

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GARY E. SCHWARTZ and DEPARTMENT OF THE ARMY,
LETTERKENNY ARMY DEPOT, Chambersburg, Pa.

*Docket No. 96-1292; Submitted on the Record;
Issued December 28, 1998*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation effective January 11, 1995.

On June 4, 1990 appellant, then a 36-year-old foreman, was moving a bookshelf cabinet when the cabinet fell on top of him, causing him to fall with his back striking an engine block. He was unconscious and was taken to a hospital for treatment. He underwent surgery on June 13, 1990 for a laminectomy, excision of herniated L4-L5 and L5-S1 discs and excision of hypertrophic ligamentum flavum and hypertrophic articular facets at the L4-L5 and L5-S1 levels. The Office accepted appellant's claim for herniated L4-L5 and L5-S1 discs and began payment of temporary total disability compensation effective July 20, 1990, after appellant's continuation of pay had ceased. On June 13, 1991 appellant underwent surgery for recurrent L4-L5 disc protrusion with radiculopathy with a right medial facetectomy and a right foraminotomy at L4-L5 with lysis of adhesions and removal of a large fragment of protruded disc adherent to the nerve root and scar tissue. The incision from the second surgery became infected. Appellant underwent surgery on July 15, 1991 for debridement of the incision and closure of the incision with wire sutures. On March 22, 1992 appellant fell from a stool at home while he was changing a light bulb, landing on a rack of barbells. An April 15, 1992 computerized tomography (CT) scan showed a fracture of the spinous process of L3.

In an August 19, 1992 report, Dr. John D. Ashby, a Board-certified orthopedic surgeon, indicated, on examination, that appellant had a rigid lumbar spine due to muscle spasms and had a large bursa over the cephaloid portion of his surgical incision with some possible residual retaining wire sutures. After neuralgic examination, the physician reported that appellant had sensory complaints and complaints of coldness, particularly in the left leg which he related to possible sensory nerve damage from the original injury. Dr. Ashby stated that the objective findings demonstrated either a current herniated disc or postoperative changes. He concluded that appellant's current condition was due solely to his employment injury because he had no history of back problems prior to that injury and the magnitude of the injury was sufficient to

cause appellant's current problems. He commented that appellant's prolonged recovery arose from the two levels of laminectomies that had to be performed and the two levels of nerve root involvement. He commented that considerable scar tissue had accumulated, to which his back operations had greatly contributed, and had made appellant's condition permanent and intractable. He indicated that this factor prevents appellant from ever returning to his former employment as a heavy mobile equipment mechanic. He stated that appellant could perform sedentary work with no forward bending or lifting over 20 pounds. He indicated that appellant could not tolerate prolonged standing or walking.

Appellant underwent surgery on February 18, 1993 for removal of granulomatous tissue and wire suture material from the upper portion of the lumbar wound. After the surgery he developed delayed wound hematoma formation with dehiscence of the wound. The wound was debrided and a secondary closure was performed on March 1, 1993. Appellant was discharged from the hospital on March 3, 1993 but later that day he developed a recurrent hematoma in the wound. In the emergency room the sutures were removed and the hematoma was drained. In a March 4, 1993 operation the wound was debrided down to healthy appearing granulation tissue. A fibrin glue was applied to the sides of the incision and the wound was sutured close.

The employing establishment offered appellant the position of heavy mobile equipment repairer supervisor. In an August 5, 1993 statement, appellant declined the position. He submitted an August 5, 1993 report from Dr. George W. Baker, a general practitioner, who stated that appellant was unable to accept the position of heavy mobile equipment repair supervisor or any other position because he had residual continuous severe low back pain with occasional severe exacerbation accompanied by leg spasms, particularly in the left leg. He indicated that any type of twisting, bending, standing or sitting for long periods, or lifting made his symptoms worse.

