U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD E. SIMPSON and DEPARTMENT OF NAVY, LONG BEACH NAVAL STATION, Long Beach, Calif.

Docket No. 95-2844; Submitted on the Record;
Issued April 3, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON, WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits effective May 30, 1993; (2) whether the Office properly terminated authorization for medical treatment; and (3) whether appellant has established that he has any continuing disability causally related to his accepted employment injury.

On July 19, 1983 appellant filed a claim for a traumatic injury occurring on July 17, 1983 for injuries resulting from a fall down a stairwell. The Office accepted appellant's claim for a cerebral concussion, cervical and lumbar strain, hemorrhagic gastritis, hypothyroidism, dementia and hearing loss.[1]

By letters dated February 20, 1992, the Office referred appellant together with the case record and a statement of accepted facts, to Dr. Richard Tindall, a Board-certified neurologist, and Dr. Glen McFerren, a Board-certified psychiatrist, for second opinion evaluations.

In a report dated April 13, 1992, Dr. McFerren reviewed the medical records, the history of illness and discussed his findings on psychological examination. Dr. McFerren diagnosed provisional organic delusional disorder, provisional dementia and to rule out schizoaffective disorder. He stated:

> "There has [] been a gradual but progressive impairment of [appellant's] cognition which has been extensively evaluated a number of times with most reports finding some degree of inconsistency in [his] presentation with markedly poor performance on IQ [intelligence quotient] testing on formal testing…."

[1] By decision dated December 30, 1986, the Office denied appellant's claim that his diabetes was causally related to his July 17, 1983 employment injury. The Office further found that appellant had no further orthopedic condition due to his July 17, 1983 employment injury. By decisions dated October 7, 1987, February 23, 1988, March 30, 1989 and July 2, 1992, the Office denied appellant's requests for modification.

Dr. McFerren stated:

> "It should be noted that the psychiatric conditions that [appellant] complains of do not fall readily into any identifiable category, at various times being described as a 'schizophrenic reaction, to central nervous system trauma (by Dr. [James H.] Jen Kin) and at other times [] 'post concussive syndrome' though neither of this would explain a progressive deterioration spanning over eight years without at least a stabilization or some degree of improvement."

Dr. McFerren found that due to the discrepancies he was unable to render a diagnosis. He stated, "To the degree that the dementia had already been accepted, we would have to accept most of [appellant's] psychiatric presentation as to some degree being associated with the 'dementia' and following from the injury." Dr. McFerren further noted that malingering was a possibility, but that he did not have sufficient information to reach such a determination.

In a report dated April 17, 1991, Dr. Tindall discussed appellant's history of injury, a review of medical records from August 2, 1983 onward[2] and findings on physical examination. Dr. Tindall found:

> "There appear[s] to be three possible explanations for this cluster of complaints, psychiatric and psychological abnormalities and diagnoses.
>
> "First, [appellant] may have a severe head injury with resultant brain damage and borderline functional IQ at approximately 60, with his thought disorder on this basis.
>
> "Second, he may have had mild head trauma, but without significant residual disabling injury and now has had a concurrent evolution of another, probably nontraumatic condition producing the progressive 'dementia' which has been evident from 1984 through 1991 testing[s].
>
> "The third possibility is that there was minor head trauma without a significant disabling injury, [appellant] is malingering with the production of his multiple complaints, somatic preoccupation, anger and frustration which is interpreted as a schizophreniform reaction, and abnormal psychological testing."

Dr. Tindall noted that a computerized tomography (CT) scan and an electroencephalogram (EEG) taken three to four weeks after the injury were normal and recommended a magnetic resonance imaging (MRI) scan study and another EEG to determine the cause of appellant's dementia. Dr. Tindall found that appellant's cerebral concussion, cervical and lumbar strain and hemorrhagic gastritis had resolved and that his hypothyroidism was controlled by medication.

By letter dated October 27, 1992, the Office authorized additional objective testing by Dr. Tindall.

[2] Dr. Tindall noted that he did not have the medical records from appellant's injury date of July 17, 1983.

