

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**MARTY W. HOWSER, Appellant**

**and**

**DEPARTMENT OF AGRICULTURE,  
AGRICULTURAL MARKETING SERVICE,  
TOBACCO PROGRAMS, Maysville, KY,  
Employer**

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**Docket No. 04-1719  
Issued: January 4, 2005**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Member  
DAVID S. GERSON, Alternate Member  
WILLIE T.C. THOMAS, Alternate Member

**JURISDICTION**

On June 29, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated May 28, 2004, in which an Office hearing representative affirmed the Office's decision to terminate appellant's compensation benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether the Office met its burden of proof to terminate appellant's compensation benefits effective July 23, 2003.

**FACTUAL HISTORY**

On January 15, 2001 appellant, then a 39-year-old supervisory tobacco grader, filed a traumatic injury claim alleging that on January 12, 2001 he sustained an injury to his lower back

and pain in both legs while pulling tobacco from a bale. Appellant stopped work on the date of injury. The Office accepted the claim for a lumbosacral strain and paid appropriate benefits.

An emergency room physician stated in a January 12, 2001 report that magnetic resonance imaging (MRI) scans that day revealed herniated discs at L4-5 and L5-S1. The physician diagnosed appellant with mechanical low back pain.<sup>1</sup> In a report dated January 16, 2001, Dr. Todd W. Williams, appellant's treating physician and a Board-certified family practitioner, stated that appellant related a back injury about six years earlier and that his severe back pain has progressed since that time. An MRI scan showed significant abnormalities. Upon examination he noted a tender back in the rhomboid area bilaterally and the lumbar region. Strength and reflexes of the lower extremity were diminished noting that pain was compromised by the examination. Dr. Williams also noted a very tender right knee. He diagnosed obesity, chronic back pain with radiculopathy and upper and mid-back pain and knee pain. Dr. Williams recommended an MRI scan and a follow-up appointment in three weeks. He placed appellant off work for three weeks. In a January 31, 2001 report, Dr. Williams indicated that appellant's back injury was employment related.<sup>2</sup>

Appellant underwent a series of MRI scans on March 8, 2001 which revealed the degenerative disc disease at T6-11, L1-2, L2-3, L4-5 and L5-S1, stenosis at L3-4 and L4-5, disc protrusion resulting in encroachment at L5-S1 and bilateral facet arthropathy at L5-S1.

In a May 29, 2001 report, Dr. Williams stated that he had examined appellant on January 16, 2001 and that he had been off work since that time due to persistent, severe back pain. He noted that MRI scans revealed degenerative disc disease and stenosis at L4-5 and stenosis and disc protrusion at L5-S1. Dr. Williams noted that appellant's range of motion was compromised and that he remained totally disabled from work.

In a June 21, 2001 report, Dr. Williams stated that appellant's work restrictions were permanent and that he was a good candidate for vocational rehabilitation. On August 7, 2001 Dr. Williams noted that appellant remained symptomatic with back strain, disc disease and pain and estimated that he could return to duty on October 7, 2001. In a report of telephone conversation dated March 7, 2002, the Office noted that appellant filed for disability retirement and was accepted through the Office of Personnel Management (OPM) effective August 13, 2001. Appellant elected compensation benefits effective August 26, 2001.<sup>3</sup>

On April 2, 2002 the Office referred appellant, his medical records, a statement of accepted facts and a list of specific questions to Dr. Richard Sheridan, a Board-certified

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<sup>1</sup> The physician's name is illegible.

<sup>2</sup> Dr. Williams actually attributed appellant's condition to an employment injury of about six years prior. The record indicates that had an accepted lumbar sprain/strain in 1992 in claim number 060553280 and an injury in 1995 that was accepted for low back strain, left lateral disc herniation, and nerve root impingement at L5-S1, claim number 060609275. These other claims are not before the Board in the present appeal.

<sup>3</sup> At his hearing, appellant noted that he elected disability retirement through OPM after his compensation benefits were terminated in 2003.

orthopedic surgeon, for a second opinion evaluation to determine whether he had medical residuals of his January 1, 2001 work-related lumbosacral strain.

In a report dated April 15, 2002, Dr. Sheridan stated that he had performed a physical examination of appellant on that day and reported findings. He stated that appellant's left lateral disc protrusion at L5-S1 with no nerve root impingement occurred on August 4, 1994 which was noted in his prior report dated June 5, 2000.<sup>4</sup> With respect to the lumbar spine, Dr. Sheridan stated that appellant had no abnormal rotation or flexion, there was no lumbar scoliosis, kyphosis pelvic obliquity or iliac crest asymmetry. He noted no lumbar paravertebral spasm. Dr. Sheridan noted a positive Waddell's sign on rotation, and observed that appellant got onto and off the examination table independently. Sciatica and sacroiliitis tests were negative on both sides. Testing for hip joint pathology on either side was negative. Appellant had full range of motion of both hips with no objective evidence of any condition. He also had full range of motion on both knees, with no deformity and stable ligamentation. Dr. Sheridan noted that the lower extremity motor groups were normal with no evidence of alopecia or edema. He reviewed the March 8, 2001 MRI scan noting that it revealed mild central canal spinal stenosis and mild disc degeneration at L4-5 and L5-S1, and a left lateral disc protrusion at L5-S1 resulting in mild to moderate encroachment upon the left neural foramen. Dr. Sheridan opined that the L5-S1 disc protrusion occurred in a prior August 4, 1994 injury which he noted he had addressed in a June 5, 2000 report. He added that the January 12, 2001 work-related lumbosacral strain had resolved. Dr. Sheridan concluded that appellant had no objective physical findings but noted some pain symptom magnification over the lumbar spine and along the left lower extremity from the knee. He also noted a positive Waddell's sign on rotation. Dr. Sheridan advised that appellant could return to his regular job as a supervisor tobacco grader with no limitations.

