

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of RODERIC J. CLARK and DEPARTMENT OF THE NAVY,  
NAVAL HOSPITAL, Philadelphia, Pa.

*Docket No. 96-267; Submitted on the Record;  
Issued April 8, 1998*

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DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation effective September 19, 1993.

On May 13, 1987 a traumatic injury claim was filed on behalf of appellant, then a 30-year-old carpenter, alleging that he had injured his right arm and the right side of his chest on May 12, 1987 while lifting a heavy object. On September 16, 1987 the Office accepted appellant's claim for strain of the right pectoralis muscle. By decision dated September 1, 1993, the Office terminated appellant's compensation effective September 19, 1993 on the grounds that any disability related to appellant's May 12, 1987 employment injury had ceased by that date. By merit decisions dated April 11 and July 24, 1995, the Office denied appellant's requests for reconsideration on the grounds that the evidence submitted was insufficient to warrant modification and affirmed its termination finding.

The Board has carefully reviewed the case record in the present appeal and finds that the Office properly terminated appellant's compensation effective September 19, 1993.<sup>1</sup>

Under the Federal Employees' Compensation Act,<sup>2</sup> once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of compensation.<sup>3</sup> After the Office determines that an employee has a disability causally related to his or her employment, the Office may not terminate compensation without establishing that its original

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<sup>1</sup> The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal. As appellant filed his appeal with the Board on October 24, 1995, the only decisions before the Board are the Office's April 11 and July 25, 1995 decisions. *See* 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

<sup>2</sup> 5 U.S.C. § 8101 *et seq.* (1974).

<sup>3</sup> *William Kandel*, 43 ECAB 1011 (1992).

determination was erroneous or that the disability has ceased or is no longer related to the employment injury.<sup>4</sup>

The fact that the Office accepts appellant's claim for a specified period of disability does not shift the burden of proof to appellant to show that he or she is still disabled. The burden is on the Office to demonstrate an absence of employment-related disability in the period subsequent to the date when compensation is terminated or modified.<sup>5</sup> Therefore, the Office must establish that appellant's condition was no longer aggravated by employment factors after September 19, 1993, and the Office's burden includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>6</sup>

In developing the medical evidence with respect to the issue of appellant's ability to work, the Office properly determined that there was a conflict in the medical evidence between Dr. Timothy F. Jenkins, appellant's treating physician and Dr. Robert E. Mannherz, a Board-certified orthopedic surgeon and Office referral physician, regarding whether appellant had any residual disability from his May 1987 employment injury. In office notes dated April 1, May 6 and 19, 1992, Dr. Jenkins indicated that appellant had increased radicular pain and was totally disabled. In a work restriction form report dated May 19, 1992, Dr. Jenkins indicated that appellant could not work an eight-hour day and could only work one to two hours walking or sitting. In contrast, in a report dated June 30, 1992, Dr. Mannherz diagnosed a cervical and right shoulder strain from which appellant had completely recovered, indicated that appellant would not require further treatment and concluded that there were no objective findings on clinical examination to substantiate appellant's complaints. In order to resolve the conflict, the Office referred appellant to Dr. Leo McCloskey, a Board-certified neurologist, for an impartial medical examination in accordance with section 8123(a) of the Act.<sup>7</sup>

In situations where there exists opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of the resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>8</sup> The Board has carefully reviewed the opinion of Dr. McCloskey and finds that it has sufficient probative value, regarding the relevant issue in the present case, to be accorded such special weight.

In a report dated June 2, 1993, Dr. McCloskey noted the history of injury, reviewed appellant's medical records and found no clear evidence of neurologic abnormality on examination. He indicated that appellant "most likely suffered from a strain/sprain injury" in the

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<sup>4</sup> *Carl D. Johnson*, 46 ECAB 804 (1995).

<sup>5</sup> *Dawn Sweazey*, 44 ECAB 824 (1993).

<sup>6</sup> *Mary Lou Barragy*, 46 ECAB 781 (1995).

<sup>7</sup> Section 8123 of the Act provides that if there is a disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination. 5 U.S.C. § 8123(a).