In a report dated November 30, 1992, Dr. Tindall noted that he would obtain additional testing and indicated that abnormalities on testing would be present with a severe head injury. Dr. Tindall further stated that he would obtain x-rays of appellant's thoracic and lumbar spine to determine whether he had a compression fracture at the time of his injury. Dr. Tindall related, "[I]f neurologic testing is unremarkable, it may be necessary to repeat the psychological testing with much more emphasis on the detection of malingering. Further evaluation by a psychiatrist would therefore be reasonable if that is the pattern which applies.

In a report dated January 15, 1993, Dr. Deo Martinez, a Board-certified internist, found that appellant was totally disabled due to his post-concussion organic brain syndrome, diabetes and hypothyroidism.

In a report dated January 22, 1993, Dr. Tindall found that the results of an EMG, nerve conduction velocity study, MRI of the brain, and x-rays of the lumbosacral and thoracic spine were all normal. Dr. Tindall stated:

> "[I]t is possible that [appellant] had a mild cerebral concussion and suffered from lumbar and cervical muscle strain. However, there are no medical records from July 17 to August 2, 1983. Had there been significant head injury, there should have been earlier medical records with positive physical examinations and testing."

Dr. Tindall opined that the EEG and MRI scan ruled out a significant past head injury or progressive degenerative disease of the central nervous system and made it outside the realm of medical probability, that appellant sustained hypothyroidism, diabetes or an injury to the brain as a result of his employment injury. He concluded that appellant's "dementia" was the result of malingering and not to his fall in 1983. Dr. Tindall further found that if appellant had schizophrenia it was unrelated to his employment injury; that he had headaches from muscle tension and age-related hearing loss. He stated:

> "In summary, [appellant] may have sustained a mild cerebral concussion and mild cervical and lumbar spine strain from a fall on July 17, 1983. His subsequent complaints of headaches, dementia, neck and low back pain, hypothyroidism and insulin-dependent diabetes mellitus, which have persisted since 1983, are not considered to be causally related to that fall."

In reports dated January 29 and February 26, 1993, Dr. Jen Kin noted appellant's continued frustration, that his diabetes was not accepted as related to his employment injury, his complaints of headaches, backaches and nausea.

In a report dated March 23, 1993, Dr. William Hunt, who is Board-certified in family practice, stated that he had treated appellant for years for his organic brain disorder, diabetes mellitus and hypothyroidism and that his thyroid disease and diabetes was stable but he was disabled from organic brain syndrome. Dr. Hunt related appellant's organic brain syndrome to his employment injury.

On April 16, 1993 the Office issued a notice of proposed termination of benefits on the grounds that the medical evidence established that appellant had no further disability due to his

work injury. The Office provided appellant 30 days within which to respond to the proposed termination letter.

In reports dated March 26 and April 26, 1993, Dr. Jen Kin discussed his continued treatment of appellant.

In a report dated May 6, 1993, Dr. Hunt again opined that appellant was totally disabled and that his "organic brain syndrome is directly related to the injury, which he suffered as a firefighter for the [employing establishment]."

Appellant submitted medical evidence from 1986 and 1989.

By letter dated May 11, 1993, appellant, through an attorney, protested the termination of benefits and requested additional time in which to respond.

By decision dated May 25, 1993, the Office terminated appellant's entitled to medical and compensation benefits effective May 30, 1993, on the grounds that the medical evidence established that he had no further disability or need for medical treatment due to the July 17, 1983 employment injury.

In a report dated April 28, 1993, received by the Office on June 3, 1993, Dr. Randoph B. Shey discussed his treatment of appellant for intermittent neck pain and muscle tension headaches.

In a report dated May 10, 1993, Dr. Acord opined that appellant was totally disabled due to organic brain syndrome.

In a report dated May 17, 1993, Dr. Martinez found that appellant was unable "to manage his activities because of his organic brain syndrome, hypothyroidism and diabetes mellitus." He attributed appellant's organic brain syndrome to his employment injury.

