

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MAX T. CANADY and DEPARTMENT OF THE ARMY,  
BLUEGRASS ARMY DEPOT, Richmond, KY

*Docket No. 99-745; Submitted on the Record;  
Issued April 17, 2000*

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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 December 6, 1998.

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

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has determined that an employee has disability causally related to his or her employment, the Office may not terminate compensation without establishing that the disability has ceased or that it was no longer related to the employment.<sup>1</sup> Furthermore, in situations where there are 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 on a proper factual background, must be given special weight.<sup>2</sup>

On June 24, 1988 appellant, then a 53-year-old security supervisor, sustained an employment-related fracture of the right wrist and back strain when he fell while exiting an armored personnel carrier.<sup>3</sup> He stopped work on June 25, 1988, has not returned and was placed on the periodic rolls. The Office continued to develop the claim, and on April 22 and September 4, 1997 respectively, referred appellant to Board-certified orthopedic surgeons, Drs. Claude E. Saint-Jacques and Charles A. Barlow, for second opinion evaluations. Finding that a conflict in the medical opinion existed between the opinion of Dr. Barlow and that of

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<sup>1</sup> See *Patricia A. Keller*, 45 ECAB 278 (1993).

<sup>2</sup> See *Kathryn Haggerty*, 45 ECAB 383 (1994); *Edward E. Wright*, 43 ECAB 702 (1992).

<sup>3</sup> The record indicates that appellant had previously sustained a nonemployment-related fracture at T11.

Dr. Robert C. Hughes, appellant's treating Board-certified family practitioner, by letter dated March 19, 1998, the Office referred appellant to Dr. Jan M. Gorzny, a Board-certified orthopedic surgeon, for an impartial medical evaluation.<sup>4</sup> By letter dated August 10, 1998, the Office informed appellant that it proposed to terminate his compensation, based on the opinion of Dr. Gorzny. In a letter received by the Office on August 24, 1998, appellant disagreed with the proposed termination.<sup>5</sup> By decision dated November 12, 1998, the Office terminated his benefits, effective December 6, 1998, on the grounds that the work-related disability had ceased. The instant appeal follows.

The relevant medical evidence<sup>6</sup> includes a June 15, 1995 letter from Dr. Hughes who stated:

"It is my feeling that [appellant] is totally disabled from injuries that apparently occurred in 1988. [He] suffers from severe chronic pain for which he states he is unable to do any manual work. Due to the chronicity of this pain, which has been long[-]standing, I do not feel that [he] will be able to return to work.

In a November 18, 1996 report, Dr. Hughes stated that he had seen appellant on October 3, 1996 when he was complaining of constant back pain.<sup>7</sup> Dr. Hughes continued:

"I discussed with him the possibility of returning to work. This work included the various light duties; however, he was of the opinion that even these jobs could not be performed without a severe degree of pain ... since he was unable to sit or stand in one position very long without severe pain. At present, I have no reason to believe that his history is inaccurate. In summary, I do not feel that [he] will be able to return to work on the basis of his severe, subjective complaints of pain. These subjective complaints are supported by positive radiological findings."

Dr. Saint-Jacques submitted an August 8, 1997 work capacity evaluation in which he advised that appellant could work 8 hours per day with limitations, of which 25 percent were due to employment injuries. In an August 12, 1997 report, he diagnosed degenerative arthritis of the

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<sup>4</sup> Drs. Saint-Jacques, Barlow and Gorzny were furnished with the medical record, a statement of accepted facts and a set of questions.

<sup>5</sup> He submitted no additional medical evidence but did provide highlighted copies of Dr. Gorzny's report and definitions of the word "sclerosis."

<sup>6</sup> The record also contains a functional capacity evaluation submitted by Tommy West, a physical therapist, and a number of reports from Dr. Teri A. Prince, a chiropractor. These reports, however, are not probative as section 8101(2) of the Federal Employees' Compensation Act provides that the term "physician" includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist. *Sheila A. Johnson*, 46 ECAB 323 (1994). In this case, Dr. Prince did not diagnose subluxation by x-ray. Likewise, the reports of a physical therapist are not medical evidence as a physical therapist is not a physician under the Act. *Thomas R. Horsfall*, 48 ECAB 180 (1996).

<sup>7</sup> At this time, the Office had referred appellant to a vocational rehabilitation counselor and the employing establishment was considering offering appellant a light-duty clerical position. The record does not indicate that a formal job offer was made.

cervical, thoracic and lumbar spines as well as signs and symptoms with his hands. Dr. Saint-Jacques stated that the 1988 injury “somewhat aggravated” the preexisting fracture at T11 and noted that appellant had not fractured his right wrist. He concluded that, while appellant could qualify for sedentary work, he could not work eight hours per day due to the degenerative arthritis which, Dr. Saint-Jacques stated, was not due to the 1988 employment injury but “mainly due to aging osteoarthritis.”

In an October 4, 1997 report, Dr. Barlow also advised that appellant had not fractured his wrist but had sustained a wrist sprain which had healed uneventfully with no residual impairment. He also advised that the employment-related back strain had healed with no residual, stating:

“I have no anatomic basis to which I can attribute the prolonged disability of [appellant] following a soft tissue injury. [He] complains of bilateral whole leg numbness intermittently which cannot be explained anatomically. The physical therapist who evaluated this patient stated that, in his opinion, [appellant] was a symptom exaggerator. [He] does not have any objective residual disability which can be causally related to his work injury and the subjective complaints can be explained with the physical therapist’s opinion.... This opinion is based on the clinical assessment, examination and documentation.”

Dr. Barlow submitted a supplementary report dated December 8, 1997 in which he reiterated his findings and conclusions and advised that the nonwork-related compression fracture that occurred before the employment injury together with arthritic changes in appellant’s spine due to aging gave him symptoms. He stated, “The subjective complaints are not in line with the physical findings and the pain he is complaining of suffering is not related to his job-related injury” and concluded that he had no employment-related disability.

In an April 8, 1998 report, Dr. Gorzny diagnosed the healed compression fracture of T11 vertebral body, along with superimposed degenerative spine disease involving the cervical, thoracic and lumbar regions which were the only explanation for appellant’s prolonged disability and complaints of pain. He advised that these conditions were not employment related as the fracture preexisted the employment injury and the degenerative disease was age related. Dr. Gorzny noted that the June 24, 1988 back strain had healed without residual and concluded that appellant had “purely subjective complaints and no clinical findings to substantiate them.”

In this case, the Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Gorzny, the referee examiner, who advised that appellant had no residual of his June 24, 1988 employment injury. The Office, therefore, properly terminated appellant’s compensation effective December 6, 1998.

The decision of the Office of Workers' Compensation Programs dated November 12, 1998 is hereby affirmed.

Dated, Washington, D.C.  
April 17, 2000

Michael J. Walsh  
Chairman

David S. Gerson  
Member

A. Peter Kanjorski  
Alternate Member