

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MICHAEL E. HOGUE and DEPARTMENT OF THE TREASURY,  
INTERNAL REVENUE SERVICE, St. Louis, MO

*Docket No. 03-1809; Submitted on the Record;  
Issued November 13, 2003*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated compensation effective March 22, 2003.

This is the second appeal in the present case.<sup>1</sup> In a July 26, 2001 decision, the Board reversed the December 7, 1999 and March 23, 2000 Office decisions which terminated compensation. The Board determined that the Office improperly terminated compensation, as there remained a conflict in the medical opinion evidence between Dr. Anthony Margherita, an attending Board-certified physician in physical medicine and rehabilitation, Dr. David Voshall, an attending Board-certified internist and an Office referral physician, and Dr. Don B.W. Mishew, a Board-certified orthopedic surgeon, regarding whether appellant could return to his date-of-injury position.<sup>2</sup> The facts and the circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

On remand the Office referred appellant and the case record to Dr. Scott Luallin, a Board-certified orthopedic surgeon, for an impartial medical evaluation.<sup>3</sup> In a report dated

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<sup>1</sup> Docket No. 00-1865 (issued July 26, 2001).

<sup>2</sup> The Board noted in its decision that the Office should seek an opinion as to whether appellant continued to be disabled from his date-of-injury job as a result of the October 5, 1998 employment injury and noted that as appellant also had an employment-related left hip replacement, the Office should consolidate the claims and also seek an opinion as to whether appellant's accepted left hip condition affected his capacity to resume the date-of-injury job. The Board further noted in the decision that the Office should seek an opinion as to whether appellant is disabled as a result of the drugs prescribed for his work-related injuries, which his attending physician indicated interfered with his ability to drive.

<sup>3</sup> The Office reinstated appellant's wage-loss retroactive to the date of termination and consolidated, the case file records for the left hip and right shoulder injuries of November 6, 1996 and October 5, 1998.

April 8, 2002, Dr. Luallin outlined appellant's work and medical history, diagnostic findings and listed current conditions and medications. Dr. Luallin stated:

"A [f]unctional [c]apacity [e]valuation report is reviewed dated March 2, 1999. The patient was not felt to be capable of resuming work due to 'numerous orthopaedic and medical complaints.' Those problems listed specifically are obesity, depression, shortness of breath, left hip pain, low back sciatic pain and right upper extremity pain....

"My impression is that [appellant] has developed left hip avascular necrosis and this has been successfully treated with a left total hip arthroplasty. He has ongoing complaints of low back and bilateral lower extremity pain. [Appellant] did have a strain injury to his low back in October of 1998, however, extensive objective testing has demonstrated little pathology and I believe that his ongoing back discomfort is largely due in part to his severely deconditioned status and morbid obesity. His subjective complaints and the chronic pain medication he is taking are in excess of what one would expect to see given his lack of objective evidence of pathology.

"With regards to his neck and shoulder complaints the only objective finding on his neck was that of C5-6 spondylosis with foraminal narrowing on the left side, which is the opposite side of where his shoulder complaints are. [Appellant's] shoulder [magnetic resonance imaging] scan was negative and he has again very little objective evidence of pathology in the shoulder to explain his chronic pain symptoms...."

Dr. Luallin then responded to the Office questions. He reiterated that the subjective complaints that appellant made were in excess of what Dr. Luallin would expect given the objective findings and although the examination revealed mild right shoulder impingement appellant had reached maximum medical improvement in that regard. With respect to appellant's regimen of medications, Dr. Luallin reported that he took OxyContin and Oxycodone and stated that those medications were seemingly in excess of what he would expect appellant to take given his objective findings. Dr. Luallin indicated that he did believe that those medications could interfere with appellant's ability to operate a motor vehicle. Regarding the hip injury, Dr. Luallin stated that he did not believe that it was appellant's left total hip replacement that indicated use of a walker but more the severe deconditioning and morbid obesity, which necessitated use of walking aids. The physician stated that upon review of appellant's position description he believed that appellant should be capable of returning to full duty with the exception of driving with high doses of his current narcotics. Dr. Luallin outlined appellant's permanent restrictions as a result of his work injuries of November 20, 1996 and October 5, 1998, that appellant should have no repetitive work overhead and limit lifting to 20 pounds regarding his right upper extremity.

On April 17, 2002 the Office requested that Dr. Luallin submit a supplemental report addressing whether the medications would interfere with appellant's ability to drive a vehicle as a part of his work. In his response dated April 18, 2002, Dr. Luallin stated:

"My recommendations for medication for [appellant] would be to use nonsteroidal anti-inflammatory medications and perhaps nonnarcotic pain medication such as Ultram. I would recommend that his medications be cleared by his primary care physician, as he does have one kidney missing and I would want to ensure that nonsteroidal anti-inflammatory medications were not contraindicated for him. Those medications would not interfere with his ability to drive a vehicle."

On January 28, 2003 the Office issued a notice of proposed termination of compensation on the basis that the weight of the medical evidence established that the residuals of the November 20, 1996 and October 5, 1998 injuries no longer disabled him from performing his date-of-injury job.