In a June 14, 1994 letter, the employing establishment informed appellant that effective June 13, 1994 he would be placed in an active duty status as a chemical equipment repair supervisor. The Office suspended appellant's compensation effective June 12, 1994. The employing establishment also indicated that it would propose that appellant be removed from the employing establishment for misrepresentation in connection with entitlements, false statements and fraud. The employing establishment stated that appellant had been investigated and his activities had been videotaped during the period February through April 1994. The employing establishment reported that the videotapes showed appellant mowing grass with a push mower equipped with a grass catcher, riding a bicycle, shoveling snow, shaking rugs, punching a punching bag, pushing a wheelbarrow, moving large flower pots, carrying five gallon water bottles, and participating strenuously in karate classes which included doing push-ups and leg raises, demonstrating motions to class participants and actively sparring with participants. The employing establishment stated that appellant performed all these activities without any obvious signs of pain, physical inability or fatigue. It contended that the videotapes showed appellant was able to do more than what he had been reporting to his physician. The employing establishment indicated that sworn statements from two witnesses indicated that appellant had been actively participating in the karate classes since April 1994 with exercises and sparring, all without showing signs of pain or difficulty performing. It stated that he had participated in a black belt test for a student by climbing steep rocks in a mile upgrade to the top of a hill. It

related that he had done pushups in class with two boys on his back. It noted that he had been observed weightlifting his own body weight on several occasions and carrying a 35-pound table.

In a May 23, 1994 report, Dr. Baker stated the he had watched the surveillance footage of appellant and indicated that he was surprised and impressed by the strenuous physical activity and endurance of appellant without any obvious signs of pain or fatigue. He commented that appellant's physical ability appeared to be better than he had expressed previously. He concluded that appellant was able to work 40 hours a week on his job as a supervisor and had reached maximum improvement.

In a June 24, 1994 report, Dr. Jay J. Cho, a Board-certified physiatrist, reviewed appellant's medical history and indicated that appellant still had back pain radiating down the left leg. He noted appellant was taking heavy narcotic medication of Percodan, Fioricet and Xanax. He commented that his examination did not show any localized focal neurological impairment. He suggested that appellant might be suffering with epidural fibrosis in the low back and long-standing muscular type of pain in the low back with anxiety-depression disorder with addiction of narcotics. In a July 7, 1994 report, Dr. Cho stated that a magnetic resonance imaging (MRI) scan showed epidural fibrosis with soft tissue at L4-L5 and L5-S1. In a July 20, 1994 report, Dr. Hong S. Park, a Board-certified physiatrist, indicated that he had performed an electromyogram and nerve conduction studies of appellant. He concluded that appellant probably had chronic left S1 radiculopathy without acute denervation. In an August 20, 1994 report, Dr. Cho indicated that appellant had been hospitalized to treat his back pain. He indicated that appellant's diagnoses on discharge from the hospital were improved ambulatory dysfunction with extensive epidural fibrosis in the lumbosacral spine with multiple history of low back surgery, chronic pain syndrome, abuse of narcotics and addiction, controlled hypertension, moniliasis in esophagus, viral hepatitis, sleeping disorder, intractable migraine headaches, and improving depression and anxiety.

In a June 21, 1994 report, Dr. Kenneth G. Small, a psychologist, indicated that he had treated appellant since 1990. He noted that when he saw appellant on May 25, 1994, appellant admitted he had exercised poor judgment and impulsiveness in attempting unwise activities during his instruction of martial arts. Dr. Small stated that the impulsive act of appellant was entirely consistent with his actions during his prior treatment. He noted that appellant often exceeded therapeutic instructions during exercise. He commented that chronic pain patients would occasionally engage in activities which appear to represent greater capacity than their physical limitations but in reality this type of patient would end up in extreme pain for several days as a result. In an August 16, 1994 report, Dr. Small stated that appellant demonstrated impulsive behavior no different than any other injury patient. He noted, however, that appellant was taking each day an average of 12 to 15 Percodan, a narcotic pain medication, 5 to 7 Fiorinal, a barbiturate and central nervous depressant, and 3 Xanax, another central nervous depressant. Dr. Small indicated that he had consulted with a Board-certified physiatrist who commented that any individual, regardless of the degree of damage to the back, could engage in substantial physical activity for a short time under the influence of these medications.

