

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES B. TAYLOR and DEPARTMENT OF VETERANS AFFAIRS,
MEDICAL CENTER, Brockton, Mass.

*Docket No. 98-1339; Oral Argument Held March 2, 1999;
Issued May 25, 1999*

Appearances: *Michael R. Pizziferri, Esq.*, for appellant; *Sheldon G. Turley, Jr., Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation effective March 2, 1997 on the grounds that he had no disability due to his August 6, 1986 employment injury after that date.

The Board finds that the Office did not meet its burden to terminate appellant's compensation.

Under the Federal Employees' Compensation Act,¹ once the Office has accepted a claim it has the burden of justifying termination or modification of compensation benefits.² The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.³ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁴

In the present case, the Office accepted that appellant sustained an employment-related cervical muscle strain on August 6, 1986; the Office authorized the performance in January 1993 of an anterior cervical discectomy and fusion at C3-4 and C4-5 and internal fixations at C3-5 with an anterior cervical stabilizing plate. The Office determined that there was a conflict in the

¹ 5 U.S.C. §§ 8101-8193.

² *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

³ *Id.*

⁴ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

medical opinion between Dr. David Dubuisson, appellant's attending Board-certified neurosurgeon, and the government physician, Dr. James G. Wespice, a Board-certified neurosurgeon acting as an Office referral physician, on the issue of whether appellant continued to have residuals of the employment injury.⁵ In order to resolve the conflict, the Office properly referred appellant, pursuant to section 8123(a) of the Act, to Dr. Herbert Cares, a Board-certified neurosurgeon, for an impartial medical examination and an opinion regarding whether appellant had continuing work-related disability.⁶ By decision dated February 26, 1997, the Office terminated appellant's compensation effective March 2, 1997 on the grounds that he had no disability due to his August 6, 1986 employment injury after that date. The Office based its determination on the opinion of Dr. Cares. By decisions dated September 15, 1997 and March 3, 1998, the Office denied modification of its February 26, 1997 decision.

In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁷

In his report dated June 9, 1994, Dr. Cares stated that, in an August 27, 1986 note, Dr. Dubuisson indicated appellant showed no change from prior examinations. Dr. Cares noted that appellant exhibited a spastic quadriplegia with a possible sensory deficit at C5 and stated, "From the medical records there is no evidence that the patient has any residual disability from his cervical strain of August 6, 1986. The most compelling evidence for this is the fact that his own neurosurgeon, who is in a position to know him best from many years, found no change in his examination." Dr. Cares indicated that appellant could perform light-duty work. In supplementary notes dated August 19, and December 27, 1994, March 12 and October 30, 1996, Dr. Cares noted that his opinion was based on the medical records and findings upon examination and took into account the fact that "cervical muscle strain does not cause focal neurological deficits." He indicated that appellant did not exhibit residuals of his January 1993 surgery and noted that diagnostic testing from 1996 did not change his opinion on causal relationship. The Board has carefully reviewed these reports and notes that they did not contain adequate medical rationale in support of their opinion that appellant ceased to have residuals of his August 6, 1986 employment injury. Dr. Cares did not sufficiently describe the medical process through which appellant's employment-related injury would have resolved such that he could return to work. Nor did he adequately explain the cause for appellant's continuing condition. Dr. Cares indicated that a major factor in his opinion was Dr. Dubuisson's notation that appellant's August 27, 1986 examination did not differ from prior examinations, but the

⁵ In a report dated October 18, 1993, Dr. Wespice diagnosed cervical myelopathy secondary to cervical spondylosis and indicated that appellant could work on a part-time basis. In a report dated March 2, 1994, Dr. Dubuisson noted that appellant was not even capable of sedentary work due to his work-related cervical myelopathy.

⁶ Section 8123(a) of the Act provides in pertinent part: "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).

⁷ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

Office has accepted that appellant sustained an employment-related cervical injury which necessitated surgery.

In a situation where the Office secures an opinion from an impartial medical examiner for the purpose of resolving a conflict in the medical evidence and the opinion from such examiner requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion.⁸ For the reasons discussed above, the opinion of Dr. Cares is in need of clarification and elaboration.

The decisions of the Office of Workers' Compensation Programs dated March 3, 1998 and September 15, 1997 are reversed.

Dated, Washington, D.C.
May 25, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

⁸ *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232, 238 (1988); *Harold Travis*, 30 ECAB 1071, 1078 (1979).