

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of KENNETH G. SEWARD and DEPARTMENT OF THE NAVY,  
LONG BEACH NAVAL SHIPYARD, Long Beach, Calif.

*Docket No. 96-1733; Submitted on the Record;  
Issued August 5, 1998*

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DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits on the grounds that his employment-related disability had ceased.

The Office has accepted that on February 3, 1992 appellant, then a 43-year-old shipwright, sustained a lumbar strain and herniated discs<sup>1</sup> at L3-4, L4-5 and L5-S1 in the performance of duty. Appellant returned to work in a limited-duty capacity on February 4, 1992, but was disabled from July 16 to August 4, 1992 and then returned to his light-duty job. Appellant was terminated from his job in July 1994 when light-duty work was no longer available.

In a disability certificate dated July 12, 1993, Dr. Charn-Jiuan Huang, a Board-certified physiatrist, diagnosed bulging discs with spinal stenosis and recommended permanent light duty.

In a report dated April 29, 1994, Dr. Huang related that appellant had been treated from July 8, 1992 to July 12, 1993 for a persistent lower back problem. He related that appellant initially injured his back in February 1992 when he tried to avoid falling and twisted and hurt his back. Dr. Huang related that appellant continued to have lower back problems with pain radiating to the left side of his leg. He related that x-rays were negative, but a computerized axial tomography (CAT) scan showed bulging discs in the area of L3-4, L4-5 and L5-S1. Dr. Huang diagnosed multiple bulging discs with spinal stenosis and recommended permanent light duty.

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<sup>1</sup> The Board notes that the Office has accepted herniated discs as a medical condition sustained by appellant in the performance of duty although there are no medical reports of record containing the diagnosis of herniated discs, only a diagnosis of bulging discs.

In notes dated January 5, 1995, Dr. Huang provided findings on examination and noted that appellant complained of constant back pain. He diagnosed bulging discs with stenosis and indicated that appellant still needed light-duty restrictions.

By letter dated February 9, 1995, the Office referred appellant, along with a statement of accepted facts and copies of medical records to Dr. Hrair E. Darakjian, a Board-certified orthopedic surgeon, for an examination and evaluation as to whether appellant had any remaining employment-related disability or medical condition.

In a report dated March 21, 1995, Dr. Darakjian provided a history of appellant's condition and noted that he was complaining of back pain with radiation into both legs. He provided findings on examination and diagnosed lumbar myofascial sprain with no evidence of disc herniation and he stated:

“It is my opinion that [appellant] possibly sustained a soft tissue injury to the paraspinal muscles of the lower back in the industrial injury of [February 3, 1992]. He has received adequate conservative care for this injury in the form of rest, medications and physical therapy. Based on the findings on the physical examination and the radiological studies, I do not find any indication for further orthopedic intervention or any evidence of permanent disability to provide any permanent work restrictions.

“I have reviewed the Statement of Accepted Facts prepared on [February 6, 1995]. In that statement, it is stated that [appellant] has sustained a herniated disc at the L3-4, L4-5 and L5-S1 level. I am unable to find evidence of disc herniations on the records provided at this time including the radiologist reports and the actual films. It is my opinion that [appellant] has reached maximum medical improvement and can be considered permanent and stationary with regards to the injury of [February 3, 1992].”

Dr. Darakjian stated that the suggestive complaints could not be substantiated by objective findings and noted that there were no objective abnormalities noted on his physical examination, x-rays or a magnetic resonance imaging (MRI) scan.

By letter dated June 1, 1995, the Office advised appellant that it proposed to terminate his compensation benefits on the grounds that the weight of the medical evidence established that he had no disability causally related to his February 3, 1992 employment injury and did not require further medical care.

By decision dated September 13, 1995, the Office terminated appellant's compensation benefits.

By letter dated January 19, 1995, appellant requested reconsideration of the Office's September 13, 1995 decision, terminating his compensation benefits and submitted additional medical evidence.

In a report dated January 5, 1996, Dr. Huang provided a history of appellant's condition and noted that he was placed on permanent light duty in 1993. He related that appellant was examined again in January 1995 complaining of persistent pain in the lower back with radiation to the lower extremity. Dr. Huang stated that an MRI scan of the lumbosacral spine showed minimal posture bulging discs at L3-4, L4-5 and L5-S1. He stated that since appellant's employment injury in February 1992 appellant had experienced lower back pain with radiation to the lower extremity and that there was no neural deficit on physical examination, but there was increased pain with extension of the lumbosacral spine. Dr. Huang stated that there was tenderness at the paraspinal muscle in the left side and tenderness at the S1 joint and that his activity level had been limited by his pain. Dr. Huang stated since appellant had not shown any significant improvement, it was felt that he required restricted duty permanently.

By decision dated April 2, 1996, the Office denied appellant's request for further merit review of his claim.

The Board finds that this case is not in posture for a decision due to an unresolved conflict in medical opinion evidence.

Section 8123(a) of the Federal Employees' Compensation 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).

In this case, in his March 21, 1995 report, Dr. Darakjian, a Board-certified orthopedic surgeon and an Office referral physician, opined that appellant had no remaining disability or medical condition causally related to his February 3, 1992 employment injury. He correctly stated that there was no medical evidence of record showing herniated discs,<sup>2</sup> but he did not address the issue as to whether the bulging discs diagnosed by appellant's attending Board-certified physiatrist, Dr. Huang, were causing any disability for work. In his January 5, 1996 report, Dr. Huang opined that appellant required permanent light-duty restrictions due to his employment-related back condition. Although Dr. Darakjian stated that there was no objective evidence to support appellant's subjective complaints, the record shows that Dr. Huang stated in his January 5, 1996 report that an MRI scan showed multiple bulging discs. Dr. Huang also stated in his April 29, 1994 report that a CAT scan revealed multiple bulging discs. Due to the unresolved conflict in medical opinion between the Office referral physician, Dr. Darakjian and appellant's physician, Dr. Huang, as to whether appellant had any employment-related residual disability or medical condition, referral to an appropriate Board-certified medical specialist for an independent evaluation is necessary.

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<sup>2</sup> It appears that the Office mistakenly accepted the condition of herniated discs rather than bulging discs.

The April 2, 1996 and September 13, 1995 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further action consistent with this decision of the Board.

Dated, Washington, D.C.  
August 5, 1998

George E. Rivers  
Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member