be necessary nor medications." However, Dr. Greenberg also stated, "The expectation would be for occasional myalgias." In a supplemental report dated July 11, 1996, Dr. Greenberg did not address continuing medical treatment.

The burden of proof to terminate appellant's continuing medical benefits rests with the Office. The Office relied solely on the reports of Dr. Greenberg in concluding that appellant had no continuing residuals causally related to his accepted employment injury. The Board finds that Dr. Greenberg's report is not sufficiently well rationalized to meet the Office's burden. Dr. Greenberg initially stated that appellant would not require additional therapy or medications for treatment of his employment injury. He then noted that he would expect that appellant would experience occasional pain related to the injury. Dr. Greenberg did not offer any reasoning for his conclusion that appellant would not require medical treatment for his "occasional myalgias." Without the necessary medical rationale to explain why appellant could be expected to experience additional symptoms, but would not require additional treatment or medications for these symptoms, Dr. Greenberg's report is not sufficient to meet the Office's burden of proof.

The Board further finds that appellant failed to meet his burden of proof in establishing a recurrence of total disability on October 2, 1991 causally related to his July 7, 1991 employment injury.

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establish that he can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he cannot perform such light duty. As part of this burden, the employee must show a

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<sup>2</sup> *Id.*

<sup>3</sup> *Furman G. Peake*, 41 ECAB 361, 364 (1990).

<sup>4</sup> *Id.*

change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.<sup>5</sup>

In this case, appellant did not stop work following his July 7, 1991 employment injury. The employing establishment and appellant agree that he performed light duty until October 2, 1991. On October 4, 1991 the employing establishment issued appellant a letter of discharge during the trial period finding that appellant failed to report for duty on September 28, 1991 as scheduled. Appellant entered a settlement agreement with the employing establishment whereby he withdrew his Equal Employment Opportunity complaint in exchange for resigning effective October 5, 1991, for rescission of the letter of discharge and withdrawal of references to absence without leave. Appellant and the employing establishment agreed that the resignation would be “to pursue career change.” Appellant entered into this agreement on December 21, 1991.

Appellant alleged at his oral hearing that his light-duty position was terminated due to the denial of his claim by the Office. He acknowledged that he was late for work on September 28, 1991 due to his accepted employment injury and that the employing establishment did not accept his medical excuse, instead finding that he was absent without leave for eight hours.

Appellant did not submit any medical evidence to substantiate that he could not perform the light-duty work on or after September 28, 1991. At his oral hearing appellant testified that since the time of his injury he was willing and able to return to light-duty work. Rather appellant has alleged that he was improperly terminated by the employing establishment due to the denial of his claim by the Office and that he was forced to tender his resignation to avoid termination due to the charge of absence without leave.

Section 8102(a) of the Federal Employees’ Compensation Act<sup>6</sup> sets forth the basis upon which an employee is eligible for compensation benefits. That section provides:

“The United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty....”

In general the term “disability” under the Act means “incapacity because of injury in employment to earn the wage[s] which the employee was receiving at the time of such injury.”<sup>7</sup>

Therefore, in order to establish entitlement to compensation, appellant must establish that the termination of his employment was due to his physical inability to perform his assigned duties, rather than unacceptable conduct. The Board has held that an employing establishment’s termination of employment for unacceptable conduct by the employee does not establish

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<sup>5</sup> *Terry R. Hedman*, 38 ECAB 222 (1986).

<sup>6</sup> 5 U.S.C. § 8102(a).

<sup>7</sup> *Maxine J. Sanders*, 46 ECAB 835, 840 (1995).

“disability” for work within the meaning of the Act.<sup>8</sup> Although appellant alleged that he was terminated due to the denial of his claim, he has not submitted evidence in support of this allegation. Furthermore he has not submitted evidence that he was unable to perform the assigned duties of his light-duty position and stated that he could in fact perform those duties. The employing establishment submitted records supporting that appellant was terminated due to his absence without leave. Appellant then resigned to avoid termination of his employment.

The evidence of record does not establish that appellant sustained a recurrence of total disability after October 2, 1991 due to his employment-related injury. Rather the evidence establishes that appellant resigned from his employment to avoid termination due to an absence without leave.

The July 11, 1997 decision of the Office of Workers’ Compensation Programs is hereby affirmed in regard to the finding that appellant has no disability after October 2, 1991 causally related to his accepted employment injury. The July 11, 1997 decision is reversed in regard to the termination of medical benefits.

Dated, Washington, D.C.  
January 20, 2000

Michael J. Walsh  
Chairman

George E. Rivers  
Member

David S. Gerson  
Member

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<sup>8</sup> *John W. Normand*, 39 ECAB 1378, 1381 (1988).