

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DEROLD LUTHER and DEPARTMENT OF THE NAVY,  
MARE ISLAND NAVAL SHIPYARD, Vallejo, CA

*Docket No. 99-1038; Submitted on the Record;  
Issued August 25, 2000*

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective April 14, 1997; and (2) whether the Office properly determined that appellant's request for reconsideration was not sufficient to require reopening the case for merit review.

In the present case, the Office accepted that appellant sustained a back contusion and strain in the performance of duty on May 14, 1982, when the drafting stool on which he was sitting collapsed. The Office also accepted that as a consequence of the employment injury appellant aggravated a preexisting schizophrenia with recurrent major depression. The record indicates that appellant worked light duty intermittently until March 1984, when he stopped working. In 1986, appellant was committed to a state mental facility.

By decision dated March 25, 1996, the Office terminated appellant's compensation on the grounds that his employment injuries had resolved. In a decision dated November 6, 1996, an Office hearing representative vacated the termination decision and remanded the case for further development of the medical evidence.

In a letter dated March 3, 1997, the Office notified appellant that it again proposed to terminate his compensation based on the medical evidence. By decision dated April 14, 1997, the Office terminated appellant's compensation benefits. In a decision dated February 3, 1998, an Office hearing representative affirmed the termination decision. Appellant requested reconsideration of his claim and by decision dated October 19, 1998, the Office determined that the request was not sufficient to warrant a merit review of the claim.

The Board has reviewed the record and finds that the Office properly terminated compensation in this case.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.<sup>1</sup>

In the present case, an Office hearing representative found that the Office had not met its burden to terminate compensation on March 25, 1996. The hearing representative noted that, with respect to appellant's orthopedic injuries, the second opinion referral orthopedic surgeon, Dr. J. Graham Bray, had not offered a complete opinion on the relevant issues. In his January 8, 1996 report, Dr. Bray opined that appellant had no disabling orthopedic residuals of his employment injury, but he did not offer an opinion as to whether appellant had any residuals of the employment injury that would entitle him to medical benefits. Moreover, the second opinion referral psychiatrist, Dr. Thomas P. Lowry, also required a supplemental report. Dr. Lowry had opined in a December 26, 1995 report that any aggravation of appellant's preexisting psychiatric condition was temporary, without clearly explaining whether the temporary aggravation had ceased.

The Office then received supplemental reports from Drs. Bray and Lowry that addressed the unresolved issues. In a report dated January 29, 1997, Dr. Bray stated that he could not find any objective residuals of the 1982 employment injury. He noted that local tenderness is very common in the lower back and did not feel that the tenderness was an objective residual of the employment injury.

In a report dated January 27, 1997, Dr. Lowry noted that there was medical evidence from December 1983 indicating that appellant's orthopedic condition was stationary at that time. He stated that it seemed logical to him that this marked the end of any orthopedic aggravation of his psychiatric condition. Dr. Lowry concluded, "I can clearly state that, at the time of my examination (12 years later) the temporary injury-related aggravation of [appellant's] psychiatric condition had ceased."

The Board finds that the weight of the evidence rests with Drs. Bray and Lowry. In reports dated January 8, 1996 and January 29, 1997, Dr. Bray provided a reasoned opinion that appellant did not continue to have orthopedic residuals of the May 14, 1982 employment injury. In reports dated December 26, 1995 and January 27, 1997, Dr. Lowry provided a reasoned opinion based on a complete background that any employment-related aggravation of a psychiatric condition had ceased. Appellant did not submit any probative medical evidence supporting that he continued to have an employment-related condition. The Board, accordingly, finds that the Office met its burden of proof in terminating compensation effective April 14, 1997.

It is noted that, after the April 14, 1997 termination decision, appellant submitted a report dated July 18, 1997 from Dr. Robert A. Harf, an orthopedic surgeon. After termination or modification of benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish

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

by the weight of the reliable, probative and substantial evidence that he had an employment-related disability which continued after termination of compensation benefits.<sup>2</sup> Dr. Harf provided a history and results on examination, stating that appellant “has significant objective findings which indicate the continuing back pain is causally related to the May 14, 1982 injury.” He did not clearly explain the specific objective findings or explain the basis for his opinion on causal relationship with the employment injury from 1982. The Board finds that his report is not of sufficient probative value to meet appellant’s burden of proof in this case.

The Board further finds that the Office properly denied appellant’s request for reconsideration.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees’ Compensation Act,<sup>3</sup> the Office’s 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 fact not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office.<sup>4</sup> Section 10.138(b)(2) states that any application for review that does not meet at least one of the requirements listed in section 10.138(b)(1) will be denied by the Office without review of the merits of the claim.<sup>5</sup>

In this case, appellant submitted a report dated July 7, 1998, from a Gary Malone, “MFCC,” (Marriage, Family and Child Counselor) who is identified as a primary therapist. The Board notes that the Act includes clinical psychologists as “physicians” under the Act,<sup>6</sup> but there is no indication that Mr. Malone is a clinical psychologist or otherwise is a physician under the Act.<sup>7</sup> The July 7, 1998 report is therefore of no probative medical value and does not constitute new and relevant evidence. Appellant has not met any of the requirements of section 10.138(b)(1), and therefore the Office properly denied his request for reconsideration without merit review of the claim.

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<sup>2</sup> *Talmadge Miller*, 47 ECAB 673, 679 (1996); *see also George Servetas*, 43 ECAB 424 (1992).

<sup>3</sup> 5 U.S.C. § 8128(a) (providing that “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.”)

<sup>4</sup> 20 C.F.R. § 10.138(b)(1).

<sup>5</sup> 20 C.F.R. § 10.138(b)(2); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

<sup>6</sup> 5 U.S.C. § 8101(2).

<sup>7</sup> A clinical psychologist is defined as an individual who: (1) is licensed or certified as a psychologist at the independent practice level of psychology by the state in which he or she practices, and (2) either possesses a doctoral degree in psychology from and educational institution accredited by an organization recognized by the Council on Post-Secondary Accreditation or is listed in a national register of health service providers in psychology which the Secretary of the Department of Labor deems appropriate, and (3) possesses two years of supervised experience in health service, at least one of which is post degree. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Overview*, Chapter 3.100.3 (October 1990).

The decisions of the Office of Workers' Compensation Programs dated October 19 and February 3, 1998 are affirmed.

Dated, Washington, D.C.  
August 25, 2000

David S. Gerson  
Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member