

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES G. BARONE and SOCIAL SECURITY ADMINISTRATION,
Sharon, PA

*Docket No. 99-351; Submitted on the Record;
Issued November 22, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's wage-loss compensation benefits effective October 12, 1997.

The Board has duly reviewed the case record and finds that the Office met its burden of proof to terminate wage-loss compensation benefits.

On February 25, 1991 appellant, then a 44-year-old claims representative, filed a claim for traumatic injury alleging that on February 19, 1991 he twisted his back when he slipped on a patch of water on the floor. The Office accepted his claim for a back strain. On April 8, 1991 appellant returned to work four hours a day, but on September 15, 1993, he sustained a recurrence of disability, which was accepted by the Office and stopped work completely.

On December 13, 1994 the Office referred appellant, together with a statement of accepted facts and a list of questions to be resolved, to Dr. Charles O. Ogunro, a Board-certified neurologist, for a second opinion. In a report dated January 6, 1995, he stated that appellant's neurological examination was within normal limits and that there was no obvious evidence of lumbar radiculopathy. Dr. Ogunro stated that a magnetic resonance imaging scan from 1992 revealed minimal degenerative changes commensurate with age, but that these changes were not expected to be symptomatic and that a herniated disc was not identifiable. He also stated that while an electromyography from 1992 listed a diagnosis of lumbar radiculopathy at L5, the test results contained insufficient criterion to support this diagnosis and further did not appear to have been performed by a physician. Dr. Ogunro opined that appellant might have fibromyalgia, possibly related to his employment injury, which could account for his symptoms. He suggested that further testing could resolve these outstanding issues and that in the absence of further data, it appeared that appellant had reached maximum medical improvement and could perform sedentary work three fourths to full time.

In response to Dr. Ogunro's report, the Office referred appellant to Dr. Ralph Rothenberg, a Board-certified rheumatologist. In a report dated July 13, 1995, he stated that

appellant had clinical signs consistent with lumbar spondylosis and radiologic findings suggestive of a bulging disc at L4-5 as well as nerve involvement at that level. Dr. Rothenberg recommended a myelogram and additional neurological consultations in order to evaluate appellant's back problems in more detail. He added that appellant, by history, had difficulty sitting for any length of time, that bending stooping, lifting and walking would also give him trouble and that he did not expect appellant to return to gainful employment unless his symptoms improved. Dr. Rothenberg did not diagnose fibromyalgia.

The Office determined that the report of Dr. Ogunro was sufficient to create a conflict with the opinion of Dr. Mitchell Felder, a Board-certified neurologist and appellant's treating physician, who continued to advise against appellant's return to work and to require further medical development of the claim.

To resolve the conflict in medical opinion evidence between Drs. Ogunro and Felder, the Office referred appellant, together with a statement of accepted facts and copies of the relevant medical evidence of record, to Dr. David A. Vermeire, a Board-certified orthopedic surgeon. In his report dated March 25, 1996, based on physical examination, patient history and a review of the medical evidence of record, Dr. Vermeire diagnosed mild degenerative disc disease at L4-5, with no evidence of neurological involvement with reference to appellant's lumbar spine. He concluded that appellant was capable of full-time remunerative employment in a light-duty capacity, provided that he was not required to sit in any one position for more than twenty minutes at a time without being able to get up and move around, performed twisting, bending, stooping and reaching less than a third of the time and did not lift over twenty pounds. In supplemental reports dated June 13 and 24, 1996, Dr. Vermeire clarified his opinion, stating that appellant suffered from mild degenerative disc disease at the L4-5 level along with exogenous obesity and deconditioning, that there was no evidence that this preexisting disc disease was in any way aggravated by his work-related back strain and that there was no evidence of any residuals of his employment-related lumbar strain.

In a decision dated August 20, 1996, issued after giving appellant proper notice and an opportunity to respond, the Office terminated appellant's compensation benefits on the grounds that the weight of the medical evidence of record, represented by the well-reasoned report of Dr. Vermeire, established that his employment-related back condition had resolved and that he could return to full-time sedentary employment.