Appellant responded on February 25, 2003, contending that the statement of accepted facts submitted to Dr. Luallin was defective and that his reports were not rationalized and, therefore, insufficient to establish that appellant was no longer disabled. He argued that Dr. Luallin had not resolved the question regarding whether appellant was capable of driving under his current regimen of medication. Appellant also submitted a report from Dr. Bruce Gutnik, a psychiatrist, dated February 18, 2002, which he maintained supported continued disability. Dr. Gutnik discussed appellant's history, medical records, subjective pain complaints and his mental status examination. He diagnosed panic disorder and depressive disorder. Dr. Gutnik stated that although the panic disorder had not been caused or exacerbated by the November 20, 1996 and October 5, 1998 work injuries, appellant's depressive disorder dated back to his left hip and shoulder injury, which was exacerbated over time with the need for surgery and ongoing pain.

By decision dated March 12, 2003, the Office terminated appellant's wage-loss compensation effective March 22, 2003. In a letter dated February 25, 2003, appellant through counsel requested a review of the written record and discussed previously submitted evidence. He contended that his duties as an investigator included driving more than 100 miles per day, occasionally driving from 200 to 300 miles per day, travel by airplane and overnight stays from home. He noted that Dr. Luallin issued work restrictions limiting lifting up to 20 pounds, however, appellant's briefcase weighed more than 20 pounds depending on the number of the files in it and his laptop weighed 21 pounds.

By decision dated July 8, 2003, an Office hearing representative found that Dr. Luallin's opinion represented the weight of the medical evidence and established that appellant's disability for work due to residuals of the November 20, 1996 and October 5, 1998 injuries had ceased.

The Office hearing representative addressed appellant's contentions and found that the factual evidence of record did not support that Dr. Luallin received an erroneous job description. The Office hearing representative determined that the statement of accepted facts provided to Dr. Luallin was dated September 25, 2001 and superceded the prior statement as factual

background for the evaluation. The hearing representative indicated further that although Dr. Gutnik linked the depressive disorder to the hip injury and subsequent surgery, he did not explain why appellant's numerous nonwork-related conditions had not caused the emotional conditions. Further, the Office hearing representative found that because Dr. Gutnik did not report that appellant was disabled from work as a result of his emotional conditions, such report lacked probative value. The Office hearing representative affirmed the March 12, 2003 termination decision.

The Board finds that the Office improperly terminated compensation.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.<sup>4</sup> 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.<sup>5</sup>

In this case, the Office based its decision to terminate appellant's compensation on the April 8 and 18, 2002 reports of Dr. Luallin, the independent medical examiner. He stated that appellant's left hip avascular necrosis was successfully treated with the left total hip arthroplasty. Dr. Luallin stated that although appellant had ongoing subjective complaints of low back and bilateral lower extremity pain, objective testing demonstrated little pathology and he related any ongoing back discomfort to his severely deconditioned status and morbid obesity. Dr. Luallin further stated that appellant also complained of neck and shoulder complaints, however, again there was little objective findings to explain chronic pain symptoms. Dr. Luallin stated that with respect to appellant's right shoulder, objective findings did show mild right shoulder impingement, however, that the condition had reached maximum medical improvement and that his use of a walker was not indicated for that condition, but likely necessitated due to his severe deconditioning and morbid obesity. He further noted that the medications that appellant took at the time of his examination for the hip and shoulder, were in excess of what he would be expected to take given the objective findings and stated that such medications could interfere with appellant's ability to operate a motor vehicle. In a letter dated April 18, 2003, Dr. Luallin recommended a different medication regimen for appellant, which would not interfere in his ability to drive.<sup>6</sup> He concluded that appellant had no further impairment of any kind causally related to the 1996 and 1998 work injuries. The Office relied on his opinion in its March 12, 2003 termination decision, finding that all residual disability stemming from his accepted left hip

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<sup>4</sup> *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

<sup>5</sup> *Id.*

<sup>6</sup> The Office considered evidence from the employing establishment, which described appellant's physical demands of the job and job duties, including operating a motor vehicle. Such evidence supported that appellant spent approximately 15 percent of his work time driving and the remaining 85 percent in an office setting, either at his office in downtown St. Louis or while reviewing files or conducting interviews in the field. The evidence supported that most of appellant's fieldwork was in close proximity to his St. Louis office and involved reviewing files at the military records center in St. Louis. Representatives of the employing establishment reported that appellant planned his itinerary at his own discretion and overnight travel was rare. Representatives further reported that appellant did not need a laptop to perform his fieldwork and that his briefcase with the necessary files would have weighed considerably less than 20 pounds.

and right shoulder conditions had ceased and that appellant currently suffered from no condition or disability causally related to his accepted 1996 and 1998 employment injuries.

The Board finds that the Office improperly relied on the opinion of Dr. Luallin negating a causal relationship between appellant's claimed current condition and disability and his 1996 and 1998 employment injuries. Although the physician provided a sound argument that appellant no longer had any residuals or disability related to the left hip and shoulder employment injuries, he did not sufficiently resolve whether appellant was disabled as a result of the drugs prescribed for his work-related injuries, which his attending physician indicated interfered with his ability to drive. Dr. Luallin in his April 8, 2002 report acknowledged that the OxyContin and Oxycodone, could interfere with his ability to drive and when the Office requested that he clarify his opinion regarding whether appellant was disabled due to his medication, he simply recommended other types of medication that would not have the same affect on his driving. Dr. Luallin further indicated that upon review of appellant's position description he believed that appellant should be capable of returning to full duty with the exception of driving with high doses of his current narcotics. The record is unclear as to whether appellant's medication regimen has been altered so that he could perform the driving duties required of his position. Thus, the issue of appellant's continued disability remains unresolved.

The July 8 and March 12, 2003 decisions of the Office of Workers' Compensation Programs are reversed.

Dated, Washington, DC  
November 13, 2003

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member