U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT W. STALKER and DEPARTMENT OF COMMERCE, NATIONAL OCEANIC & ATMOSPHERIC ADMINISTRATION, Norfolk, Va.

Docket No. 96-1080; Submitted on the Record;
Issued February 5, 1998

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT, A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation effective November 30, 1994 on the grounds that he had no disability due to his January 2, 1991 employment injury after that date.

The Board has duly reviewed the case record in the present appeal and finds that the Office did not meet its burden of proof to terminate appellant's compensation effective November 30, 1994 on the grounds that he had no disability due to his January 2, 1991 employment injury after that date.

Under the Federal Employees' Compensation Act,[1] when employment factors cause an aggravation of an underlying physical condition, the employee is entitled to compensation for the periods of disability related to the aggravation.[2] However, when the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased.[3] Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.[4] The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[5] The

[1] 5 U.S.C. § 8101 *et seq.*

[2] *Richard T. DeVito,* 39 ECAB 668, 673 (1988); *Leroy R. Rupp,* 34 ECAB 427, 430 (1982).

[3] *Ann E. Kernander,* 37 ECAB 305, 310 (1986); *James L. Hearn,* 29 ECAB 278, 287 (1978).

[4] *Charles E. Minniss,* 40 ECAB 708, 716 (1989); *Vivien L. Minor,* 37 ECAB 541, 546 (1986).

[5] *Id.*

Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[6]

In the present case, the Office accepted that appellant sustained employment-related subluxations at C6, C7, and L5 on January 2, 1991 and paid compensation for periods of disability. By decision dated January 24, 1996, the Office terminated appellant's compensation effective November 30, 1994 on the grounds that he had no disability due to his January 2, 1991 employment injury after that date. The Office based its termination of appellant's compensation on the opinion of Dr. Martin Lehman, a Board-certified orthopedic surgeon to whom it referred appellant for a second opinion.

The Board finds that there is a conflict in the medical evidence between the government physician, Dr. Lehman, and appellant's attending chiropractor, Dr. Robert Fabrizio, regarding whether appellant had continuing disability due to his January 2, 1991 employment injury.[7] In a report dated November 30, 1994 and a supplemental report dated January 5, 1996, Dr. Lehman determined that appellant did not have any continuing residuals of his January 2, 1991 employment injury. He indicated that appellant exhibited normal findings upon examination and that the results of diagnostic testing of his cervical and lumbar spine were not related to his January 2, 1991 employment injury. In contrast, Dr. Fabrizio indicated in a March 29, 1995 report that appellant's diagnosis based on x-ray testing, subluxation complex of his cervical and lumbar spine with associated radiculitis, myalgia, and myofascitis, continued to be related to his January 2, 1991 employment injury and continued to cause disability.[8]

The Board notes that since the Office relied on the reports of Lehman to terminate appellant's compensation effective November 30, 1994 without having resolved the existing conflict in the medical evidence, the Office failed to meet its burden of proof to terminate appellant's compensation.[9]

[6] *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

[7] Section 8123(a) of the Act provides in pertinent part: "If 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." 5 U.S.C. § 8123(a). When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence. *William C. Bush*, 40 ECAB 1064, 1075 (1989).

[8] Dr. Fabrizio's report would constitute medical evidence in that chiropractors are considered physicians, and their reports considered medical evidence, if they treat spinal subluxations as demonstrated by x-ray to exist. 5 U.S.C. § 8107(a); *see Jack B. Wood*, 40 ECAB 95, 109 (1988).

[9] *See Gail D. Painton*, 41 ECAB 492, 498 (1990); *Craig M. Crenshaw, Jr.*, 40 ECAB 919, 922-23 (1989).

The decision of the Office of Workers' Compensation Programs dated January 24, 1996 is reversed.

Dated, Washington, D.C.
February 5, 1998

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member