

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

JAMES D. THORNTONA, Appellant

and

**DEPARTMENT OF THE AIR FORCE,
McCLELLAN AIR FORCE BASE, CA,
Employer**

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**Docket No. 05-606
Issued: September 14, 2005**

Appearances:
James D. Thornton, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 12, 2005 appellant filed a timely appeal of an October 14, 2004 merit decision of a hearing representative of the Office of Workers' Compensation Programs that affirmed the termination of his compensation effective January 27, 2004. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether appellant's disability related to his April 1, 1987 employment injury ceased by January 27, 2004.

FACTUAL HISTORY

On April 1, 1987 appellant, then a 40-year-old sealant worker, filed a claim for compensation for a traumatic injury to his low back sustained on that date by mixing sealant for three hours. He stopped work on April 1, 1987 and received continuation of pay from April 2 to

May 16, 1987, after which the Office began paying compensation for temporary total disability. The injury was accepted for a lumbar strain.

In an April 8, 1987 report, Dr. Frank G. Harper, who first examined appellant on April 2, 1987 diagnosed low back syndrome and radiculitis and prescribed muscle relaxants and heat treatments. On May 13, 1987 he prescribed daily physical therapy.

On August 12, 1987 Dr. Stephen I. Mann, a Board-certified physiatrist, performed an electromyogram (EMG) of the bilateral lower extremities and the bilateral paralumbar muscles and a nerve conduction study of the left common peroneal nerve and reported that both tests were normal. Dr. Julian B. Holt, a Board-certified radiologist, reported that a computerized tomography (CT) scan of appellant's lumbar spine on September 8, 1987 showed no herniated disc or spinal stenosis in the lower lumbar spine and extensive facet hypertrophy in the upper lumbar spine especially at L2-3 and L3-4, with no herniated disc but some narrowing of the spinal canal, which was "thought to probably be on the basis of congenital variation." On December 8, 1987 Dr. Holt performed a lumbar myelogram, which showed moderate bulging at L3-4 that was particularly notable on the upright film, slight anterior displacement of L3 in relationship to L4, nerve roots at L3-4 bilaterally that were "somewhat impinged by the centrally herniated disc" and some bulging of the L2-3 disc, though not nearly as marked as at L3-4, with some posterior impression on the thecal sac. Dr. Holt concluded that these findings correlated with those on the September 8, 1987 CT scan. In a January 8, 1988 report, Dr. Edward O. Gammel, a neurosurgeon to whom Dr. Harper referred appellant, stated that review of the myelogram showed a central bulging disc at L3-4, which was quite pronounced in the upright position and essentially resolved in the supine position, which helped to correlate why the CT scan was essentially negative in the supine position. Dr. Gammel stated that appellant was unable to work, that the risks of surgery were discussed with him and that he elected conservative treatment. In April 13 and October 21, 1988 reports, he diagnosed a herniated disc at L3-4.

On June 26, 1989 the Office referred appellant, his medical records and a history of the April 1, 1987 injury to Dr. Eric E. Bugna, a Board-certified orthopedic surgeon, for a second opinion on his condition and its relationship to his work injury. In a September 1, 1989 report Dr. Bugna, after reviewing the medical records, including the diagnostic testing, diagnosed lumbosacral spine pain and lower extremity pain and paresthesias secondary to spondylolisthesis at L3-4, with concomitant intervertebral disc injury at L3-4. He concluded that appellant continued to experience residuals of his April 1, 1987 injury and that his present symptomatology was related to factors of employment by direct cause and by acceleration, explaining that the bony abnormality of spondylolisthesis was in all probability an underlying abnormality not related to his work activities, but that the intervertebral disc abnormality was "felt quite likely due to [appellant's] work activities which require repetitive bending, pulling, pushing, etc."

On May 30, 1990 Dr. Mann performed another EMG of the muscles of appellant's lower extremities and his paraspinal muscles from L3 to the sacrum and stated that the only abnormality was slight prolongation for the sural sensory distal latencies bilaterally. On March 11, 1993 the employing establishment proposed to separate appellant for disability. In a November 29, 1993 report, Dr. Mann diagnosed chronic low back pain with a pars defect and

spondylolisthesis; stated that this condition was permanent and stationary; and limited appellant to lifting no more than 10 pounds. In a December 7, 1993 letter requesting further information, the Office advised Dr. Mann that the accepted condition was low back strain and L3-4 concomitant intervertebral disc. In his February 7, 1994 reply, Dr. Mann diagnosed spondylolisthesis with disc injury.

