U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PHILIP M. FOSTER and DEPARTMENT OF THE NAVY, NAVAL AIR STATION, Alameda, Calif.

Docket No. 96-1394; Submitted on the Record;
Issued April 3, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation on the grounds that he had no residual disability from the accepted lumbar strain.

The Board has duly reviewed the case record and finds that the Office met its burden of proof in establishing that appellant has no continuing disability related to his accepted work injury sustained on February 26, 1988 and therefore properly terminated compensation.

Under the Federal Employees' Compensation Act,[1] the Office has the burden of justifying modification or termination of compensation once a claim is accepted and compensation paid.[2] Thus, after the Office determines that an employee has disability causally related to his or her employment, the Office may not terminate compensation without establishing either that its original determination was erroneous or that the disability has ceased or is no longer related to the employment injury.[3]

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.[4] The Office's burden

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[1] 5 U.S.C. §§ 8101-8193.

[2] *William Kandel,* 43 ECAB 1011, 1020 (1992).

[3] *Carl D. Johnson,* 46 ECAB 804, 809 (1995).

[4] *Dawn Sweazey,* 44 ECAB 824, 832 (1993).

includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[5]

In assessing medical evidence, the number of physicians supporting one position or another is not controlling; the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for and the thoroughness of, physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[6]

In this case, appellant, then a 44-year-old automotive mechanic, filed a notice of traumatic injury on February 26, 1988, claiming that he hurt his back, neck and right leg and arm when some equipment he was repairing fell on him. The Office accepted a cervical and lumbosacral strain and paid appropriate compensation.

Appellant returned to light-duty work on August 25, 1988 and was released for full duty on September 15, 1988. On March 13, 1989 appellant filed a notice of recurrence of disability. The Office accepted the claim and referred appellant for vocational rehabilitation.

On August 17, 1993 the Office referred appellant, along with the medical records, a statement of accepted facts and a list of questions to Dr. Timothy J. Bray, a Board-certified orthopedic surgeon, for a second opinion evaluation. Dr. Bray stated in a September 22, 1993 report that he was "unclear as to the exact diagnosis" and could find no neurologic deficit, but that appellant would probably not ever return to gainful employment in view of his severe limitations and questionable motivation. Dr. Bray completed a duty status report indicating that appellant could work full time with restrictions on sitting, standing, walking and lifting.

By letter dated October 6, 1993, the Office requested that Dr. Bray address the physical requirements of the job of procurement clerk. Dr. Bray responded that his restrictions were based on the residuals of the 1988 injury, but the employing establishment's job description of a procurement clerk and the actual duties as described by appellant were "strikingly different." Dr. Bray added that appellant did not feel that he could perform the job.

On January 12, 1994 the Office repeated its request that Dr. Bray opine whether appellant could perform the clerk's job. Dr. Bray replied that appellant would "probably never" work full time and completed a duty status report indicating that his responses regarding appellant's physical restrictions were based on an interview with appellant on February 23, 1994.

Subsequently, Dr. Bray became appellant's treating physician and referred him to Dr. E. Gary Starr, Board-certified in physical medicine and rehabilitation, who diagnosed chronic pain syndrome and L5-S1 herniated nucleus pulposus with S1 radiculopathy and stated in an August 16, 1994 report that it is "going to be very difficult to get [appellant] back to work."

[5] *Mary Lou Barragy*, 46 ECAB 781, 787 (1995).

[6] *Connie Johns*, 44 ECAB 560, 570 (1993).

A nerve conduction study dated September 15, 1994 found no evidence of lumbosacral radiculopathy or peripheral nerve lesion.

The Office again referred appellant for a second opinion evaluation. Dr. George E. Sims, a Board-certified orthopedic surgeon, examined appellant on November 14, 1994, noting that appellant was using crutches, which he stated had been prescribed in 1988. Dr. Sims reviewed appellant's medical records and diagnostic tests, including normal x-rays of the lumbar spine and both hips. Dr. Sims concluded that appellant's cervical and lumbosacral strains had resolved, probably by the fall 1988 and that his current symptoms, supported by objective findings, were related to rheumatoid spondylitis (inflammation of the vertebrae).

Dr. Sims added that appellant could not return to his former job because of the spondylitis and a herniated disc, which was not present on a 1990 x-ray following his work-related injury. However, Dr. Sims indicated that appellant might be capable of work as a procurement clerk and completed a work capacity evaluation form showing that appellant should limit his kneeling, bending, standing, but could lift up to 20 pounds and could work 8 hours a day.