On September 5, 1996 appellant, through counsel, requested a review of the written record by an Office hearing representative. In a decision dated December 11, 1996, an Office hearing representative vacated the August 20, 1996 decision on the grounds that Dr. Ogunro had not offered an opinion as to whether appellant had recovered from residuals of his accepted condition. The hearing representative found a conflict of opinion did not exist between Drs. Felder and Ogunro and, therefore, Dr. Vermeire could not be accorded special weight as an impartial medical examiner. The hearing representative further found, however, that Dr. Vermeire's opinion was sufficient to create a conflict with the opinion of Dr. Felder and to require further medical development of the claim.

To resolve the conflict in medical opinion evidence between Drs. Vermeire and Felder, the Office referred appellant, along with a statement of accepted facts and copies of the relevant

medical evidence of record, to an impartial medical specialist, Dr. Robert O. Sarver, a Board-certified orthopedic surgeon. In his report dated June 4, 1997, based on physical examination, patient history and a review of the medical evidence of record, Dr. Sarver diagnosed chronic low back syndrome and underlying degenerative disc changes L4-5, but with no radicular signs. He noted that despite the assertion by the Office in the statement of accepted facts that appellant has a “long-standing preexisting history of chronic degenerative joint disease, for which he was treating prior to the work injury,” he could find no documentation of such a preexisting condition in the record and, therefore, could not determine definitively whether the bulging disc at L4-5 was present before the February 19, 1991 employment injury. Dr. Sarver further stated that while it could not be denied that appellant’s persistence of symptoms was causally related to the February 19, 1991 incident, his opinion was that appellant had long since plateaued and required no further active treatment. He concluded that based on his examination, appellant was “fully capable of carrying out full work activities at a light to sedentary level and the only codicil being that he be allowed to either work standing up or arise from the seated position as frequently as indicated by his low back symptoms.”

In a decision dated October 7, 1997, issued after appellant was given proper notice and an opportunity to respond, the Office found that the weight of the medical evidence of record, represented by the opinion of Dr. Sarver, established that appellant has no continuing disability for his usual sedentary job as a claims representative, causally related to his previously accepted back condition and thus terminated appellant’s wage-loss compensation benefits. The Office specifically stated that medical expenses related to the accepted condition would continue to be paid.

On October 13, 1997 appellant, through counsel, requested a review of the written record by an Office hearing representative. In a decision dated February 3, 1998, an Office hearing representative affirmed the October 7, 1997 termination of wage-loss compensation benefits decision. On March 13, 1998 appellant, through counsel, requested reconsideration and submitted arguments in support of his request. In a decision dated August 25, 1998, the Office found the arguments raised by appellant to be insufficient to warrant modification of its Office’s prior 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 disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disabling condition has ceased or that it is no longer related to the employment.¹ In terminating wage-loss compensation benefits, the Office relied on the opinion of Dr. Sarver, as the impartial medical examiner, that appellant has no disability for sedentary work causally related to accepted factors of his employment. In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an independent medical examiner for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background must be given special weight.² The Board finds that Dr. Sarver’s opinion is complete and well

¹ *Patricia A. Keller*, 45 ECAB 278 (1993).

² *Kathryn Haggerty*, 45 ECAB 383, 389 (1994); *Jane B. Roanhaus*, 42 ECAB 288 (1990).

rationalized in establishing that appellant's disability for performing his usual sedentary job has ceased. He reviewed appellant's medical history at length, reviewed all the relevant diagnostic tests and performed a physical examination and concluded that while appellant's L4-5 bulging disc may or may not be related to his February 19, 1991 employment injury, he suffers from no conditions which would disable him from performing sedentary work. As the impartial medical examiner, Dr. Sarver's opinion constitutes the weight of the medical evidence. The Office therefore properly relied on his opinion in terminating wage-loss compensation benefits.

The decisions of the Office of Workers' Compensation Programs dated August 25 and February 3, 1998 are hereby affirmed.

Dated, Washington, DC
November 22, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member