On December 19, 1996 the Office referred appellant, his medical records and a statement of accepted facts to Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon, for a second opinion on his condition and its relationship to his employment injury. In a February 25, 1997 report, Dr. Swartz, after reviewing appellant's medical reports and describing his complaints, stated that on examination he was unable to obtain any motion whatsoever in the lumbar spine. Appellant claimed marked tenderness with light palpation to the upper and midlumbar spine, there were stocking hypesthesias in both lower extremities and no neurologic findings. He stated that the physical examination would not be considered valid or objective as there appeared to be a great deal of embellishment and exaggeration in appellant's responses. He stated that appellant appeared to be capable of performing his usual and customary job. Dr. Swartz diagnosed chronic spondylolisthesis and chronic multiple level degenerative disc disease of the lumbar spine and stated that whether these conditions were medically connected to his work injury remained to be seen, as appellant was involved in at least four motor vehicle accidents for which he needed the records of treatment to further address causation. On March 16, 1998 the Office advised appellant that it needed reports of treatment for his motor vehicle accidents.

On March 30, 1998 the Office referred appellant, the case record and a statement of accepted facts to Dr. Ernest B. Miller, a Board-certified orthopedic surgeon, to resolve a conflict of medical opinion between Dr. Swartz, who stated that he could perform his regular work and Dr. Mann, who stated that he had injury-related limitations. In a July 28, 1998 report, Dr. Miller reviewed appellant's medical history, stating that his myelogram demonstrated no evidence of disc herniation and that there was no recommendation for surgery by Dr. Gammel or any neurosurgeon. On examination appellant's cane was not used for ambulation, his range of motion was variable and his description of the numbness of his legs was nonanatomic. Dr. Miller concluded that appellant sustained an acute lumbosacral strain on April 1, 1987; that this condition had completely resolved; and that the studies used to make other diagnoses including a herniated disc were equivocal at best and demonstrated what appeared to be age, weight and sex appropriate degenerative changes of the lumbar spine. He stated that his exaggerated symptoms and complaints had been proven by multiple electric diagnostic studies to be nonphysiologic and nonanatomic; and that the normal diagnostic studies and the objective inconsistencies on physical examination justified a diagnosis of malingering. Dr. Miller completed a work tolerance limitations form indicating appellant had no limitations for work.

On July 9, 2003 the Office issued a notice of proposed termination of compensation on the basis that appellant had no ongoing disability because of his April 1, 1987 employment injury. He submitted an August 4, 2003 report from Dr. Bernard B. McGinity, a Board-certified family practitioner, who stated that he had treated appellant for pain since 1995 with medication, massage and acupuncture and that he was not a malingerer. The Office determined that a more current medical examination was the best course of action, as Dr. Miller's report was over five years old.

On September 19, 2003 the Office referred appellant, the case record and a statement of accepted facts to Dr. Arthur M. Auerbach, a Board-certified orthopedic surgeon, to resolve the conflict of medical opinion regarding whether he had recovered from his April 1, 1987 employment injury or still had disabling residuals. In an October 14, 2003 report, Dr. Auerbach set forth the history of appellant's April 1, 1987 injury and of motor vehicle accidents in December 1987, February 1988 and February 1992 and noted that a review of medical records revealed that he most probably aggravated his low back in the 1987 and 1988 accidents and increased his low back pain in the 1991 accident. He noted that the statement of accepted facts indicated that each of these accidents temporarily aggravated appellant's low back condition, but that appellant stated that he did not aggravate or injure his low back in the December 1987, February 1988 and April 1991 accidents and that there was no February 1992 motor vehicle accident. Examination revealed no knee or ankle deep tendon reflexes on the right, decreased sensation over both thighs, good muscle strength in the lower extremities against resistance, no atrophy and diffuse tenderness to touch in the low lumbar spine. Dr. Auerbach stated that appellant had preexisting spondylolisthesis and pars defects "with subsequent aggravation in multiple automobile accidents and development of a combination of traumatic and degenerative disc disease in the lumbar spine with a probable degree of neurogenic claudication from the back into the lower extremities as the years went on" and that the degenerative disc disease, spinal stenosis and clinical neurogenic claudication had "nothing to do with the self-limiting low back strain of April 1, 1987 from which he has recovered. He has no impairment and disability left from the lumbar strain related to the specific injury at work on April 1, 1987." Dr. Auerbach concluded:

"[Appellant's] present impairment and disability of the low back into the lower extremities is considerable and is entirely related to the nonindustrial motor vehicle accidents and the natural predisposition for the development of degenerative disease in the low back in a 57-year-old gentleman. At the present time, secondary to his nonindustrial degenerative disease and motor vehicle accident aggravation sequelae, he has a present impairment and disability that would limit his ability to sit, stand, walk and lift."