In reports dated June 1, 29 and September 28, 1993 and January 11, 1994, Dr. Jen Kin discussed his treatment of appellant for frustration, anger and confusion. In a report dated June 9, 1993, Dr. Jen Kin found appellant had a history of "chronic brain syndrome secondary to central nervous system trauma."

The record indicates that appellant's wife and mother were appointed his conservators on June 9, 1993. The record further indicates that appellant began receiving supplemental social security income on July 23, 1993.

In a report dated August 28, 1994, Dr. Bruce W. Meeks, a psychologist, discussed appellant's history of a work injury in early 1980 and complaints of memory loss, headaches and loss of orientation. Dr. Meeks found appellant's occupational functioning impaired and recommended further testing.

Appellant further submitted medical records documenting his treatment at the time of the employment injury.

By letter dated May 13, 1994, appellant, through his attorney, requested reconsideration. Appellant's attorney argued, *inter alia*, that the Office erred in failing to provide Dr. Tindall with the medical records from July 17, 1983, the date of the employment injury.

By decision dated August 23, 1994, the Office denied modification of its prior decision.

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation effective May 30, 1993.

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 or her employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[3]

The Office based its termination of compensation benefits on the opinion of Dr. Tindall, a Board-certified neurologist and Office referral physician. In his initial report dated April 17, 1991, Dr. Tindall reviewed the medical records from August 2, 1983 onwards and found that appellant either had residuals from a severe head injury, a nontraumatic condition producing dementia or was malingering. Dr. Tindall requested and received authorization from the Office to perform objective testing on appellant. In a report dated November 30, 1992, Dr. Tindall recommended evaluation of appellant by a psychiatrist if the results of neurologic testing were negative. In a report dated January 22, 1993, Dr. Tindall found that an EEG and MRI scan of appellant's head were normal and established that he had had no significant head injury in the past. Dr. Tindall stated:

> "[I]t is possible that [appellant] had a mild cerebral concussion and suffered from lumbar and cervical muscle strain. However, there are no medical records from July 17 to August 2, 1983. Had there been significant head injury, there should have been earlier medical records, with positive physical examinations and testing."

Dr. Tindall further found that while appellant "may" have sustained a mild concussion and mild cervical and lumbar back strain due to a fall in July 1983, his headaches, dementia, neck and low back pain, hypothyroidism and diabetes mellitus were not causally related to the employment injury.

Although Dr. Tindall found no basis upon which to attribute any of appellant's continuing symptoms to employment factors or her employment injury, his report is of lessened probative value since it was based on an incomplete factual background.[4] The Office did not provide Dr. Tindall with the medical records contemporaneous with appellant's July 17, 1983 employment injury, which included a hospital report from the date of injury, in which a physician diagnosed a concussion. The omission by the Office influenced Dr. Tindall's findings, as indicated by his statement that if appellant had had a serious injury there would be medical records around the time of the incident. Since Dr. Tindall was not provided with the relevant

[3] *Gail D. Painton*, 41 ECAB 492, 498 (1990).

[4] *Daniel J. Overfield*, 42 ECAB 718 (1991).

medical evidence, his report is insufficient to establish that appellant's employment-related condition ceased as of May 30, 1993.

Furthermore, it appears that Dr. Tindall may have made his own findings regarding whether appellant had an employment injury, as he noted that appellant "may" have had a concussion and back strain and further found that the rest of the medical conditions accepted by the Office as employment related were not due to the injury. The Board notes that a medical expert should only determine medical questions certified to him or her.[5] The medical expert should not act in an adjudicatory capacity or address legal issues in a case, as these matters are outside the scope of expertise of the physician.[6] Thus, to the extent that Dr. Tindall made his own findings regarding whether appellant had an accepted employment injury, his report loses probative value.

The decision of the Office of Workers' Compensation Programs dated August 23, 1994 is hereby reversed.

Dated, Washington, D.C.
April 3, 1998

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

[5] *Jeannine E. Swanson*, 45 ECAB 325 (1994).

[6] *See Robert O. Tondee*, 37 ECAB 352 (1986).