

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HENRY J. REJNIAK and DEPARTMENT OF THE NAVY,
NAVAL AVIATION DEPOT NORTH ISLAND, San Diego, Calif.

*Docket No. 96-505; Submitted on the Record;
Issued February 9, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's monetary compensation and medical benefits effective November 12, 1995.

On December 1, 1989 appellant, then a 54-year-old paint worker, filed a traumatic injury claim, alleging that he injured his lower back and right leg when he tripped on an unsecured floor plate.¹ Appellant stopped work. The Office accepted appellant's claim for lumbosacral strain. He returned to work on January 23, 1990 but stopped work again on February 16, 1990. Appellant returned to work intermittently through March 1990 when he ceased work altogether due to temporary total disability. By letter dated February 9, 1995, the Office notified appellant that it proposed termination of his monetary compensation and medical benefits on the grounds that he was no longer disabled due to his December 1, 1989 injury. Appellant submitted additional evidence and the Office declared a conflict in the medical opinion evidence. After further development of the evidence, by decision dated October 27, 1995, the Office terminated appellant's compensation effective November 12, 1995 on the grounds that the medical evidence established that he was no longer disabled and did not need continuing medical care as a result of his December 1989 injury.

The Board has duly reviewed the case record in the present appeal and finds that the Office has met its burden of proof in terminating appellant's compensation effective November 12, 1995.

Under the Federal Employees' Compensation Act,² once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of compensation.³

¹ Appellant had several prior work-related injuries including a lumbar strain on April 8, 1987, multiple injuries due to a fall in 1986 and a lumbosacral strain on June 8, 1986.

² 5 U.S.C. § 8101 *et seq.*

After the Office determines that an employee has a disability causally related to his or her employment, the Office may not terminate compensation without establishing that its original determination was erroneous or that the disability has ceased or is no longer related to the employment injury.⁴

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.⁵ Therefore, the Office must establish that appellant's condition was no longer aggravated by employment factors after November 12, 1995 and the Office's burden includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁶

In the present case, the Office properly determined, after it had proposed termination of benefits, that there was a conflict in the medical opinion evidence between the March 14, 1995 report by Dr. William C. Kubitschek, an osteopath and appellant's treating physician and the second opinion examination reports by Dr. Henry E. Bruce, a Board-certified orthopedic surgeon. Dr. Kubitschek indicated that appellant could not return to work due to his age and physical disabilities that were the result of disc disease that was caused by traumatic episodes at work whereas Dr. Bruce found that appellant was capable of working the proposed modified painter position and that appellant's discogenic disease was strictly due to aging. In order to resolve the conflict, the Office referred appellant to Dr. Kendall S. Wagner, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the matter in accordance with Section 8123 of the Act⁷ which provides that if there is a disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination.⁸

In a report dated June 12, 1995, Dr. Wagner diagnosed osteoarthritis and degenerative disc disease in the cervical spine that was not work related, musculoligamentous sprain/strain of the lumbar spine overlying moderate degenerative disc disease at multiple levels, intermittent minimal to slight pain in the cervical spine and intermittent slight to moderate pain of the lumbar spine, possibly becoming severe with activity. He reported that appellant's complaints appeared to be overstated, that appellant had discogenic disease due 50 percent to normal aging and 50 percent to his 1987 and 1989 employment injuries, and that based on the totality of evidence he believed that appellant was capable of performing the modified-duty position which required

³ *William Kandel*, 43 ECAB 1011 (1992).

⁴ *Carl D. Johnson*, 46 ECAB 804 (1995).

⁵ *Dawn Sweazey*, 44 ECAB 824 (1993).

⁶ *Mary Lou Barragy*, 46 ECAB 781 (1995).

⁷ 5. U.S.C. § 8123(a)

⁸ *Shirley L. Steib*, 46 ECAB 309 (1994).

intermittent standing and sitting, avoidance of unusual positions and lifting and carrying no more than 20 pounds. Dr. Wagner added that a magnetic resonance imaging (MRI) scan should be done. After appellant underwent MRI scans of his cervical and lumbar spine, Dr. Wagner submitted supplemental reports dated May 22, July 24 and September 8, 1995. He reported that upon review of the cervical MRI scan, he continued to believe that appellant's complaints were overstated and that appellant did not have a need for work restrictions based on his cervical spine nor did he require any future medical care for his cervical spine. Dr. Wagner indicated that a review of appellant's lumbar MRI scan dated August 8, 1995 revealed some degenerative changes consistent with aging but that no foraminal stenosis was evident. He concluded that given the absence of any neurological deficit, appellant's complaints were "grossly overstated either on a conscious or an unconscious basis and [he] did not believe that any work restrictions should apply." Dr. Wagner concluded that appellant could return to work without any limitations. In *James P. Roberts*,¹⁴ the Board held that the opinion of an impartial medical specialist resolving a conflict of medical opinion would be given special weight, but that the conflict must be between "medical reports of virtually equal weight and rationale." As Dr. Wagner's combined reports are rationalized and based upon a proper factual background, his reports represent the weight of the medical evidence and establish that appellant had no continuing disability causally related to his December 1, 1989 work injury. Thus, the Office has met its burden of proof in terminating appellant's benefits effective November 12, 1995 as he had no residuals of his December 1989 employment injury.

The decision of the Office of Workers' Compensation Programs dated October 27, 1995 is hereby affirmed.

Dated, Washington, D.C.
February 9, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member