<sup>8</sup> *Jack R. Smith*, 41 ECAB 691 (1990); *James P. Roberts*, 31 ECAB 1010 (1980).

cervical and shoulder region and that given the extensive period of time that elapsed since the injury had most likely reached maximum medical improvement. In a letter dated July 6, 1993, Dr. McCloskey supplemented his report, indicating that his previous examination of appellant did not demonstrate that appellant had any significant disability causally related to his accepted employment injury and that any symptoms he had could not be attributed to that accepted injury. Dr. McCloskey has provided a well-reasoned and rationalized opinion that appellant did not have any continuing disability related to his accepted employment injury. Thus, the Office met its burden of proof and properly terminated compensation effective September 19, 1993, according special weight to the impartial medical examination report by Dr. McCloskey.

Subsequent to the issuance of the Office's September 1, 1993 decision, appellant requested reconsideration and submitted additional medical evidence in support of his assertion that he continued to be disabled. Appellant submitted a medical report dated February 24, 1994 by Dr. Jenkins, a report dated October 23, 1993 by Dr. Barbara G. Frieman, a Board-certified orthopedic surgeon and a report dated July 28, 1994 by Dr. Robert Knobler, a Board-certified neurologist. In his report, Dr. Jenkins reiterated his conclusion that appellant remained disabled due to significant neck pain, occipital headaches and right arm pain. In her October 28, 1993 report, Dr. Frieman noted exquisite tenderness over the right brachial plexus and diagnosed a right brachial plexus traction injury related to the accepted employment injury with continued disability of his upper extremity. In a report dated July 28, 1994, Dr. Knobler diagnosed permanent right-sided brachial plexus traction which caused right hand problems and headaches that, while treatable with medication, had not fully resolved. He indicated that appellant would require ongoing treatment.

The Office properly determined that the reports of Drs. Frieman and Knobler created a conflict in the medical evidence with the report of Dr. McCloskey.<sup>9</sup> Therefore, the Office referred appellant together with his medical records to Dr. Julio L. Kuperman, a Board-certified neurologist, for an impartial medical examination and opinion. In a report dated January 1, 1995, Dr. Kuperman noted appellant's history of injury, reviewed the medical evidence of record and recorded findings for nerve conduction studies and an electromyography (EMG) which he administered of appellant's upper right extremity. Dr. Kuperman noted that in order to sustain a diagnosis of brachial plexus traction of such a degree that it would persist almost eight years after the onset of injury, there should be motor findings that could be "objectivized" clinically on the EMG. Appellant's EMG was within normal limits with no evidence of radiculopathic, neuropathic or entrapment syndrome. Therefore Dr. Kuperman concluded that while the initial injury may have involved "cervio/thoracic and/or pectoralis sprain," its affects had ceased and appellant was not considered to be disabled. As Dr. Kuperman provided a well-reasoned and fully rationalized opinion regarding why appellant was no longer disabled due to residuals of his employment injury, the Office properly accorded his report special weight and found that the weight of the medical evidence rested with this opinion. Moreover, the Office properly determined that the June 21, 1995 report by Dr. Frieman which was submitted subsequent to the issuance of the Office's April 11, 1995 merit decision was not sufficient to overcome Dr. Kuperman's report. The Board notes that Dr. Kuperman was selected to resolve the conflict

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<sup>9</sup> The Office properly did not include Dr. Jenkins' report in this determination since his prior reports were used to create the conflict that had been resolved by Dr. McCloskey's report.

in medical opinions between Drs. Frieman and Knobler and Dr. McCloskey. For this reason, the subsequent report of Dr. Frieman which was essentially repetitive of her prior report is insufficient to outweigh the special weight given the report by Dr. Kuperman as Dr. Frieman had participated. Therefore, appellant has not established that the Office erred in not modifying the termination of his benefits.

The decisions of the Office of Workers' Compensation Programs dated July 25 and April 11, 1995 are hereby affirmed.

Dated, Washington, D.C.  
April 8, 1998

George E. Rivers  
Member

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member