

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONALD G. JONES and DEPARTMENT OF THE ARMY,
ROCK ISLAND ARSENAL, Rock Island, IL

*Docket No. 01-1907; Submitted on the Record;
Issued September 16, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation.

On November 16, 1988 appellant, then a 41-year-old quality assurance specialist, sat down in his chair at work, which did not provide back support and developed severe pain in his lower back. He stopped working on November 17, 1988 and returned to work on November 28, 1988. Appellant stopped again on November 30, 1988. He returned to part-time work on February 27, 1989. Appellant received continuation of pay and authorization for leave buy back for periods he did not work. Appellant stopped working again on April 12, 1989 and returned to part-time light-duty work on August 22, 1989. The Office authorized additional leave buy back and paid compensation for the period he did not work. After appellant returned to work, the Office paid compensation for loss of wage-earning capacity based on his actual earnings.

In a June 2, 1989 report, Dr. Arlo B. Brakel, a Board-certified neurosurgeon, stated that a February 6, 1989 electromyogram showed a left lumbar radiculopathy. Dr. Brakel noted that an April 12, 1989 myelogram showed impingement of the left S1 nerve root, which appeared to be secondary to a small disc rupture, swelling of the nerve root in the neural exit foramen, a spur formation, or a combination of these conditions. He indicated that appellant underwent a left L5-S1 hemilaminectomy for release of conjoined L5-S1 nerve roots. Dr. Brakel reported that the nerve root was freed from fibrous adhesions and its swelling in its neural exit. The Office accepted appellant's claim for low back strain, herniated nucleus pulposus at L5-S1 and conjoined nerve roots.

Appellant stopped working on October 11, 1993 and filed a claim for recurrence of disability. In an August 8, 1995 decision, the Office denied appellant's claim on the grounds that the medical evidence of record did not establish that appellant's requirements had changed or that his employment-related condition had worsened. Appellant requested a hearing, which was conducted on September 12, 1995. In an April 9, 1996 decision, the Office hearing

representative found that the evidence of record established that he was totally disabled due to a recurrence of disability effective October 11, 1993.¹

In a November 18, 1999 decision, the Office terminated appellant's compensation effective December 5, 1999, on the grounds that the medical evidence of record established that appellant was no longer disabled due to the employment injury. He requested a hearing before an Office hearing representative, which was conducted on November 8, 2000. In a May 11, 2001 decision, the Office hearing representative found that the Office had met its burden of proof in terminating appellant's compensation. He, therefore, affirmed the Office's November 18, 1999 decision. The Office hearing representative further found that appellant had submitted medical evidence after the November 18, 1999 decision, which created a conflict in the medical evidence. He, therefore, remanded the case for referral of appellant to an appropriate impartial medical specialist to resolve the conflict in the medical evidence.

The Board finds that the Office improperly terminated appellant's compensation.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. 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.²

The Office based its decision to terminate appellant's compensation on the June 1, 1999 report, of Dr. Dale E. Minner, a specialist in occupational medicine, to whom the Office referred appellant for an examination and second opinion. Dr. Minner stated that appellant was in no acute distress despite standing, sitting, squatting and changing positions every 5 to 10 minutes during the interview and examination. Dr. Minner noted that appellant walked with a left-sided limp. He reported appellant's left calf was 1.5 centimeters smaller than the right calf in circumference. Dr. Minner noted that surveillance videos taken of appellant, accompanied by investigative reports, showed he was able to perform a number of activities that were at odds with his limitations, including a lack of apparent difficulty in entering and exiting his vehicle, lack of a significant limp and carrying items weighing more than 10 pounds. Dr. Minner diagnosed postoperative status, L5-S1 laminectomy, on the left side with symptoms of back and leg pain, congenital conjoined nerves and significant symptom magnification. He stated that appellant had no objective clinical findings to indicate a need for additional medical treatment. Dr. Minner concluded that appellant was able to return to his date-of-injury employment. He indicated that appellant was able to walk, stand for at least 2 hours at a time with a 5 minute break, lift and carry up to 25 pounds, sit up to 1 hour and perform mental tasks sufficient to successfully complete graduate courses of study.

¹ The Office hearing representative also found that the Office had incorrectly computed appellant's compensation for loss of wage-earning capacity for the period January 11 to October 11, 1993. He also ordered the Office to determine whether appellant had a permanent impairment of the left leg due to the employment injury. There is no indication in the record of whether the Office carried out the Office hearing representative's order on determining whether appellant was entitled to a schedule award for the leg.

² *Jason C. Armstrong*, 40 ECAB 907 (1989).

In an October 6, 1999 report, Dr. Ernest Found, a Board-certified orthopedic surgeon, stated that a functional capacity evaluation showed appellant had maximum nonrepetitive lifting limits of 35 pounds in a partial squat lift or an arm lift and repetitive lifting limits of 17.5 pounds. Dr. Found indicated that appellant's gait was variable with a broad base, favoring the left leg. He noted that appellant demonstrated moderate benefit from kneeling or crouching but getting up and down was a struggle. Dr. Found stated that appellant used postures that suggested he was experiencing extensive, real pain and that he was attempting to use proper body mechanics as he conducted his daily activities. He saw no evidence that would show appellant's functional level of activities and medical condition had changed from the assessment made by the first Office hearing representative.

In an October 12, 1999 report, Dr. John W. Wright, a Board-certified neurologist, stated that appellant was being treated for chronic back discomfort exacerbated by activity. Dr. Wright indicated that treatment for the condition would be to avoid any activity that exacerbated his discomfort and to use medication as necessary. He related that appellant had consistently reported that the activities of sitting or standing for long periods of time exacerbated his discomfort. Appellant indicated that he had chronic discomfort and had to change positions frequently so he would not be able to perform his job effectively. Dr. Wright concluded that the videotapes did not disprove or prove that appellant had significant discomfort after these types of activities and, therefore, did not change his general assessment that appellant would not be able to perform his original occupation.

There existed, therefore, a conflict in the medical evidence at the time of the November 18, 1999 termination. Dr. Minner concluded that appellant had no objective evidence to support any further medical treatment. He stated that appellant could return to his preinjury employment. On the other hand, Drs. Found and Wright stated that their respective examinations of appellant showed that he had chronic back pain and significant discomfort, which would prevent him from performing his original duties. Since this is an unresolved conflict in the medical evidence on whether appellant was able to return to his preinjury duties, the Office has not met its burden of proof in establishing that appellant's disability due to the employment injury had ceased.

The decision of the Office of Workers' Compensation Programs, dated May 11, 2001, is hereby reversed.

Dated, Washington, DC
September 16, 2002

Alec J. Koromilas
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member