

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WYLIE H. MITCHELL and DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, Columbia, S.C.

*Docket No. 95-2176; Submitted on the Record;
Issued August 7, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether appellant had any disability after March 6, 1992 causally related to his October 30 and November 1, 1990 employment-related injuries.

On November 20, 1990 appellant, then a 40-year-old computer assistant, filed a claim for compensation. He alleged that on October 30, 1990 he strained his neck while lifting in the performance of duty. Appellant also alleged that on November 1, 1990 he again strained his neck while assisting the move of two heavy cabinets. He did not stop work.

Appellant came under the treatment of Dr. C. Tucker Weston, an orthopedic surgeon, who treated him for intermittent soreness and stiffness in the right side of his neck and right shoulder. In reports attached to appellant's claim for intermittent disability, Dr. Weston summarized appellant's monthly examinations noting that he had remained symptomatic with pain in his right neck and shoulder. Appellant's claim was accepted by the Office of Workers' Compensation Programs for cervical sprain and appellant received appropriate compensation benefits for his intermittent disability from work.¹

Appellant was referred by the Office for examination by Dr. James W. Faulk, an orthopedic surgeon. In a September 23, 1991 report, Dr. Faulk noted appellant's history that he had originally injured his neck in a nonemployment-related automobile accident on July 28, 1990. Dr. Faulk noted that appellant thereafter experienced right-sided neck pain and received 24 physical therapy treatments for his neck condition. Dr. Faulk reviewed appellant's history of lifting a 29-pound box of tapes on October 29, 1990 and assisting in moving a 300-pound power supply crate on November 1, 1990. He stated that on examination appellant complained of some neck pain when he laterally rotated his head to the left side. He reviewed x-rays which showed a little bit of a posterior spur at C6-7. Dr. Faulk stated that appellant sustained a cervical strain in the July 28, 1990 injury which had been aggravated on several occasions. He indicated that

¹ The record reflects that appellant last worked on June 1, 1991 when he resigned from his position at work.

appellant had been appropriately treated and related appellant's ongoing cervical complaints to a preexisting degenerative disc disease at C6-7. He opined that appellant had neither an impairment from his cervical condition nor did it require physical restrictions in order to work.

In an April 2, 1992 telephone memorandum, the Office noted that appellant stated that he was fired from his job on June 1, 1992 for poor performance but that the employing establishment stated that appellant had resigned in order to have a clean record.

By decision dated April 16, 1992, the Office denied appellant's claim for wage loss beyond March 6, 1992. The Office found that appellant removed himself from employment by resigning for personal reasons, not due to his disability. The Office found that the employing establishment had work available for appellant within his work restrictions. The Office noted, however, that medical benefits would continue for his accepted cervical sprain condition.

On April 20, 1992 appellant requested an oral hearing which was held on August 17, 1992. At the hearing, appellant testified that he was terminated from his position on June 1, 1991 for performance reasons but that his Standard Form-50 was later amended to reflect a resignation effective August 1, 1991 for personal reasons.

In a decision issued December 10, 1992 and finalized on December 23, 1992 the hearing representative remanded the case to the Office to resolve a conflict in medical opinion between Drs. Weston and Faulk regarding appellant's capacity for work.

On February 24, 1993 the Office referred appellant, a copy of his medical records and statement of accepted facts, to Dr. Joe D. Christian, Jr., a Board-certified orthopedic surgeon, to resolve the conflict in medical opinion. The Office requested Dr. Christian to determine whether appellant was limited to light-duty work or had physical restrictions due to the accepted employment-related injuries. Dr. Christian was also requested to address any permanent residuals due to the accepted condition.

