

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ELTON L. FLOCH and DEPARTMENT OF INTERIOR,
BONNEVILLE POWER ADMINISTRATION, Portland, OR

*Docket No. 00-1154; Submitted on the Record;
Issued November 16, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated compensation benefits on the basis that appellant had no continuing disability.

This is appellant's second appeal before the Board. In the May 31, 1985 decision, the Board found that the Office properly reduced appellant's compensation based upon his ability to earn wages as a hotel/motel clerk. The relevant facts and circumstances of this case are contained in the Board's May 31, 1985 decision and are hereby incorporated by reference.¹

By letter dated April 7, 1999, the Office referred appellant to Dr. David Henzler, a Board-certified neurologist, for a second opinion regarding the status of appellant's current disability due to his accepted employment injury.

In a May 5, 1999 report, Dr. Henzler diagnosed chronic low back and leg pain with reported hypesthesia of the left foot and passive aggressive behavior disorder with histrionic qualities. Dr. Henzler determined that appellant's low back pain and leg pain were due to his January 1970 employment injury and the two back surgeries. The physician also noted:

“[A]ppellant's initial back pain was initiated by the work incidence 1970 and likely exacerbated by the two subsequent surgeries. It is difficult to describe the biomechanical process in regards to [appellant's] pain at this time other than inflammatory and/or irritative at the time of the injury. However, within a year of his injuries all of these processes should have resolved. There is little 'biomechanical process' at this time that is contributing to his chronic pain. Instead [appellant] has a chronic pain syndrome where there is little, if any, 'biomechanical process' at this time ... however, if the injury had not occurred, [appellant's] pain would not have been a work-related incident. In this case, it is

¹ Docket No. 85-737 (issued May 31, 1985).

likely that the two subsequent surgeries only perpetuated his chronic pain syndrome.”

Regarding the issue of whether appellant’s work-related conditions were disabling, Dr. Henzler opined that the employment-related injury “was only the impetus for his chronic pain syndrome and is at least contributing to the continuing chronic pain syndrome.” Next, he noted that appellant had restrictions of no lifting over 25 pounds infrequently or 10 pounds frequently, no bending, sit for 20 minutes, stand for 10 minutes, walking up to 300 feet at which time appellant would need to rest. Lastly, Dr. Henzler questioned whether the aggravation of appellant’s psychoneurosis had resolved as indicated by the statement of accepted facts.

By letter dated May 17, 1999, the Office referred appellant to Dr. David G. Grubb, a Board-certified psychiatrist, for a second opinion regarding the status of appellant’s current disability due to his accepted employment injury.

In a report dated June 8, 1999, Dr. Grubb diagnosed chronic back pain and concluded that appellant did not have a psychological disorder due to his accepted employment injury. He opined that appellant was capable of working without restrictions as he had no psychiatric disability.

On June 18, 1999 the Office issued a notice of proposed termination of compensation based upon the reports of Drs. Grubb and Henzler that appellant had no residual disability due to his accepted employment injury.

By decision dated September 13, 1999, the Office terminated appellant’s compensation effective September 12, 1999 on the basis that he had no continuing residuals due to his accepted employment injury.

Appellant’s counsel requested reconsideration and submitted a July 29, 1999 magnetic resonance imaging (MRI) scan, an office note by Dr. John K. Shuster and a September 28, 1999 report by Dr. Timothy Moody, an attending physician Board-certified in public health and general preventive medicine, in support of his request.

Dr. Moody noted that he had been treating appellant for his chronic back pain which has limited his activities and noted that a recent test revealed significant abnormalities in the lumbar spine. The physician specifically noted that appellant had “significant spinal stenosis and foraminal stenosis in the lower lumbar region” as well as changes due to his previous back surgeries which he determined was due to the 1970 employment injury. He opined that appellant’s work disability was continuing and precluded him from any gainful employment. In support of this conclusion, Dr. Moody noted that appellant was “unable to sit for any more than 10 to 15 minutes, stand for anything more than 10 to 15 minutes,” was unable to work or lift on uneven surfaces.

By merit decision dated November 8, 1999, the Office denied appellant’s request for modification.

The Board finds that the Office did not meet its burden of proof when it terminated compensation benefits on the basis that appellant had no continuing disability

Once the Office accepts a claim, it has the burden 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 based its termination of appellant's compensation benefits on the May 5, 1999 report from the second opinion Board-certified neurologist, Dr. Henzler, who concluded that appellant had chronic pain syndrome resulting from his accepted employment injury and indicated appellant was capable of working with restrictions on lifting, standing and the June 8, 1999 report from the second opinion Board-certified psychiatrist, Dr. Grubb, who concluded that appellant had no psychiatric disability due to his accepted employment injury.

The Board finds that Dr. Henzler's conclusions regarding the issue of whether appellant's disability has ceased are not sufficient to meet the Office's burden of proof to terminate appellant's compensation benefits. He concluded that appellant's employment injury was "the impetus" for his chronic pain syndrome and that if appellant had not had the accident he would not have the pain. Furthermore, as he opined that appellant's chronic pain syndrome was employment related, the opinion fails to support that appellant's residuals from his employment injury had resolved. In addition, Dr. Moody concluded that appellant's work disability was continuing and precluded him from any gainful employment as appellant was "unable to sit for any more than 10 to 15 minutes, stand for anything more than 10 to 15 minutes," was unable to work or lift on uneven surfaces.

As the Office failed to base its decision to terminate appellant's compensation benefits upon a sufficiently well-rationalized report, it failed to meet its burden of proof.

² *Lynda J. Olson*, 52 ECAB ____ (Docket No. 00-2085, issued July 11, 2001).

³ *Winton A. Miller*, 52 ECAB ____ (Docket No. 99-2559, issued June 19, 2001).

The decisions of the Office of Workers' Compensation Programs dated November 8 and September 13, 1999 are hereby reversed.

Dated, Washington, DC
November 16, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member