Appellant also concluded that any need for treatment was unrelated to the resolved back strain.

On December 16, 2003 the Office issued a notice of proposed termination of compensation on the basis that he had fully recovered from his April 1, 1987 employment injury. In a January 15, 2004 letter, appellant stated that no automobile accident had any effect on his job injury and that he had never claimed any back injuries in reference to any automobile accidents. He contended that the April 1, 1987 employment injury resulted in his bulging discs. Appellant submitted a November 21, 2003 report from Dr. McGinity stating that he was treating him for the findings seen on the magnetic resonance imaging (MRI) scan and an October 17, 2003 report from Dr. Mann diagnosing chronic back pain, discogenic. He stated that the diagnosis of lumbar strain made no sense as lumbar strains were symptomatic for at most a month or two and appellant had complaints of pain for more than 10 years.

By decision dated January 27, 2004, the Office terminated appellant's compensation on that date on the basis that the medical evidence showed that the findings of the lumbar spine

were not the result of the April 1, 1987 employment injury. He requested a hearing, at which he testified that the only treatment he underwent for his motor vehicle accidents was to his knee in 1991 and his finger in 1992. Appellant submitted medical reports regarding a May 1985 low back strain sustained at work and a September 16, 2004 report from Dr. McGinity stating that he was permanently disabled, with the disability verified by MRI scan, CT scan and myelogram.

By decision dated October 14, 2004, an Office hearing representative found that the report of Dr. Auerbach constituted the weight of the medical evidence and established that appellant recovered without residuals from the low back strain caused by the April 1, 1987 employment injury.

LEGAL PRECEDENT

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 disability has ceased or that it is no longer related to the employment.¹ The Board has held that when a case is referred to an impartial medical specialist for the purpose of resolving a conflict in medical opinion evidence, the opinion of such specialist, if sufficiently well rationalized and based on a proper medical background, must be given special weight.² The Board has also held that in a situation where the Office secures an opinion from an impartial medical specialist and the opinion from such specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original report.³

ANALYSIS

There was a conflict of medical opinion on appellant's ability to work. Drs. Swartz and Miller, who examined appellant upon referral by the Office, concluded, respectively, that it appeared that appellant could perform his regular work and that he had no limitations for work. Dr. Gammel and Dr. McGinity, appellant's attending physicians, consistently maintained that appellant was disabled for his regular work.

To resolve this conflict of medical opinion on appellant's ability to work, the Office, pursuant to section 8123(a) of the Federal Employees' Compensation Act,⁴ referred appellant to Dr. Auerbach, a Board-certified orthopedic surgeon. In an October 14, 2003 report, he concluded that appellant had considerable disability and impairment of the low back into the lower extremities, but that this was entirely related to his nonwork motor vehicle accidents and the

¹ *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

² *James P. Roberts*, 31 ECAB 1010 (1980).

³ *Harold Travis*, 30 ECAB 1071 (1979).

⁴ 5 U.S.C. § 8123(a) states 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."

natural predisposition for development of degenerative disease. Dr. Auerbach, however, did not provide adequate rationale for his stated conclusions on causal relationship.

Dr. Auerbach concluded that the lumbar strain appellant sustained on April 1, 1987 had resolved. However, the resolution of the lumbar strain does not completely address the issues in this case. Appellant's continuing disability was described by Dr. Auerbach as due to a combination of traumatic and degenerative disc disease, which he stated was related to the degenerative changes of his lumbar spine and the bulging disc at L3-4, which some physicians have characterized as herniated.

The cause of the degenerative changes and disc bulging has not been resolved by the medical opinion evidence. The Office's December 7, 1993 letter indicates that the Office accepted the L3-4 disc condition but this was not reflected in the statement of accepted facts sent to Dr. Auerbach who found that appellant had limitations for work, but concluded that his disability was not related to his employment injury. As noted above, Dr. Auerbach did not provide sufficient rationale for his opinion that the degenerative disc disease, spinal stenosis and neurogenic claudication were related to appellant's motor vehicle accidents or whether appellant's April 1, 1987 injury contributed to these disabling conditions. For this reason, his report is insufficient to support the termination of appellant's compensation.

CONCLUSION

The Office did not meet its burden of proof to terminate appellant's compensation effective January 27, 2004.

ORDER

IT IS HEREBY ORDERED THAT the October 14, 2004 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 14, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board