

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DENNIS J. KRETCH and DEPARTMENT OF THE NAVY,
PEARL HARBOR NAVAL SHIPYARD, Honolulu, Hawaii

*Docket No. 97-1621; Submitted on the Record;
Issued June 16, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation on the grounds that he had no continuing disability resulting from the accepted work injury.

The Board finds that the Office has failed to meet its burden of proof in terminating appellant's compensation because there is an unresolved conflict in the medical opinion evidence.

Under the Federal Employees' Compensation Act,¹ once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of compensation.² Thus, after the Office determines that an employee has disability causally related to his or her employment, the Office may not terminate compensation without establishing either that its original determination was erroneous or that the disability has ceased or is no longer related to the employment injury.³

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.⁴ The Office burden

¹ 5 U.S.C § 8101 *et seq.* (1974).

² *William Kandel*, 43 ECAB 1011, 1020 (1992).

³ *Carl D. Johnson*, 46 ECAB 804, 809 (1995).

⁴ *Dawn Sweazey*, 44 ECAB 824, 832 (1993).

includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵

Section 8123 of the Act⁶ provides that if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination.⁷ The Board has held that the medical opinions must be of relatively equal weight for a conflict to arise, and in assessing the medical evidence, the number of physicians supporting one position or another is not controlling; the weight of such evidence is determined by its reliability, its probative value and its convincing quality.⁸

In this case, appellant's notice of traumatic injury, filed on August 5, 1993, was accepted by the Office for a contusion and sprain after appellant, a 47-year-old telecommunications specialist, twisted his left ankle and knee on July 30, 1993 when his foot slipped off the second to last step of an eight-foot ladder. Appellant returned to light duty on October 25, 1993 but was off work from November 2, 1993 and did not return.

Subsequently, the Office referred appellant's treatment records to the Office medical adviser who concluded on April 4, 1994 that the case was "problematical" because appellant related an "intensity of symptoms" that were not explained by recorded objective findings and the swelling of soft tissues was not completely consistent with the documented venous insufficiency.

The Office referred appellant to Dr. Eugene B. Ferris, a Board-certified surgeon and a specialist in vascular surgery, and subsequently to Dr. Ajit S. Arora, Board-certified in internal medicine, for a second opinion evaluation.

On February 28, 1996 the Office issued a notice of proposed termination of compensation, based on Dr. Arora's reports, and provided appellant with 30 days to submit additional evidence or argument if he disagreed. In its April 4, 1996 decision terminating appellant's compensation, the Office addressed the evidence and legal arguments made by appellant in responding to the February 28, 1996 notice.

The Board finds a conflict between the conclusions of Drs. Arora and Calvin Van Reken, Board-certified in internal medicine and appellant's treating physician, who reviewed Dr. Arora's March 27 and July 27, 1995 reports as well as a statement of accepted facts and medical treatment records. Dr. Arora stated in an October 4, 1995 report that the injury of July 30, 1993 was not traumatic enough to have caused appellant's venous thrombosis, because this very minor sprain/strain was insufficient "to account for disruption of the endothelial surface of the veins in [appellant's] leg and thigh, triggering onset of deep venous thrombosis."

⁵ *Mary Lou Barragy*, 46 ECAB 781, 787 (1995).

⁶ 5 U.S.C. § 8123(a).

⁷ *Shirley L. Steib*, 46 ECAB 309, 316 (1994).

⁸ *Connie Johns*, 44 ECAB 560, 570 (1993).

Dr. Van Reken disagreed, stating in his November 2, 1995 report that the 1993 work injury did cause the venous thrombosis of appellant's left leg because there was rapid swelling after the injury and appellant persistently complained of continued swelling and pain until the diagnosis of venous insufficiency was made a month later. While Dr. Arora's expert qualifications exceed those of Dr. Van Reken in that he is of professorial rank as well as Board-certified, other medical evidence from appellant's treating physicians bolsters Dr. Van Reken's opinion.

Dr. Shankar P. Bhat, Board-certified in pediatrics, treated appellant on August 2, 4, 11, 13 and 18, 1993 and noted the swelling of appellant's left ankle. Appellant was referred to Dr. Leslie Y. Ito, Board-certified in thoracic surgery, who diagnosed venous insufficiency on August 30, 1993 "with association of his recent traumatic injury to his left ankle."

Appellant was also seen by Dr. Masao Takai, a Board-certified orthopedic surgeon who noted appellant's venous insufficiency and the "same left ankle problems" on September 24, 1993 and diagnosed severe contusion and sprain of the left leg and ankle on October 12, 1993.

Subsequently, Dr. Ito referred appellant to Dr. Elna M. Masuda, a Board-certified surgeon for a noninvasive venous work-up which she completed in December 1993. In a form report dated March 14, 1994, she related appellant's severe venous insufficiency to his employment. Dr. Masuda stated in a November 26, 1994 report that over the four months prior to her November 1993 treatment of appellant he developed persistent pain and swelling of the left leg and ankle.

Finally, the Board notes that Dr. Ferris, to whom the Office referred appellant for a second opinion evaluation, indicated in a clinical note dated May 17, 1994 that appellant's venous insufficiency was exacerbated by the 1993 injury. The Office asked Dr. Ferris to respond to the questions it had sent and to provide a rationalized opinion explaining how the 1993 incident could result in venous thrombosis. Dr. Ferris stated on January 14, 1995 that the diagnoses of venous thrombosis and chronic venous insufficiency were well established since December 1993 and was directly related to the July 30, 1993 injury.

Because of the conflict in the medical opinion evidence, the Board finds that the Office has failed to meet its burden of proof in terminating appellant's compensation.⁹

⁹ See *Craig M. Crenshaw Jr.*, 40 ECAB 919, 923 (1989) (finding that Office failed to meet its burden of proof because a conflict in the medical evidence was unresolved).

The April 4, 1996 decision of the Office of Workers' Compensation Programs is reversed.

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

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member