

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARVIN N. READ and U.S. POSTAL SERVICE,
POST OFFICE, Oakland, CA

*Docket No. 03-1128; Submitted on the Record;
Issued July 1, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate compensation effective August 24, 2002; and (2) whether appellant had disability after August 24, 2002 due to his December 3, 2001 employment injury.

On December 3, 2001 appellant, then a 48-year-old clerk, sustained right shoulder derangement and aggravation of lower and upper back derangement when he caught a falling coworker. He received compensation for periods of disability. By decision dated August 20, 2002, the Office terminated appellant's compensation effective August 24, 2002 on the grounds that he had no disability after that date, due to his December 3, 2001 employment injury. The Office based its termination of appellant's compensation on a June 4, 2002 report of Dr. Jerrold M. Sherman, a Board-certified orthopedic surgeon, who served as an Office referral physician.

In September 2002, appellant submitted an August 14, 2002 report, in which Dr. Ernest L. Bonner, an attending Board-certified orthopedic surgeon, indicated that he continued to have residuals of his December 3, 2001 employment injury. He diagnosed right shoulder derangement and aggravation of lower and upper back derangement secondary to the December 3, 2001 injury.¹ The Office determined that there was a conflict in the medical opinion between Dr. Bonner and Dr. Sherman regarding whether appellant continued to have residuals of his December 3, 2001 employment injury and referred him to Dr. John W. Batcheller, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the matter. In a report dated November 18, 2002, Dr. Batcheller determined that appellant no longer had any residuals of his December 3, 2001 employment injury and indicated that he could return to his regular work for the employing establishment without restrictions.

¹ Dr. Sherman indicated that appellant had right shoulder atrophy and limited motion of his back and right shoulder.

By decision dated December 27, 2002, the Office determined that appellant had not shown that he had disability after August 24, 2002 due to his December 3, 2001 employment injury. The Office found that the weight of the medical evidence regarding this matter rested with the well-rationalized opinion of the impartial medical specialist, Dr. Batcheller.

The Board finds that appellant did not have disability after August 24, 2002 due to his December 3, 2001 employment injury.

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.² The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.³ After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that he had an employment-related disability, which continued after termination of compensation benefits.⁴

The Board finds that the weight of the medical evidence regarding the Office's termination of appellant's compensation is represented by the thorough, well-rationalized opinion of Dr. Sherman, who served as an Office referral physician.

In his June 4, 2002 report, Dr. Sherman indicated that he had reviewed the medical evidence of record, including a magnetic resonance imaging (MRI) scan of the right shoulder and noted that appellant complained of right shoulder and upper and lower back pain. He indicated that, on examination, when he was distracted, appellant exhibited 100 percent range of motion on the back and right shoulder.⁵ Dr. Sherman stated that appellant exhibited no back spasms or wasting of his extremities. He diagnosed "complaints of right shoulder pain with neurologic or mechanical deficit" and "complaints of upper and lower back pain with neurologic or mechanical deficit." Dr. Sherman indicated that there were no abnormalities of appellant's right shoulder or back, which would substantiate his subjective complaints of right shoulder and back pain. He determined that appellant had no residuals of his December 3, 2001 employment injury and indicated that he could return to his regular work.

The Board has carefully reviewed the opinion of Dr. Sherman and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. He had the benefit of an accurate and up-to-date statement of accepted facts and provided an accurate factual and medical history.⁶ Dr. Sherman provided

² *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

³ *Id.*

⁴ *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

⁵ Dr. Sherman noted, however, that, when attention was drawn to appellant's back, he exhibited some limitation of motion.

⁶ *See Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

medical rationale for his opinion by explaining that appellant did not exhibit any objective findings which would support his subjective complaints of right shoulder and back pain. He indicated that appellant no longer exhibited any sign of his December 3, 2001 employment injury, right shoulder derangement and aggravation of lower and upper back derangement.⁷

After the Office's August 20, 2002 decision terminating appellant's compensation effective August 24, 2002, appellant submitted an August 14, 2002 report of Dr. Bonner, which indicated that he continued to have residuals of his December 3, 2001 employment injury. Given that the Board has found that the Office properly relied on the opinion of Dr. Sherman in terminating appellant's compensation effective August 24, 2002, the burden shifted to appellant to establish that he is entitled to compensation after that date.

The Office determined that there was a conflict in the medical opinion between Dr. Bonner and the government's physician, Dr. Sherman, regarding whether appellant continued to have residuals of the December 3, 2001 employment injury. In order to resolve the conflict, the Office properly referred appellant, pursuant to section 8123(a) of the Federal Employees' Compensation Act, to Dr. Batcheller, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the matter.⁸

In situations where there exist 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.⁹

In a report dated November 18, 2002, Dr. Batcheller provided a discussion of appellant's factual and medical history and recorded, he complained of right shoulder and back pain. He indicated that appellant was able to fully squat and return to the erect position without restriction or complaint and noted that he had no limitation of right shoulder motion. Dr. Batcheller stated that there was no effusion, crepitation or complaint or pain upon motion of appellant's right shoulder. He noted that the December 3, 2001 injury to appellant's right shoulder and back was "relatively trivial" and would have resolved many months ago. Dr. Batcheller indicated that an MRI study taken of appellant's right shoulder would not substantiate his pain complaints as it showed results that were "essentially benign." He indicated that appellant did not exhibit objective evidence on examination which would substantiate his pain complaints¹⁰ and

⁷ Moreover, he noted that appellant exhibited inconsistencies upon examination which could not be objectively explained. The record contains other reports regarding appellant's shoulder and back condition including a March 21, 2002 report of Dr. Bonner, an attending Board-certified orthopedic surgeon, and May 8 and July 22, 2002 reports of Dr. Robert A. Eppley, an attending Board-certified orthopedic surgeon. However, these reports do not contain any opinion on the cause of appellant's condition.

⁸ Section 8123(a) of the Act provides in pertinent part: "If there is 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 U.S.C. § 8123(a).

⁹ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

¹⁰ He indicated that he had "some problem" with the fact that appellant's pain complaints stayed constant despite having been off work for several months.

determined that he no longer had residuals of the December 3, 2001 injury and could return to his regular work for the employing establishment without restrictions.

The Board finds that the opinion of Dr. Batcheller constitutes the weight of the medical evidence regarding whether appellant had disability after August 24, 2002, due to his December 3, 2001 employment injury. In his report, Dr. Batcheller provided a thorough factual and medical history, accurately summarized the relevant medical evidence and provided medical rationale supporting his opinion on causal relationship. He provided medical rationale for his opinion by explaining that appellant did not exhibit any objective signs of his December 3, 2001 employment injury. Dr. Batcheller indicated that neither the findings on examination nor diagnostic testing showed a continuing employment-related condition of appellant's right shoulder or back. He further explained that appellant's December 3, 2001 injury was of such a minor nature that it would have long since resolved.

For these reasons, appellant did not show that he had disability after August 24, 2002, due to his December 3, 2001 employment injury.

The decisions of the Office of Workers' Compensation Programs dated December 27 and August 20, 2002 are affirmed.

Dated, Washington, DC
July 1, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member