

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLARD A. OVERSTREET and DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION, AIRWAY FACILITIES SECTOR,
Memphis, TN

*Docket No. 97-2787; Submitted on the Record;
Issued August 17, 1999*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits; and (2) whether the Office abused its discretion by refusing to reopen appellant's claim for consideration of the merits.

The Board has duly reviewed the case on appeal and finds that the Office met its burden of proof to terminate appellant's compensation benefits.

Appellant filed a claim alleging on March 25, 1975 he developed pain in his lower back after pulling a piece of equipment in the performance of duty. The Office accepted appellant's claim for lumbar strain, discogenic lumbar disease and central bulging disc at L4-5. The Office determined appellant's loss of wage-earning capacity by decision dated June 21, 1979 and authorized compensation benefits. The Office proposed to terminate appellant's compensation benefits on December 4, 1995 and terminated his benefits by decision dated June 6, 1996. Appellant requested an oral hearing and by decision dated June 4, 1997, the hearing representative affirmed the June 6, 1996 decision. Appellant requested reconsideration on August 4, 1997 and by decision dated August 28, 1997, the Office declined to reopen appellant's claim for consideration of the merits.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.¹ 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.² Furthermore, the right to medical

¹ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

² *Id.*

benefits for an accepted condition is not limited to the period of entitlement for disability.³ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.⁴

The Office referred appellant, a statement of accepted facts and a list of specific questions to Dr. Richard A. Silver, a Board-certified internist, for a second opinion evaluation. In a report dated September 14, 1995, Dr. Silver noted appellant's history of injury as well as his medical history. He performed a physical examination and diagnosed postural thoracolumbar scoliosis, massive morbid obesity, umbilical hernia and "apparent awareness of low back pain." Dr. Silver stated that appellant had a normal physical examination with no objective findings, that his employment-related condition had long since abated and that he could not provide a medical explanation of why appellant's soft tissue injury persisted. He concluded that appellant's subjective complaints were inappropriate to his objective findings and that appellant was capable of any and all forms of employment including heavy work. Dr. Silver also submitted the results of diagnostic tests including bone scan, electromyogram, magnetic resonance imaging (MRI) scan and a functional study.

The Board finds that Dr. Silver's detailed and well-rationalized report is entitled to the weight of the medical evidence. Dr. Silver provided a history of injury as well as the results of physical examination and diagnostic testing. He opined that appellant's physical examination was normal and that there were no objective findings to support appellant's continued disability or medical residuals.

In this case, appellant's attending physician, Dr. Robert D. Mills, a Board-certified orthopedic surgeon, found on August 12, 1986 that appellant was disabled due to a herniated disc causally related to his accepted employment injury. Dr. Mills submitted a series of medical notes supporting appellant's continued disability due to his accepted condition through April 3, 1995. Appellant also submitted notes from Dr. J. Rodney Pitts, a Board-certified orthopedic surgeon. On December 19, 1995, Dr. Pitts stated that appellant had no clinical changes and that his work restrictions remained. In a note dated April 3, 1997, Dr. Pitts stated that appellant had been symptomatic since he injured his back in 1975. On April 17, 1997 Dr. Pitts stated that appellant's MRI scan was abnormal.

These reports are not sufficient to overcome the weight of Dr. Silver's report or to create a conflict. Neither Dr. Mills nor Dr. Pitts provided a report with a history of injury, findings on physical examination and diagnostic studies and an opinion on the causal relationship between appellant's current condition and his accepted employment injury. Although Dr. Pitts opined on April 3, 1997 that appellant had been symptomatic since 1975, he did not provide a clear statement that it was his opinion that appellant's current condition was caused or aggravated by his employment injury. Furthermore, Dr. Pitts did not provide any medical reasoning explaining how or why appellant's accepted employment injuries resulted in disability 20 years later.

³ *Furman G. Peake*, 41 ECAB 361, 364 (1990).

⁴ *Id.*

As the weight of the medical opinion evidence rests with the detailed report of Dr. Silver, the Office met its burden of proof to terminate appellant's compensation benefits.

The Board further finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for consideration of the merits on August 28, 1997.

Appellant requested reconsideration of the June 4, 1997 hearing representative's decision on August 4, 1997. In support of this request, he submitted a report from Dr. Pitts dated July 25, 1997. By decision dated August 28, 1997, the Office declined to reopen appellant's claim for consideration of the merits finding that the evidence submitted was cumulative.

Section 10.138(b)(1) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.⁵ Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without review the merits of the claim.⁶

Dr. Pitts' July 25, 1997 report reviewed the medical evidence of record including Dr. Mills' August 12, 1996 report. He suggested that the Office review the medical evidence of record and restated that he believed appellant's condition had not changed in 20 years and that appellant was restricted from performing vigorous work activities.

This report did not contribute any additional new evidence to the record. Dr. Pitts merely reviewed the medical evidence in the record and restated that he believed that appellant's work restrictions had not changed and that his condition had not changed. Dr. Pitts had previously offered these opinions in his notes dated December 19, 1995 and April 3, 1997. As Dr. Pitts did not provide additional medical findings or medical reasoning in support of his conclusions, this report is not sufficient to require the Office to reopen appellant's claim for consideration of the merits.

⁵ 20 C.F.R. § 10.138(b)(1).

⁶ 20 C.F.R. § 10.138(b)(2).

The decision of the Office of Workers' Compensation Programs dated August 28 and June 4, 1997 are hereby affirmed.

Dated, Washington, D.C.
August 17, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member