On May 24, 2002 Dr. Williams stated that appellant had an active "workers' comp[ensation]" claim that he remained symptomatic with severe back pain and was unable to perform his previous work duties. He noted that appellant was unable to stand or sit for an extended period, and could not squat, bend or lift without severe pain. Dr. Williams stated that appellant's MRI scans revealed abnormalities consistent with L5 nerve root involvement and that his physical examination was consistent with this finding. He noted his disagreement with the second opinion physician who found that appellant could return to work.

On June 17, 2002 the Office sent appellant a notice of proposed termination of compensation benefits on the grounds that his work-related lumbosacral strain had resolved.

By decision dated July 23, 2003, the Office terminated appellant's compensation benefits effective that day. The Office stated that the opinion of Dr. Sheridan, the second opinion physician, demonstrated that appellant had no medical residuals from his accepted work injury of January 12, 2001.

In a report dated July 2, 2003 and received by the Office on July 31, 2003, Dr. Williams noted his disagreement with Dr. Sheridan, noting that appellant's persistent, severe low back problems had not resolved. In a report dated that same day, Dr. Williams stated that he examined appellant and provided findings. He stated that appellant remained symptomatic with

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<sup>4</sup> This apparently was in reference to a prior claim not presently before the Board. *See supra* note 2.

low back pain, bilateral leg numbness, generalized leg weakness and pain with a burning radiculopathy on the left down to his foot. Dr. Williams repeated his previous reports with respect to appellant's central canal stenosis and disc generation at L4-5 and L5-S1 disc protrusion. He also noted appellant's low back osteoarthritis as well as his work-related lumbar strain. Upon examination he noted that appellant's back was tender bilaterally and in the lumbar region diffusely. Appellant had no knee jerk on the right, a plus one knee jerk on the left, no ankle jerk of either ankle and normal lower extremity sensation and blood flow. Dr. Williams noted that appellant was unable to walk on his toes but that he could walk on his heels. Quadriceps and hamstring strength was diminished bilaterally and a significant diminished range of motion in flexion, hyperextension, and bending and twisting of the back was noted.

On August 15, 2003 appellant requested an oral hearing which was held on April 2, 2004. By decision dated May 28, 2004, the hearing representative affirmed the Office's July 23, 2003 decision terminating appellant's benefits.

### **LEGAL PRECEDENT**

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.<sup>5</sup> 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.<sup>6</sup> In this case, the Office accepted that appellant sustained work-related lumbosacral and cervical strain on May 2, 1985. The Office, therefore, has the burden of proof to establish that these conditions have ceased.

### **ANALYSIS**

The Office accepted that appellant sustained a lumbosacral sprain and strain and paid appropriate medical benefits and compensation for disability. The Office subsequently referred him to Dr. Sheridan<sup>7</sup> for a second opinion evaluation. He noted appellant's history, reported findings and concluded that appellant's accepted condition had resolved.

On the other hand, appellant's physician, Dr. Williams submitted numerous reports indicating that appellant remained disabled due to his employment injury.

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<sup>5</sup> *Jorge E. Sotomayer*, 54 ECAB 105 (2000).

<sup>6</sup> *Mary E. Lowe*, 52 ECAB 223 (2001).

<sup>7</sup> At the hearing, appellant's counsel asserted that Dr. Sheridan was selected to resolve a medical conflict and that his selection was improper as he previously examined appellant in relation to a prior claim. However, Office records establish that Dr. Sheridan was selected to perform a second opinion evaluation. The Board notes that the procedures for referral examinations do not contain the same strictures as those for impartial medical examinations, which prohibit a physician from serving as an impartial medical specialist if he or she has previously examined an employee. See generally Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapters 3.500.3 and 3.500.4 (March 1994 and May 2003); see also *Harold Burkes*, 42 ECAB 199, 203 (1990) (the Board has not extended the proscriptions, regarding referrals to impartial medical examiners, to Office referral physicians).

Section 8123 of the Act<sup>8</sup> provides that, if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician to resolve the conflict.<sup>9</sup>

In this case, there is a conflict between the second opinion physician, Dr. Sheridan, who found that appellant had no residuals of his employment injury, and appellant's attending physician, Dr. Williams, who stated that appellant remained symptomatic with back pain caused, in part, by his employment injuries. As an unresolved medical conflict existed at the time the Office terminated benefits, the Office did not meet its burden of proof in terminating benefits.

### **CONCLUSION**

In this case, the Office did not meet its burden of proof to terminate compensation and medical benefits because there exists a conflict in medical opinion evidence.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 28, 2004 is reversed.

Issued: January 4, 2005  
Washington, DC

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

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<sup>8</sup> 5 U.S.C. §§ 8101-8193.

<sup>9</sup> *Brenda C. McQuiston*, 54 ECAB \_\_\_\_ (Docket No. 03-1725, issued September 22, 2003); *Shirley L. Steib*, 46 ECAB 309 (1994).