

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MICHAEL J. SPEISER and DEPARTMENT OF AGRICULTURE,  
FOREST SERVICE, Missoula, Mont.

*Docket No. 96-1607; Submitted on the Record;  
Issued August 10, 1998*

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,  
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation on March 12, 1996.

The Office accepted that appellant sustained a lumbar strain on July 14, 1985 when he slipped and fell while carrying a 60-pound box of pulaskis, which landed on top of him. Appellant received continuation of pay for 45 days, after which the Office began payment of compensation for temporary total disability. The Office continued to pay such compensation until March 12, 1996. By decision of that date, the Office terminated appellant's compensation on the basis that the weight of the medical evidence established that he was no longer disabled due to the employment injury that occurred on July 14, 1985.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. 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>1</sup>

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation on March 12, 1996.

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<sup>1</sup> *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

In terminating appellant's compensation, the Office relied on a report dated August 28, 1995 from Dr. Arthur M. Auerbach, a Board-certified orthopedic surgeon, to whom it referred appellant for a second opinion examination. In this report Dr. Auerbach stated:

"In your letter to me of July 24, 1995, you note that prison guards did periodically observe the claimant lifting weights in the Avenal State Prison. Also, when he was incarcerated at Avenal State Prison, he did work in the kitchen. The claimant was transferred to the Mule Creek Prison from Avenal Prison in October of 1994. We note that a second medical examination had been originally scheduled February 28, 1995, but just prior to this date, he had been involved in an altercation with another inmate that resulted in the claimant being hospitalized. He was subsequently moved to the infirmary for several days.

"After reviewing my report and reviewing the statements that he did lift weights and did have a working position in the kitchen at Avenal State Prison, and was involved in an altercation with another inmate that required hospitalization, I would state that most probably the claimant is no longer partially disabled secondary to an alleged lumbar strain secondary to a July 14, 1985 incident. With the facts in hand, if [appellant] were not in prison, he most probably could perform the duties of a tool grinder. Those duties would be performed though with a degree of pain in the low back when doing so."

In an earlier report dated May 3, 1995, Dr. Auerbach noted that the Office's statement of accepted facts indicated that appellant had been seen lifting weights in his free time while in prison. Dr. Auerbach stated that appellant denied lifting weights, and that on examination "he did not have the appearance of one who lifted weights and did not have firm muscles of his upper and lower extremities, abdomen or back." In this report Dr. Auerbach concluded:

"The medical condition of lumbar strain was caused by the work injury of July 14, 1985. A herniated disc had been diagnosed in the past, but that condition was never confirmed on CT scan. In the absence of any other specific injury and in light of the fact that he has had pain in the back and down into the lower extremities since the original injury of July 14, 1985, I believe [appellant's] symptoms are caused by the work injury.

"Based upon my examination and review of the medical records, the examinee does continue to have residuals due to the work injury of July 14, 1985. These residuals are limitation of back motions in all directions, probable mild degree of weakness of dorsiflexion of both feet and decreased sensation to pinwheel and touch in a dermatome distribution of the right lower extremity to some degree. The examinee does continue to suffer residuals of the work injury and the duration of that condition is permanent.

"Given the fact that several other specialists have noted that he was unable to perform the work duties of a tool grinder,<sup>2</sup> and given the objective findings as

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<sup>2</sup> At the time Dr. Auerbach wrote his May 3, 1995 report, the most recent medical report indicating that

noted above that were found by my examination, I would state that the examinee continues to be incapable of performing the work duties of a tool grinder on a full-time basis.”