In a medical report dated March 17, 1993, Dr. Christian stated that he examined appellant on that date. He reviewed the statement of accepted facts and, based on his examination of appellant, stated that appellant had sustained a cervical sprain condition on several occasions. Dr. Christian stated that physical examination of the cervical spine was normal and that appellant's x-rays were considered normal for his age. He added that he was unable to fully explain the pain appellant exhibited in the area of the neck or right thoracic spine. Dr. Christian concluded that appellant's cervical sprain conditions due to the accepted employment injuries and the 1990 automobile accident had resolved. He indicated that the employment injuries would have caused a very mild soft tissue injury which resolved within six weeks. Dr. Christian added that appellant had no impairment or permanent residuals from the accepted injuries nor any permanent restrictions for work.

By decision dated March 24, 1993, the Office rejected appellant's claim for compensation benefits after March 6, 1992. The Office found that the weight of medical opinion, as represented by the report of Dr. Christian, established that appellant had no residuals due to the accepted employment injuries and that they had resolved.

On April 6, 1993 appellant requested an oral hearing which was held on June 25, 1993. Appellant submitted a May 13, 1993 medical report from Dr. Nigel A.R. Watt, a Board-certified orthopedic surgeon. Dr. Watt diagnosed appellant as having cervical spondylosis or degenerative arthritis, which he stated was exacerbated “as a result of the described episodes of July 28, October 10 and November 1, 1990.” Dr. Watt added that appellant had a permanent impairment of his cervical spine resulting in total impairment of the whole person of 12 percent. He stated that appellant could return to a sedentary position with a restriction against lifting more than 25 pounds.

In a decision issued on October 29, 1993 and finalized on November 9, 1993, an Office hearing representative affirmed the March 24, 1993 decision. The hearing representative found that the weight of the medical opinion was represented by Dr. Christian, as the impartial medical specialist, and established that appellant did not have any continuing medical residuals causally related to his accepted work-related injuries. He found Dr. Watt provided insufficient rationale to support that appellant continued to be disabled due to the accepted employment injuries.

On December 7, 1993 appellant filed for reconsideration of the Office’s October 29, 1993 decision. Appellant submitted a November 30, 1993 medical report from Dr. Watt, who stated that he has reviewed the decision of the hearing representative and that “[i]t appears they are accepting the opinion of Dr. Christian and rejecting my opinion.” Dr. Watt stated that, with the “presence of existing disc disease, ... further disc damage can occur in the course of a straining lifting event” without a short-term resolution. He also noted that such an injury can become chronic and occasionally can result in permanent impairment.

By decision dated February 7, 1994, the Office denied modification of the November 9, 1993 decision. The Office found Dr. Watt’s opinion equivocal in nature, as he had not addressed any specific disagreement with Dr. Christian but had addressed his differences in general terms.

On February 23, 1994 appellant filed a request for reconsideration of the Office’s February 7, 1994 decision. Appellant submitted a February 21, 1994 medical report from Dr. Weston, who stated that appellant brought the x-rays relied on by Dr. Christian in his March 17, 1993 report. Dr. Weston stated that he did not believe the x-rays obtained by Dr. Christian to be adequate to identify degenerative disc disease between C6-7, as was previously diagnosed. He stated that the injuries of October 30 and November 1, 1990 were superimposed on the preexisting automobile accident of July 28, 1990, which caused an aggravation of the preexisting symptoms from the automobile accident. Dr. Weston stated that appellant’s cervical symptoms remained and he could not work at a job which required heavy lifting with the upper right extremity.

By decision dated February 28, 1994, the Office denied modification of its prior decisions.

On March 14, 1994 appellant filed a request for reconsideration of the Office’s February 28, 1994 decision, alleging error and malpractice in Dr. Christian’s impartial medical examination.

By decision dated May 17, 1994, the Office denied reconsideration on the grounds that appellant's contentions were repetitive in nature and insufficient to warrant review of the prior decisions.

On July 15, 1994 appellant filed a request for reconsideration and submitted medical evidence from Dr. Gal G. Margalit, a general surgeon, Dr. Frank E. Forsthoefel, Board-certified in psychiatry and neurology, and Dr. Weston.