The Office referred appellant, together with the statement of accepted facts and the case record, to Dr. J. Joseph Danyo, a Board-certified orthopedic surgeon specializing in hand

surgery, for an examination and second opinion on appellant's ability to work. In a January 16, 1996 report Dr. Danyo stated that appellant was able to sit comfortably and had a limp on both sides, more prominently on the left. He noted appellant was able to sit at a right angle with the knees out straight and the ankles dorsiflexed 5 degrees above 90 degrees. He concluded that appellant's ability to handle the position showed his ability to stand and bend at a right angle. He indicated that appellant had no muscle spasm on examination and no percussion tenderness in the low back or trigger area. Dr. Danyo noted that appellant had multiple lumbar discectomy procedures and had trouble with wound healing. He stated appellant had marked symptom magnification. He commented that for a while appellant limped on the left side, then on the right side and then on both sides. He reported that appellant showed a range of motion only in the hips but when he had appellant bend over from a standing position and then doing the range of motion another way, he was able to bend over at a right angle. He stated that there was no spasm in evidence on examination when appellant was standing. He concluded that appellant did not need any treatment and stated that appellant could return to work at his previous job on a full-time basis with no restriction.

In a March 29, 1995 decision, the Office terminated appellant's right to compensation effective January 11, 1995 on the grounds that the medical evidence supported that the residuals of the June 4, 1990 employment injury had resolved.

Appellant requested a hearing before an Office hearing representative which was held on August 28, 1995. He submitted several medical reports prior to or at the hearing. In a July 4, 1995 report, Dr. Daniel E. Gelb, a Board-certified orthopedic surgeon of professorial rank, noted that x-rays showed appellant was status post laminectomy of L4 and L5 with degenerative disc changes at L4 and L5 and a slight retrolisthesis of L4 on L5. He diagnosed failed laminectomy syndrome. He concluded that appellant should be considered totally disabled.

Appellant also submitted the transcript from the hearing before an administrative law judge of the Office of Hearings and Appeals of the Merit System Protection Board arising from the employing establishment's termination of appellant's employment. At the hearing, Dr. Cho testified that he viewed the videotape of appellant performing martial arts and noted that appellant was taking strong narcotic medication at the time which influenced his judgment. He commented that, while taking such medication, appellant would be able to perform the martial arts activities shown on the videotape but would feel the pain later. He stated that appellant had a pain problem with pathologic nerve damage in the back. He concluded that appellant was disabled for work because of his pathologic problem in the back and his history of narcotic dependency for the prior four years. Appellant's representative submitted a copy of the April 21, 1995 decision of the administrative law judge who found that appellant participated in the activities that appeared on the videotapes and that his activities were inconsistent with total disability. However, the judge found that the employing establishment had not established that appellant intended to misrepresent, defraud or make false statements due to the large amount of narcotic medication he was taking.

In a December 6, 1995 decision, the Office hearing representative found that the report of Dr. Danyo provided a sufficient basis for the Office's decision to terminate appellant's compensation. He concluded, however, that evidence subsequent to the termination of

appellant's compensation, particularly the reports of Dr. Gelb and the testimony of Dr. Cho, had caused a conflict in the medical evidence. He therefore remanded the case for referral of appellant, together with the statement of accepted facts and the case record, to an appropriate impartial medical specialist to resolve the conflict in the medical evidence on appellant's ability to work. The hearing representative also found that appellant was entitled to compensation for any periods between the suspension of his compensation on June 12, 1994 and the termination of his compensation on January 11, 1995.

The Board finds that the Office met its burden of proof in terminating appellant's compensation effective January 11, 1995.

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.¹

While the record contained videotapes and descriptions of appellant's activities that would suggest he was not totally disabled for work, the Office based its decision to terminate compensation on Dr. Danyo's January 16, 1995 report. Dr. Danyo concluded that appellant had marked symptom magnification and was able to return to his previous job on a full-time basis without restrictions. He pointed out that appellant, in his examination, gave inconsistent results and symptoms. His examination showed that appellant had no disability remaining due to the employment injury. As a result, his report was sufficient to support the Office's decision to terminate appellant's compensation. The Office, therefore, met its burden of proof in terminating appellant's compensation.

¹ *Jason C. Armstrong*, 40 ECAB 907 (1989)

The decision of the Office of Workers' Compensation Programs, dated December 6, 1995, is hereby affirmed.

Dated, Washington, D.C.
December 28, 1998

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member