As Dr. Auerbach did not examine appellant between the dates of his May 3 and August 28, 1995 reports, it is apparent that Dr. Auerbach’s change of opinion on appellant’s ability to work was based on the information provided in the Office’s July 24, 1995 request for a supplemental report. In this letter, the Office advised Dr. Auerbach that “prison guards did periodically observe the claimant lifting weights in the Avenal State Prison. Also, when the claimant was incarcerated at the Avenal State Prison, he *did* work in the kitchen. I have provided a statement from Mr. Speiser that does confirm that he was working. This letter was received by this Office on April 19, 1994.” (Emphasis in the original.) Appellant’s letter received by the Office on April 19, 1994 stated that he had “been assigned a light-duty assignment in the culinary [area]. That assignment began February 5, 1994 with no pay.” This statement contradicts one in the Office’s statement of accepted facts provided to Dr. Auerbach stating, “The claimant was assigned the position of ‘loader’ effective February 5, 1994 in the main kitchen which consisted of loading or unloading culinary transport vehicles and transporting food items to the loading dock area. He only worked in this capacity for a few months.” There is no reason to believe that the Office’s statement of accepted facts is accurate, especially as to the amount of time appellant performed the “loader” position. A June 13, 1994 letter from a prison litigation coordinator noted that appellant was at that time not assigned any work duties, and that he had been assigned to the “loader” position on February 5, 1994. It does not indicate he performed this position “for a few months,” as stated in the Office’s statement of accepted facts. In a letter received by the Office on February 21, 1996, appellant stated that he was “removed from the loader job ... because I was unable to perform the job because of my back injury, so I was reassigned to a light-duty job of pushing a broom.” This information was not provided to Dr. Auerbach.

The Office’s source of its statement that appellant lifted weights at Avenal State Prison also was the June 13, 1994 letter from the prison litigation coordinator: “The housing unit officer reports that [appellant] has been seen lifting weights in his free time.” This information was distorted in the Office’s July 24, 1995 letter to Dr. Auerbach to “prison guards did periodically observe the claimant lifting weights in the Avenal State Prison.” More important than this minor distortion is the fact that the Office did not ascertain how long or often appellant lifted weights or how heavy the weights were that appellant lifted. The Office attempted to obtain further information on these points, as well as on appellant’s work assignment, from officials at the Avenal State Prison, but did not receive a response. The only information on these points in the case record comes from appellant, who stated in a letter received by the Office on January 25, 1993, long before the weight lifting became an issue, “I have however a total of five to seven times done certain exercises with weights. This five to seven times meaning in the past seven years that many times. I invented these exercises myself as I’ve never seen anyone

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appellant’s disability related to his July 14, 1985 injury had not ended was a January 11, 1993 report from Dr. Richard L. Rouhe, a Board-certified orthopedic surgeon, to whom the Office referred appellant for a second opinion.

else do them and they do not involve building the body. It is more like trying to release pressure by being on all fours swinging a dumbbell 25 lbs.” Similarly, appellant stated in his letter received by the Office on February 21, 1996 that “in the past 11 years I’ve exercised with weights in ways that were not lifting but pushing and then it was for very short periods of time.” Appellant also contended that the weight area could not be seen from the housing officer’s post. The evidence does not establish the accuracy of the Office’s statement to Dr. Auerbach that appellant periodically lifted weights, a statement that implies more weight lifting than is supported by the evidence in the case record.

Also in serious doubt is the accuracy of Office’s statement of accepted facts’ description of the physical requirements of the position of tool grinder that appellant held when he was injured on July 14, 1985. This description states, “There were no requirements for pushing, pulling, bending, squatting, climbing, kneeling, or twisting. Lifting was intermittent and limited to less than 6 pounds (the weight of a pulaski).” This description was derived from a position description prepared by the employing establishment’s regional OWCP specialist on June 7, 1994, and also notes that lifting a box of pulaskis, the very activity appellant was performing when he was injured, was not a job requirement. This position description varies radically from one provided to the Office by an employing establishment personnel clerk on January 13, 1986. The January 1986 position description states, under physical effort, “Duties require a vigorous and active individual with considerable walking, standing, stooping and bending requirements and frequent lifting, carrying and loading that weigh [sic] up to 100 pounds.” The Office has made no attempt to reconcile these two radically different versions of the physical requirements of appellant’s former position, instead providing Dr. Auerbach with the more sedentary description after its first referral specialist, Dr. Rouhe, indicated appellant could not perform the more demanding one.

The evidence does not establish that the Office provided Dr. Auerbach with accurate statements upon which to base an opinion on appellant’s ability to work. As a medical report based on an inaccurate history is of reduced probative value,<sup>3</sup> Dr. Auerbach’s August 28, 1995 report is not sufficient to meet the Office’s burden of proof to terminate appellant’s compensation.

The decision of the Office of Workers’ Compensation Programs dated March 12, 1996 is reversed.

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<sup>3</sup> *Peter Seaman*, 34 ECAB 1735 (1983).

Dated, Washington, D.C.  
August 10, 1998

David S. Gerson  
Member

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member