In a May 23, 1994 report, Dr. Margalit reviewed appellant's history of injury and medical treatment. Dr. Margalit diagnosed a degenerative disc at C6-7 which preexisted the employment injury but were probably aggravated by them. He also recommended a psychological evaluation based on exhibited symptoms of irritability and depression.

In a June 15, 1994 medical report, Dr. Forsthoefel stated that he evaluated appellant on that day and reviewed his medical history. He diagnosed appellant as having major depression. Dr. Forsthoefel noted that appellant stated he was in essentially good health prior to his automobile accident, during which he sustained a cervical strain. After his employment injuries, appellant withdrew socially. Dr. Forsthoefel stated that appellant's employment-related injuries "triggered a secondary depression that also interferes with his ability to work."

In a July 11, 1994 medical report, Dr. Weston stated that a comparison between December 1990 and June 1994 x-rays revealed a progression of spur formation in the C6-7 interspace and foramina of the C6-7. He noted that this finding supported an aggravation of a preexisting condition as a result of appellant's October 30 and November 1, 1990 employment-related injuries.

In a decision dated August 29, 1994, the Office denied modification of its prior decisions. The Office found that the medical reports from Dr. Margalit and Dr. Weston did not outweigh the opinion of Dr. Christian, the impartial medical examiner, and that Dr. Forsthoefel's report was of diminished probative value because his conclusions were based on medical conditions not accepted by the Office as employment related.

On October 4, 1994 appellant filed a request for reconsideration of the Office's August 29, 1994 decision and submitted a medical report from Dr. Edward E. Kimbrough, a Board-certified orthopedic surgeon. In his September 7, 1994 medical report, Dr. Kimbrough found that appellant had a preexisting cervical impairment which was aggravated by heavy lifting on October 30 and November 1, 1990. He noted that appellant's lifting caused his shoulder and paraspinal muscles to compress, rather than stretch, the cervical spine which produced injury to his intervertebral discs. Dr. Kimbrough provided as impairment rating of 12 percent of the whole person for appellant's cervical condition.

In a decision dated January 30, 1995, the Office denied modification of its prior decisions. The Office found Dr. Kimbrough's medical opinion to be speculative insufficient in rationale for his conclusion that appellant's neck and shoulder conditions were related to the employment-related injuries.

On March 3, 1995 appellant filed a request for reconsideration on the Office's January 30, 1995 decision. Appellant alleged that the Office had obstructed the development of his claim by not allowing him discovery prior to the June 23, 1993 hearing and that the hearing representative relied on erroneous medical evidence in reaching his decision.

By decision dated April 7, 1995, the Office denied modification of its prior decisions. It was noted that the Office hearing representative provided appellant with the time and date of the hearing, notice as to the issue to be addressed, and his right to request evidence and to submit additional medical evidence at the hearing.

By decisions dated April 21 and May 5, 1995, the Office denied appellant's subsequent April 18 and May 3, 1995 requests for reconsideration on the grounds that the evidence was repetitive and insufficient to warrant merit review of the prior decision.

The Board finds that appellant has failed to establish that he sustained disability for work after March 6, 1992 causally related to his accepted injuries of October 30 and November 1, 1990.

In the present case, appellant's claim was accepted for injury on October 30 and November 1, 1990. His claim was accepted by the Office for cervical sprains. Appropriate compensation was paid to appellant following his injuries based on his claims for intermittent disability when appellant was unable to work. Appellant has the burden of establishing that he had disability for work after March 6, 1992.²

Section 8123(a) of the Federal Employees' Compensation Act provides, "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."³

The Office hearing representative determined that a conflict existed in the medical opinion evidence regarding appellant's employment-related residuals and his capacity for work between Dr. Weston, appellant's treating physician, and Dr. Faulk, an Office referral physician. Dr. Christian, a Board-certified orthopedic surgeon, was selected as the impartial medical specialist for purposes of examination to resolve the conflict in the medical opinion evidence. In situations where there are opposing medical reports of virtually equal weight and the case is referred to an impartial medical specialist for the purpose of resolving a conflict in the medical opinion evidence, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁴ As a conflict did exist in the medical opinion evidence between appellant's physician, Dr. Weston, and Dr. Faulk, the Office medical consultant, the Office properly referred appellant to Dr. Christian for an impartial medical evaluation.

