

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ARTHUR BENITEZ and DEPARTMENT OF THE AIR FORCE,
NORTON AIR FORCE BASE, Calif.

*Docket No. 96-1544; Submitted on the Record;
Issued June 15, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective February 7, 1996.

The Office accepted that appellant's December 27, 1978 employment injury, sustained while helping to move an engine fan case, resulted in a low back strain and in a herniated disc at L4-5. Appellant received continuation of pay from January 8 to February 5, 1979, when he returned to work. Appellant's application for disability retirement was approved effective February 17, 1984, but appellant elected to receive benefits under the Federal Employees' Compensation Act, and the Office began payment of compensation for temporary total disability on February 18, 1984.

On January 5, 1996 the Office issued appellant a notice of proposed termination of compensation on the basis that the weight of the medical evidence established that he was no longer disabled as a result of his December 27, 1978 employment injury. By decision dated February 7, 1996, the Office terminated appellant's compensation effective that date on the basis that he was no longer disabled as a result of his employment injury, and did not suffer from residuals of the injury.

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

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

The Board finds that the Office has not met its burden of proof, as there exists an unresolved conflict of medical opinion.

The conflict of medical opinion is between Dr. Benjamin Cox, a specialist in legal medicine to whom the Office referred appellant for a second opinion, and Dr. Malcolm E. Heppenstall, a Board-certified orthopedic surgeon who has been appellant's attending physician since June 1, 1979. These doctors disagree on appellant's diagnosis, on his ability to work, and on his need for further medical treatment.

In a report dated August 1, 1995, Dr. Cox stated that appellant "strained his lumbosacral facet joints at the time of the December 27, 1978 injury and got better," and that he did not have a herniated nucleus pulposus at L4-5. Dr. Cox also stated that appellant "has chronic subjective pain complaints with no objective evidence to support his pain complaints from the time of his December 27, 1978 injury. On that basis, I would then have to consider the pain being psychosomatic or compensation neurosis." Dr. Cox also concluded that appellant had facet joint hypertrophy as a continuing residual of his employment injury, "but nothing that would account for the patient's unrelenting back pain complaint." Dr. Cox concluded that appellant was not disabled and needed no further medical treatment. In a supplemental report dated November 16, 1995, Dr. Cox stated that appellant "has no current symptomatology as a result of or related to the facet joint hypertrophy seen on x-ray," and that there was no connection between appellant's current medical status and "the accepted conditions of the work injury which have resolved without symptom or disability residuals."

On the other side of the conflict of medical opinion, Dr. Heppenstall stated in an October 2, 1991 report:

"The findings of the lumbar myelogram and enhanced CT [computerized tomography] scan [done on August 5, 1991] reveal the herniated disc problem which has very likely been present throughout the years since [appellant's] injury, manifested by his pain symptoms but the patient not having neurological findings until recently. The CT scan and MRI [magnetic resonance imaging] scan lack of findings in the past is not unusual as these tests are not totally reliable in identifying a herniated disc. However, the myelogram and enhanced CT scan are the ultimate invasive studies and now have confirmed what has been suspicioned in the past."

In a report dated May 11, 1994, Dr. Heppenstall stated that appellant's "subjective findings continue to coincide with his objective diagnosis on CT and MRI, that being a herniated nucleus pulposus at L4-5. He continues to be disabled and will be followed again in this office on an as necessary basis." In a report listing appellant's work tolerance limitations and dated May 13, 1994, Dr. Heppenstall indicated that he considered appellant "permanently and totally disabled."

The decision of the Office of Workers' Compensation Programs dated February 7, 1996 is reversed.

Dated, Washington, D.C.
June 15, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member