U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ERNIE RIVERA and DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, Juneau, Alas.

Docket No. 96-1675; Submitted on the Record;
Issued December 17, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON, A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's disability compensation, effective July 22, 1995, on the grounds that he had no work-related residuals of his accepted conditions.

The Board has carefully reviewed the case record and finds that the Office has met its burden of proof in terminating appellant's compensation on the grounds that the medical evidence establishes that his cervical strain and post-traumatic head syndrome have resolved.

Under the Federal Employees' Compensation Act,[1] once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of compensation.[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 burden

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[1] 5 U.S.C. § 8101 *et seq.*

[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 cases where the Office has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[7]

In this case, appellant, then a 24-year-old temporary light-duty mechanic, filed a notice of traumatic injury, claiming that he lost consciousness and hurt his neck and back when a heavy hydraulic cylinder fell on him while he was repairing it on April 13, 1984. The Office accepted the claim for a contusion to the upper back, a cervical strain, and post-traumatic head syndrome, based on the comprehensive evaluations of Drs. Thomas W. Harris, an orthopedic practitioner, Jeffrey L. Rausch, Board-certified in psychiatry, and Ronald S. Teschke, a neurologist, no longer in practice. Appellant did not return to work and received appropriate compensation.

On March 31, 1994 the Office issued a notice of proposed termination, based on the second opinion evaluations of Dr. Eric C. Yu, a Board-certified orthopedic surgeon, and Dr. Paul K. Raffer, Board-certified in neurology. The Office noted that Dr. Edward B. Friedman, a Board-certified neurologist and appellant's long-time treating physician, had repudiated his previous opinion that appellant could work only part time and had agreed that appellant could work full time in a sedentary position. Appellant objected to the proposed termination and submitted the reports of Dr. J. Sterling Ford, also Board-certified in neurology.

The Office found a conflict in the medical opinion evidence and referred appellant for impartial medical examinations in orthopedics and neurology. Based on the reports of Dr. Roman B. Cham,[8] a Board-certified orthopedic surgeon, and Dr. Mark C. Levine, Board-certified in neurology, the Office terminated appellant's compensation, effective July 22, 1995, on the grounds that he had no residuals from his work-related injury.

Appellant requested a written review of the record. On January 18, 1996 the hearing representative determined that the Office met its burden of proof in terminating appellant's

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

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

[7] *Gary R. Sieber*, 46 ECAB 215, 223 (1994).

[8] The Office initially referred appellant to Dr. Bruce A. Thompson, a Board-certified orthopedic surgeon, but he failed to clarify his conclusions regarding appellant's capability for work and any permanent residuals of the 1984 injury. Therefore, the Office had to refer appellant to another orthopedic specialist to resolve the conflict in the medical evidence.

compensation, noting that the opinions of the impartial medical specialists were entitled to special weight and established that appellant no longer had any residuals or disability caused by the 1984 work injury.

The Board finds that Dr. Cham's June 29, 1995 opinion as well as Dr. Levine's reports represent the weight of the medical evidence and thus meet the Office's burden of proof in terminating compensation.

Dr. Cham thoroughly reviewed the extensive medical records, beginning with an April 16, 1984 report in which Dr. Richard R. Byrne, a Board-certified orthopedic surgeon, diagnosed a cervical strain, and a May 4, 1984 report by Dr. Richard I. Birchfield, a neurologist, who stated that appellant could return to work in a month's time. Dr. Cham noted that appellant had been seen by multiple physicians and that his complaints were essentially unchanged over the years. Dr. Cham diagnosed a resolved cervical sprain and thoracic contusion and stated that appellant had been permanent and stationary since the accident and suffered from no physical or obvious psychiatric impairment.

Commenting that physician after physician, including his treating physician, had reported no objective findings to support appellant's subjective complaints, Dr. Cham concluded that appellant did not have a medical condition resulting from the 1984 work injury and that he could have returned to work in November 1984, as found by Dr. William E. Bowman, appellant's treating physician at the time, and Dr. Robert A. Nichols, a Board-certified neurologist, who stated in August 1984 that appellant's muscular problems should resolve in a few months. Dr. Cham pointed out that Dr. Friedman's assessment of appellant's disability was based on appellant's post-traumatic head syndrome, which he acknowledged produced no objective findings; thus, Dr. Friedman's disability determination was supported solely by appellant's subjective complaints and, consequently, was invalid.