² See *Donald Leroy Ballard*, 43 ECAB 876 (1992).

³ 5 U.S.C. § 8128(a).

⁴ See *Gary R. Sieber*, 46 ECAB 215 (1994).

In his report of March 17, 1993, Dr. Christian reviewed appellant's history of injury and medical treatment. He noted that appellant sustained injury in the nonemployment-related automobile accident of July 1990, and on October 30 and November 1, 1990 while at work. Dr. Christian diagnosed appellant's neck condition as a cervical sprain, as was accepted by the Office, which he noted was a soft tissue injury. Dr. Christian stated that his examination of appellant that date revealed a normal cervical spine and stated that appellant's x-rays were considered normal for a man of his age. He concluded that the residuals due to the two employment injuries and the nonemployment automobile accident had resolved and stated that appellant has no permanent impairment or physical restrictions for work due to the employment injuries. The Board finds that the report of Dr. Christian is well rationalized and constitutes the weight of medical opinion. His report was based on an accurate factual background of appellant's accepted injuries and medical treatment. Dr. Christian's report establishes that appellant's accepted cervical sprains resolved within a period of approximately six weeks without residual. For this reason, the Office properly denied appellant's claim for compensation benefits after March 6, 1992.⁵

On reconsideration, appellant submitted medical reports from several physicians in support of his contention that he remains disabled due to residuals of the October 30 and November 1, 1990 employment injuries. The Board finds, however, that these reports are insufficient to outweigh the report of Dr. Christian, whose opinion is entitled to special weight as the impartial medical specialist.⁶ Dr. Watt diagnosed cervical spondylosis and degenerative arthritis, conditions which the Office has not accepted as related to the employment injuries. Dr. Watt stated that these diagnosed conditions were exacerbated by the traumatic episodes of July, October and November 1990, but failed to support this conclusion with rationale explaining the nature of the traumatic incidents and how they would cause or contribute to appellant's diagnosed degenerative disease process.⁷ Dr. Margalit diagnosed degenerative disc at C6-7 which preexisted the employment injuries, but was probably aggravated by them. He failed to support his opinion with sufficient explanation of appellant's underlying degenerative disc at C6-7 and how it was caused or aggravated as a result of the two work-related injuries. Dr. Forsthoefel diagnosed major depression with degenerative disc disease. His opinion that the two employment incidents triggered a secondary depression interfering with appellant's ability to work is not well rationalized.⁸ Dr. Kimbrough diagnosed injury to appellant's cervical discs caused by two employment incidents. The Board finds that his opinion is of limited probative

⁵ While appellant has alleged errors in the examination by Dr. Christian and the Office's determination of his report as representing the weight of medical opinion, the Board finds that there is no evidence of an improper examination or evidence of bias; *see Roger S. Wilcox*, 45 ECAB 265 (1993).

⁶ *Thomas Bauer*, 46 ECAB 257 (1994).

⁷ *Joanne S. Rozelle*, 40 ECAB 931 (1989).

⁸ *Sandra Dixon-Mills*, 44 ECAB 882 (1993). (The medical evidence of record did not establish a progression of appellant's condition after the accepted injury or that appellant's condition was a progression of the accepted injury).

value as it is also lacking in a rationalized medical explanation for the physician's stated conclusions.⁹

For these reasons, the Board finds that appellant has not sustained his burden of establishing that he remained disabled due to his accepted employment injuries of October 30 and November 1, 1990 after March 6, 1992.

The decisions of the Office of Workers' Compensation Programs dated May 5, April 21 and April 7, 1995 are hereby affirmed.

Dated, Washington, D.C.
August 7, 1998

George E. Rivers
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

⁹ *Ern Reynolds*, 45 ECAB 690 (1994).