

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM J. CHIRGWIN and DEPARTMENT OF THE ARMY,
ARMY CORPS OF ENGINEERS, Greenup, Ky.

*Docket No. 96-1682; Submitted on the Record;
Issued July 29, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation effective November 12, 1994 on the grounds that he had no condition or disability causally related to his February 10, 1988 accepted employment injury.

On February 24, 1988 appellant, then a 50-year-old lock and dam operator, filed a traumatic injury claim, alleging that he sustained injury to his lower back, hips and leg when he was kicked in the lower back by a coworker on February 10, 1988. The Office accepted appellant's claim for lower back strain superimposed on preexisting degenerative disc disease. Appellant stopped work on February 23, 1988 and returned to work on February 26, 1988. He then stopped work on May 6, 1988 on the advice of his physician and began receiving compensation for temporary total disability. On December 16, 1988 the employing establishment notified appellant that he could not return work as a lock and dam operator based on the medical evidence and advised him that he should pursue disability retirement. The Office of Personnel Management approved appellant's disability retirement application. By letter dated September 26, 1994, the Office notified appellant that it proposed termination of his compensation benefits on the grounds that the medical evidence established that there were no residuals of his accepted employment injury. By decision November 1, 1994, the Office terminated appellant's compensation effective November 12, 1994 on the grounds that there was no continuing disability or condition causally related to appellant's February 10, 1988 employment injury. In a merit decision dated August 16, 1995, an Office hearing representative affirmed the Office's November 1, 1994 decision. In a merit decision dated April 3, 1996, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was not sufficient to warrant modification.

The Board has carefully reviewed the entire case record in the present appeal and finds that the Office properly terminated appellant's compensation effective November 12, 1994.¹

Under the Federal Employees' Compensation Act,² once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of compensation.³ After the Office determines that an employee has a disability causally related to his or her employment, the Office may not terminate compensation without establishing that its original determination was erroneous or that the disability has ceased or is no longer related to the employment injury.⁴

The fact that the Office accepts appellant's claim for a specified period of disability does not shift the burden of proof to appellant to show that he or she is still disabled. The burden is on the Office to demonstrate an absence of employment-related disability in the period subsequent to the date when compensation is terminated or modified.⁵ Therefore, the Office must establish that appellant's condition was no longer aggravated by employment factors after November 12, 1994, and the Office's burden includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁶

In the present case, the Office properly determined there was a conflict in the medical evidence prior to notifying appellant that it proposed termination of compensation. The Office declared a conflict between Dr. Colin Craythorne, a Board-certified orthopedic surgeon and appellant's treating physician, and Dr. Henry M. Hills, a Board-certified orthopedic surgeon and Office referral physician. Dr. Craythorne indicated in several reports that appellant was totally and permanently disabled due to residuals of his employment injury. On the other hand, Dr. Hills reported that although appellant had a considerable amount of difficulty with his back with two surgical approaches having been performed⁷ and with still experiencing flare-ups with increased activities, he concluded that appellant could return to some type of gainful employment. In order to resolve the conflict in the medical evidence concerning the degree and cause of appellant's

¹ The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal. As appellant filed his appeal with the Board on May 7, 1996, the only decisions before the Board are the Office's August 16, 1995 and April 3, 1996 decisions. See 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

² 5 U.S.C. § 8101 *et seq.* (1974).

³ *William Kandel*, 43 ECAB 1011 (1992).

⁴ *Carl D. Johnson*, 46 ECAB 804 (1995).

⁵ *Dawn Sweazey*, 44 ECAB 824 (1993).

⁶ *Mary Lou Barragy*, 46 ECAB 781 (1995).

⁷ Appellant underwent laminectomy surgery on 1959 or 1960 and fusion of the L4, L5 and S1 in 1967.

claimed continuing disability, the Office referred appellant to Dr. Carl J. Roncaglione, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on the matter.⁸

In situations where there exists opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of the 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 The Board has carefully reviewed the opinion of Dr. Roncaglione and finds that it has sufficient probative value, regarding the relevant issue in the present case, to be accorded such special weight.

In a report dated April 5, 1994, Dr. Roncaglione provided an extensive review of appellant's medical records and history as well as his findings on examination. Relevant to this case, he diagnosed hypokinetic musculoskeletal deficiency disease, moderate (total inactivity since 1988), intervertebral disc disease at the L1-2 level and also at the L4 and L5 levels with laminectomy in 1961 and lumbosacral fusion L5/S1 level 1967, episodes of low back pain in 1960, two times in 1966, and on February 10, 1988 related to employment incident, and multiple complaints of low back pain and bilateral leg pain due to the aforementioned conditions, all of which is not anatomically explained. Dr. Roncaglione indicated that there appeared to be little or no relation between the lumbosacral pathology, intervertebral disc disease at the L4-5 and L5/S1 levels, the lumbosacral fusion and the accepted employment incident. He found no neuromuscular malfunction or deficit and that the impairment consisted of some stiffness in the back and hamstring muscle, associated with the subjective complaints of pain, some of which could not be anatomically related. Dr. Roncaglione reported that any anatomical or structural alteration caused by the accepted employment injury should have resolved spontaneously with a return to appellant's "preinjury level" reasonably within a few days or weeks and concluded that none of the pathology currently diagnosed was related to the February 10, 1988 employment incident. Thus, Dr. Roncaglione established that any residuals of appellant's accepted employment injury had ceased, appellant had reached his preinjury state of health and any current disability was due to a progression of appellant's preexisting conditions. As Dr. Roncaglione's report is rationalized and is based upon a proper factual foundation, his report represents the weight of the medical evidence and establishes that appellant had no continuing disability causally related to his accepted employment injury. The Office has met its burden of proof in terminating appellant's benefits effective November 12, 1994.

Subsequent to the Office's termination of compensation, appellant requested reconsideration and submitted a new medical report by Dr. Craythorne and a medical report dated October 24, 1995 by Dr. Luis Loimil, a Board-certified orthopedic surgeon. The Board notes that Dr. Roncaglione was selected to resolve the conflict in the medical evidence between

⁸ Section 8123(a) of the Federal Employees' Compensation Act provides: "An employee shall submit to examination by a medical officer of the United States, or by physician designated or approved by the Secretary of Labor, after the injury and as frequently and at the times and places as may be reasonable required.... 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 (1990); *James P. Roberts*, 31 ECAB 1010 (1980).

Drs. Hills and Craythorne. For this reason, the subsequent report by Dr. Craythorne which is essentially repetitive of his prior reports is insufficient to outweigh the special weight given the report by Dr. Roncaglione as Dr. Craythorne participated in the creation of the conflict which was referred to Dr. Roncaglione for resolution.¹⁰ In the report by Dr. Loimil, he concluded that “whatever injury” caused appellant’s present condition, he was permanently and totally disabled. This report is not sufficient to establish that modification of the termination in benefits is warranted since Dr. Loimil did not relate appellant’s disability status to his accepted employment injury. Therefore, appellant has not established that the Office erred in not modifying the termination of his benefits.

The decisions of the Office of Workers’ Compensation Programs dated April 3, 1996 and August 16, 1995 are hereby affirmed.

Dated, Washington, D.C.
July 29, 1998

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

¹⁰ *Josephine L. Bass*, 43 ECAB 929 (1992); see *Dorothy Sidwell*, 41 ECAB 857 (1990).