By contrast, the May 19, 1994 report of Dr. Ford, who first treated appellant in February 1986, indicated that appellant suffered significant injuries, including a concussion and post-traumatic head syndrome, from the April 1984 injury. Dr. Ford stated that appellant's persistent neck symptoms, a herniated disc at C4-5 as shown by a magnetic resonance imaging (MRI) scan, intrinsic brain injury, as shown by a quantitative electroencephalogram, and damage to the balance system seen from somatosensory evoked potential studies and an electronystagmograph, were a direct result of the work injury. Dr. Ford found appellant incapable of doing his usual and customary work.

Dr. Ford offered no rationale for his conclusion. He did not explain how a herniated cervical disc would manifest itself almost ten years after the 1984 injury, particularly when the cervical x-rays at the time showed no fracture or abnormality. As Dr. Cham pointed out, if the herniated disc were a result of the 1984 injury, the x-rays in 1995 would show narrowing or deterioration of the disc spaces as a natural progression of the herniation. Yet appellant's cervical x-rays are normal.

Further, Dr. Cham explained that suffering from a herniated disc over that period of time would result in clinical findings such as muscle wasting, reflex changes, and sensory deficits over the nerve root impinged by that disc, yet he found no such objective evidence. Therefore,

the Board finds that Dr. Cham's detailed explanation far outweighs Dr. Ford's cursory conclusion that appellant's herniated disc stemming from the 1984 injury prevents him from working.

Dr. Levine also reviewed the complete medical records and examined appellant on September 15, 1994, finding no muscle spasm, some tenderness over the mid-dorsal area but excellent spinal mobility and no cervical bruits. He also found normal sensory testing, gait, heel and toe walking, and cranial nerves. Dr. Levine stated that appellant had been permanent and stationary from a neurological point of view for at least eight years and appeared to be in generally good health, noting that appellant's muscle mass and tone suggested regular full use of his upper extremities in the course of daily activities. The physician completed a work capacity evaluation, noting that appellant could work 8 hours a day with a lifting restriction of 35 to 40 pounds.

Asked by the Office to clarify his opinion, Dr. Levine responded that he found no objective evidence of any work-related residuals, that appellant's complaints were not "sufficiently credible" to accept at face value, and that if appellant has been so motivated, he could have returned to his original occupation many years ago. However, to attempt to return him to that job now would be "an exercise in futility." Therefore, appellant should participate in a vocational rehabilitation program and is capable of full-time work as a parking lot cashier.[9]

Dr. Levine added that the cognitive dysfunction described by Dr. Ford did not correlate with the evidence of above-average intelligence appellant showed on tests administered for vocational rehabilitation and that the suggested cervical protrusion seen on the MRI was not correlated with clinical findings on physical examination of appellant. Dr. Levine concluded that appellant's self-professed inability to work full time was based solely on a lack of motivation.

Inasmuch as Drs. Cham and Levine reviewed the case record in detail and a statement of accepted facts, examined appellant thoroughly, found no objective evidence to support appellant's complaints of pain or a work-related mental disorder,[10] and provided a detailed and well-rationalized medical explanation of why the accepted conditions had resolved, the Board finds that their conclusions represent the weight of the medical evidence[11] and are sufficient to carry the Office's burden of proof.[12] Therefore, the Board finds that the Office properly terminated appellant's compensation.[13]

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[9] Appellant had withdrawn from rehabilitation efforts and the Office selected the position of parking lot cashier and reduced his compensation accordingly. This decision was reversed by the hearing representative who remanded the case for the Office to develop the record further.

[10] *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).

[11] *See Cleopatra McDougal-Saddler*, 47 ECAB ____ (Docket No. 95-2634, issued March 20, 1996) (finding that the Office referral physician provided convincing rationale, bolstered by the opinion of another Board-certified specialist, that appellant's continuing disability was not work-related).

[12] *See Samuel Theriault*, 45 ECAB 586, 590 (1994) (finding that physician's opinion was thorough, well-

The January 18, 1996 and July 17, 1995 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
December 17, 1998

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

rationalized, and based on an accurate factual background and thus constituted the weight of the medical evidence that appellant's accepted injury had resolved).

[13] *See Thomas Bauer*, 46 ECAB 257, 265 (1994) (finding that the additional report from appellant's physician concerning his emotional condition was insufficient to overcome the special weight accorded to the impartial medical examiner's opinion).