

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of LEONARD L. DREW and DEPARTMENT OF VETERANS AFFAIRS,  
SPOKANE VETERANS HOSPITAL, Spokane, Wash.

*Docket No. 96-974; Submitted on the Record;  
Issued February 20, 1998*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation benefits as of April 5, 1994.

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 benefits as April 5, 1994.

On March 9, 1994 appellant, then a pharmacy technician, filed a traumatic injury claim (Form CA-1) assigned number A14-292422 alleging that on March 7, 1994 while putting away supplies, he bent over to pick up a box and experienced back pain.<sup>1</sup> Appellant stopped work on March 8, 1994.

On March 29, 1994 the Office accepted appellant's claim for a lumbar strain.

By decision dated June 30, 1994, the Office rescinded its acceptance of appellant's claim for a lumbar strain. The Office found that the medical evidence of record did not establish a clear diagnosis of appellant's back condition. The Office also found the medical evidence of record insufficient to establish a causal relationship between appellant's back condition and factors of his federal employment. The Office, however, found that appellant had established a *prima facie* case and thus, directed that appellant be referred to a second opinion physician.

By decision dated September 16, 1994, the Office found the medical evidence of record sufficient to establish that appellant sustained a lumbar strain which resolved no later than

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<sup>1</sup> Previously, on November 2, 1992, appellant filed a Form CA-1 assigned claim number A14-278442 alleging that on that date while putting heavy boxes away, his right knee gave out and he fell twisting his back. The Office accepted appellant's claim for a back strain. This claim is not currently before the Board on this appeal. 20 C.F.R. § 501.2(c).

April 5, 1994. Accordingly, the Office found that appellant was not entitled to benefits for the period beyond April 5, 1994.

In a September 29, 1994 letter, appellant, through his representative, requested an oral hearing before an Office representative.

By decision dated August 29, 1995, the hearing representative affirmed the Office's September 16, 1994 decision. In addition, the hearing representative found that a conflict existed between the medical opinion of Dr. Charles M. Colwell, a Board-certified family practitioner, and the medical opinion of Dr. Scott Linder, a Board-certified orthopedic surgeon and second opinion physician. The hearing representative directed the Office on remand to refer appellant to an impartial medical examiner to determine whether appellant had any disability causally related to the November 2, 1992 and/or March 7, 1994 employment injuries on or after April 5, 1994.

By letter dated September 19, 1995, the Office referred appellant along with a statement of accepted facts, medical records and a list of specific questions to Dr. William A. Nerud, a Board-certified orthopedic surgeon, for an impartial medical examination. By letter of the same date, the Office advised Dr. Nerud of the referral.

Dr. Nerud submitted an October 17, 1995 medical report revealing that appellant had no continuing disability after April 5, 1994.

By decision dated October 30, 1995, the Office found the evidence of record insufficient to establish that appellant sustained any disability after April 5, 1994. In an accompanying memorandum, the Office found that Dr. Nerud's medical opinion represented the weight of the medical opinion evidence of record.

Once the Office has accepted a claim and pays compensation, it has the burden of proof of justifying termination or modification of compensation benefits.<sup>2</sup> 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>3</sup> In this case, the Office accepted appellant's claim for a lumbar strain. The Office terminated appellant's compensation benefits based on the October 17, 1995 medical report of Dr. Nerud, a Board-certified orthopedic surgeon and impartial medical specialist.

Section 8123(a) of the Federal Employees' Compensation Act provides that "[i]f 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."<sup>4</sup> In the present case, Dr. Colwell opined that appellant's back condition was more

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<sup>2</sup> *Curtis Hall*, 45 ECAB 316 (1994); *John E. Lemker*, 45 ECAB 258 (1993); *Robert C. Fay*, 39 ECAB 163 (1987).

<sup>3</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989).

<sup>4</sup> 5 U.S.C. § 8123(a).

likely than not the result of his March 7, 1994 employment injury based on the March 7, 1994 magnetic resonance imaging (MRI) test results. Dr. Linder opined that appellant had no disability causally related to the March 7, 1994 employment injury after April 5, 1994. As a conflict did exist in the medical opinion evidence between Drs. Colwell and Linder as to whether appellant had any continuing disability after April 5, 1994 due to the March 7, 1994 employment injury, the Office properly referred appellant to Dr. Nerud for an impartial medical evaluation.

In situations where there are opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.<sup>5</sup>

In his October 17, 1995 report, Dr. Nerud indicated a history of the March 7, 1994 employment injury and appellant's medical treatment, and his findings on physical examination. Dr. Nerud diagnosed a history of back strain on November 2, 1992 which was preexistent, a history of back strain on March 7, 1994 which aggravated the November 2, 1992 injury as provided by appellant's history, unrelated postoperative status right knee injury and surgery, unrelated herniorrhaphies, and an unrelated history of hypertension. In response to the Office's questions, Dr. Nerud stated that appellant had a low back condition based on appellant's description of his employment activities and November 2, 1992 employment injury and that the March 7, 1994 employment injury aggravated appellant's previous injury. Dr. Nerud further stated that his diagnosis was a history of back strain on November 2, 1992 with repeated strain and aggravation on March 7, 1994, and that based on his review of the MRI test findings, apparently there were some disc problems, but nothing had been considered a surgical problem. Dr. Nerud then stated that he had no way of knowing at what time the MRI findings occurred, but that historically they were present in 1982. Dr. Nerud also stated that appellant's described work activities could have aggravated or exacerbated the preexisting back condition. Additionally, Dr. Nerud stated that assuming appellant had an aggravation of the preexisting condition, it had appeared to be persistent based on appellant's description. In response to the Office's question providing that if there was a permanent aggravation, indicate the specific physical mechanism whereby appellant's preexisting condition was permanently aggravated by his 1992 and 1994 work injuries, Dr. Nerud stated that the physical mechanisms were unknown. Dr. Nerud recommended that regarding appellant's employment injury, he should be restricted from extreme bending and lifting. Dr. Nerud concluded that "I am unaware of any work-related back condition subsequent to April 5, 1994."

Inasmuch as Dr. Nerud provided a rationalized opinion based on a complete medical and factual background, the Board finds that his report represents the weight of the evidence in this case and establishes that appellant no longer had any employment-related disability. Therefore, it must be accorded special weight on the issue of whether appellant had any continuing disability. Because Dr. Nerud's opinion constitutes the weight of the reliable, probative and substantial evidence, the Board finds that the Office met its burden in terminating appellant's continuing entitlement to compensation as of April 5, 1994.

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<sup>5</sup> *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

The October 30 and August 29, 1995 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, D.C.  
February 20, 1998

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

Bradley T. Knott  
Alternate Member