

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARVIN T. SCHWARTZ and U.S. POSTAL SERVICE,
INWOOD STATION, Dallas, TX

*Docket No. 98-225; Submitted on the Record;
Issued August 16, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits.

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

This case has previously been before the Board on appeal. In a decision dated May 21, 1997¹, the majority of the Board² reversed the Office's decision to terminate appellant's compensation benefits effective February 17, 1995 based on the report of Dr. Samuel M. Bierner, a physician Board-certified in physical medicine and rehabilitation. The facts and circumstances of the case as set out in the Board's prior decision are adopted herein by reference.

Following the Board's May 21, 1997 decision, the Office proposed to terminate appellant's compensation benefits on August 26, 1997. The Office issued a final decision on October 6, 1997 terminating appellant's compensation benefits effective that date.

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.³ 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.⁴ Furthermore, the right to medical

¹ Docket No. 95-1634.

² Michael E. Groom, Alternate Member, dissented from the majority opinion.

³ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

⁴ *Id.*

benefits for an accepted condition is not limited to the period of entitlement for disability.⁵ 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.⁶

The Office based its decision to terminate appellant's compensation benefits on a report dated August 18, 1997 from Dr. Arthur L. Sarris, a Board-certified orthopedic surgeon and Office second opinion physician. Dr. Sarris noted appellant's history of injury and medical history. He performed a physical examination and concluded that there were no objective findings to substantiate appellant's complaints as he had no atrophy and as motor and sensory examination did not fit any anatomical distribution. Dr. Sarris noted that appellant demonstrated positive Waddell signs indicating symptom magnification. He reviewed appellant's x-rays which demonstrated loss of height of disc space at L3-4, L4-5 and L5-S1 with lumbar scoliosis and severe degenerative disc at L5-S1. Dr. Sarris noted that a lumbar myelogram revealed degenerative disc disease through the entire lumbar spine with mild broad disc bulges, but no significant compromise of the spinal canal and no evidence of any nerve root compression. He stated that appellant had no current residual disability related to the work injury. Dr. Sarris opined that appellant had a preexisting lumbar condition noted on x-rays and that the employment injury caused a "flare-up" or interval of symptoms and signs of pain without aggravation. He stated that appellant could return to his date-of-injury position if it were modified due to his preexisting conditions.

Dr. Sarris completed a work restriction evaluation and stated appellant should limit the following activities "related to the work injury of May 21, 1994," bending, twisting and lifting. He indicated that appellant could not lift over 20 pounds "at any time" and that he could work 8 hours a day. In response to a question regarding which of the above-described limitations were due to the employment injury, Dr. Sarris responded by indicating that this question was not applicable as the limitations were not accepted as related to the injury of May 21, 1994.

Appellant's attending physician, Dr. Jewel S. Daughety, a physician Board-certified in physical medicine and rehabilitation, completed a report on September 9, 1997 and noted appellant's history of injury. Dr. Daughety reported her physical findings including intact knee jerks, no posterior tibial jerks and a decreased right ankle jerk to the left. She found weakness of small muscle extensors of the right more than the left foot and weakness of the right peroneals and weakness of the right hip with discomfort contrasted to the left. Dr. Daughety reported a decreased right ankle jerk and more clear sensory pattern for right S1 root and less favorable straight leg raising in comparison to previous examination. She reviewed a mylogram from 1994 and found lumbar spondylosis at L3-4, L4-5 and L5-S1. Dr. Daughety concluded that based on this data appellant's low back condition, causally related to his accepted employment injury, had worsened. She stated, "this does represent a progressive degeneration of disc following trauma," found that appellant had a significant lumbar back problem and concluded that he should not return to work at the employing establishment.

⁵ *Furman G. Peake*, 41 ECAB 361, 364 (1990).

⁶ *Id.*

The Board finds that there is an unresolved conflict of medical opinion evidence between appellant's attending physician, Dr. Daughety and the Office referral physician, Dr. Sarris. Dr. Daughety found that appellant not only had residuals of his accepted employment injury, but that his condition had worsened and that he could not return to his date-of-injury position. Dr. Sarris found no objective evidence of a condition causally related to the accepted injury and opined that appellant could return to work. Section 8123(a) of the Federal Employees' Compensation Act,⁷ provides, "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."

As there is an unresolved conflict of medical opinion evidence, the Office failed to meet its burden of proof to terminate appellant's compensation benefits.

The decision of the Office of Workers' Compensation Programs dated October 6, 1997 is hereby reversed.

Dated, Washington, D.C.
August 16, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

⁷ 5 U.S.C. §§ 8101-8193, 8123(a).