Based on Dr. Sims' report, the Office issued a notice of proposed termination on December 27, 1994. Appellant responded by letter dated January 9, 1995, indicating that he had met with Dr. Starr, who recommended a work-capacity evaluation and that he wanted to go back to work. On February 3, 1995 the Office terminated appellant's benefits on the grounds that the residuals of appellant's work had resolved.

On January 30, 1996 appellant requested reconsideration and submitted office treatment notes and a report from Dr. Starr. On March 12, 1996 the Office denied appellant's request on the grounds that the evidence submitted in support of reconsideration was insufficient to warrant modification of the prior decision.

The Board finds that Dr. Sims' report establishes that appellant had no continuing disability resulting from the February 26, 1988 work injury. Dr. Sims thoroughly examined appellant and reviewed the medical records, noting that a July 13, 1994 computerized tomography (CT) scan showed a large L5-S1 disc herniation with compression of the S1 nerve root, but that a 1990 CT scan showed no such herniation. Dr. Sims added that a March 16, 1990 medical evaluation showed no evidence of disc herniation, either. Thus, Dr. Sims' conclusion that appellant's current pain and symptoms are related, not to the initial back strain, but rather to the disc herniation is supported by objective tests showing that the herniation and the diagnosed spondylitis occurred well after the work injury had resolved.

The Board finds that Dr. Bray's conclusions were not supported by sufficient medical rationale or objective findings[7] and was, by his own admission, based solely on appellant's "feeling" that he cannot work.[8] Thus, Dr. Bray's report is of diminished probative value.

Dr. Starr stated in his January 25, 1996 report that, based on the history given to him, "the mechanism of injury" causing appellant's disc protrusion was the February 26, 1988 incident because CT scans following this injury showed the protrusion. Dr. Starr provided no medical rationale for this conclusion and failed to discuss the 1990 CT scan, which showed no evidence of herniation. Thus, his opinion is of diminished probative value and does not detract from that of Dr. Sims who concluded that the medical evidence showed that appellant's accepted strain had resolved by fall 1988.[9]

Therefore, the Board finds that the weight of the medical evidence rests with the opinion of Dr. Sims, the second opinion specialist, who provided a detailed and well-rationalized medical explanation of why the accepted condition had resolved and appellant had no continuing disability from the back strain he sustained on February 26, 1988[10] and is sufficient to meet the Office's burden of proof in terminating appellant's compensation.[11]

[7] *See Anna Chrun*, 33 ECAB 829, 835 (1982) (finding that the absence of objective evidence of disability is more compatible with the absence of disability than with its presence).

[8] *See Rosie M. Price*, 34 ECAB 292, 294 (1982) (finding that the mere occurrence of an episode of pain during the workday is not proof of an injury having occurred at work; nor does such an occurrence raise an inference of causal relationship); *Max Haber*, 19 ECAB 243, 247 (1967) (same); *see also John L. Clark*, 32 ECAB 1618, 1624 (1981) (finding that a medical opinion based on a claimant's complaint that he hurt too much to work, with no objective signs of disability being shown, was insufficient to establish a basis for compensation).

[9] *See Patricia M. Mitchell*, 48 ECAB ___ (Docket No. 95-834, issued February 27, 1997) (finding that medical opinions based on an incomplete history have little probative value); *Margarette B. Rogler*, 43 ECAB 1034, 1039 (1992) (finding that a physician's opinion that provides no medical rationale for its conclusion on causation is of diminished probative value); *Arthur N. Meyers*, 23 ECAB 111, 1113 (1971) (finding that a physician's opinion in support of causal relationship was of diminished probative value because its basis was a medical history of injury not corroborated by contemporaneous documents in the record).

[10] *See Delphine L. Scott*, 41 ECAB 799, 802 (1990) (finding that the second opinion physician's conclusion regarding the improbability of appellant's lumbosacral sprain persisting for so long was sufficient to establish that appellant had recovered from the accepted injury).

[11] *See Samuel Theriault*, 45 ECAB 586, 590 (1994) (finding that a physician's opinion was thorough, well rationalized, and based on an accurate factual background and thus constituted the weight of the medical evidence that appellant's accepted injury had resolved).

The March 12, 1996 and February 3, 1995 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

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

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member