

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THOMAS L. GILLER and DEPARTMENT OF THE ARMY,
CORP OF ENGINEERS, St. Louis, MO

*Docket No. 02-1418; Submitted on the Record;
Issued January 2, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits.

Appellant, 43-year old lock and dam operator, injured his lower back on June 28, 1988 while pulling on some wire. He filed a claim for benefits, which the Office accepted for a lumbosacral strain. Appellant returned to work on light duty on July 31, 1989, but stopped work on September 5, 1989. He has not returned to work since that date. The Office paid appropriate compensation for temporary total disability.

In a report dated March 15, 1993, Dr. Maurice H. Miller, appellant's treating physician and a specialist in orthopedic surgery, stated that appellant's low back complaints were causally related to his employment-related lumbar strain injury. He stated that appellant had post-traumatic degenerative joint disease and intractable, chronic pain in the cervical and lumbosacral spine. Dr. Miller advised that appellant had permanent restrictions and opined that he did not anticipate appellant would be able to return to work at any point in the future.

In order to determine whether appellant continued to suffer residuals from his accepted lumbar strain injury, the Office referred appellant for a second opinion examination with Dr. Donald H. Brancato, a Board-certified orthopedic surgeon.

In a report dated February 26, 1998, Dr. Brancato advised that, although appellant was not fit to return to work as a dock hand, he could perform other types of work which did not require bending, squatting, lifting and kneeling. In a supplemental report dated June 4, 1998, Dr. Brancato stated that appellant should have adequately recovered from the type of injury he sustained in 1988 in a maximum of three months' time and that he was in fact completely recovered from his 1988 employment injury.

In follow-up reports dated January through October 1998, Dr. Miller essentially reiterated his previous findings and conclusions.

The Office determined that there was a conflict in the medical evidence and referred appellant to Dr. David B. Robson, a Board-certified orthopedic surgeon for an impartial examination to resolve the conflict.

In a report dated December 3, 1998, Dr. Robson, after reviewing the medical records and the statement of accepted facts, stated findings on examination and found that appellant likely had a lumbar strain superimposed on some degenerative back disease which should have resolved. He stated that, while appellant had some permanent restrictions resulting from his lumbar strain injury and from degenerative changes in his spine, there was no way this type of injury, based on the objective evidence of record, should leave him permanently disabled.

In a letter of proposed termination dated May 24, 2001, the Office found that Dr. Robson's impartial opinion finding that appellant's 1988 work injury had resolved and that he no longer was disabled represented the weight of the medical evidence. The Office gave appellant 30 days to submit additional medical evidence or legal argument to contest the proposed termination. Appellant did not respond within 30 days.

By decision dated June 25, 2001, the Office terminated appellant's compensation, finding that Dr. Robson's opinion represented the weight of the medical evidence.

By letter dated July 16, 2001, appellant's attorney requested an oral hearing, which was held on October 30, 2001. Appellant submitted an October 29, 2001 report from Dr. Miller and an October 31, 2002 report from Dr. Ronald T. Althardt, a chiropractor.¹ In his report, Dr. Miller stated:

“[Appellant] remains disabled arising from complaints in his [lumbosacral] spine. He received two pain management injections today in the region of both sacroiliac joints. [Appellant] is to return for follow up in two weeks. There is no change since my first evaluation [of] September 27, 1992.”

By decision dated March 21, 2002, an Office hearing representative affirmed the June 25, 2001 termination decision.

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits.

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.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

¹ Dr. Althardt did not state that he provided manual manipulation of the spine based on subluxation shown by x-rays; thus, his report does not constitute medical evidence pursuant to section 8101(2).

² *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

³ *Id.*

In this case, the Office based its decision to terminate appellant's compensation on the December 3, 1998 report of Dr. Robson, the independent medical examiner. In his impartial medical opinion, Dr. Robson stated that appellant's 1988 lumbar injury should have resolved and advised that he had no permanent disability stemming from his employment injury. He opined that objective evidence, including diagnostic tests appellant underwent such as his January and October 1998 magnetic resonance imaging [MRI] scans, indicated that aside from degenerative changes in his spine he had no permanent residuals from the 1988 employment injury. The Office relied on Dr. Robson's opinion in its June 25, 2001 termination decision, finding that all residual disability stemming from his accepted lumbar strain had ceased and that appellant currently suffered from no condition or disability causally related to his accepted 1988 employment injury.

The Board holds that Dr. Robson's impartial opinion negating a causal relationship between appellant's claimed current condition and disability and his accepted lumbar strain injury and that he no longer had any residuals from his employment injuries was sufficiently probative, rationalized and based upon a proper factual background and that, therefore, Dr. Robson's opinion contains the weight of the evidence.⁴ Accordingly, the Board finds that Dr. Robson's opinion contains sufficient medical rationale to support the Office's June 25, 2001 decision terminating appellant's compensation.

Following the Office's termination of compensation, the burden of proof in this case shifted to appellant, who requested a hearing and submitted Dr. Miller's October 29, 2001 report. This report, however, did not contain countervailing, probative medical evidence that appellant continued to have residual disability from his accepted lumbar strain injury. Dr. Miller stated that appellant remained disabled due to complaints of pain in his lumbosacral spine and advised that there was no change in his condition since September 27, 1992, the date of his initial evaluation. However, this opinion, stated in summary form, was merely a restatement of one side of the conflict which was resolved by Dr. Robson. Thus, Dr. Miller's report did not satisfy appellant's burden of proof to submit medical evidence sufficient to warrant modification of the Office's June 25, 2001 termination decision. Dr. Miller's additional report is, therefore, insufficient to overcome the special weight accorded to the impartial medical specialist's report or to create a new conflict.⁵

⁴ Gary R. Seiber, 46 ECAB 215 (1994).

⁵ Virginia Davis-Banks, 44 ECAB 389 (1993).

The decisions of the Office of Workers' Compensation Programs dated March 21, 2002 and June 25, 2001 are hereby affirmed.

Dated, Washington, DC
January 2, 2003

Alec J. Koromilas
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member