

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FREDERICK E. STEARN and DEPARTMENT OF TRANSPORTATION,
COAST GUARD SUPPLY CENTER, Boston, Mass

Docket No. 95-2881; Submitted on the Record;
Issued May 22, 1998

DECISION and ORDER

Before DAVID S. GERSON, 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 benefits as of August 9, 1994.

On December 3, 1986 appellant, a 41-year-old pipefitter, sustained an injury to his lower back while pulling on a pipe wrench. Appellant filed a Form CA-1 claim for benefits based on traumatic injury on December 3, 1986. On December 8, 1986, appellant was examined by Dr. John Grady, a Board certified orthopedic surgeon, who stated in a medical report dated December 8, 1986 that appellant had sustained an injury, a lumbosacral strain, to his back causally related to the employment incident of December 3, 1986. Dr. Grady opined that appellant was disabled from returning to his preinjury job. Based on Dr. Grady's opinion, the Office accepted appellant's claim for lumbosacral strain by letter dated February 13, 1987.

In a report dated March 25, 1987, Dr. Grady stated that he had examined appellant on January 12 and 27, 1987, on which dates appellant complained of persistent back pain. Dr. Grady referred appellant for a computerized axial tomography (CAT) test of the lumbar spine on February 7, 1987, which indicated suspicion for midline herniation of the disc at L5-S1 without evidence of nerve root compression. Dr. Grady stated that appellant was still disabled due to his employment-related back injury of December 3, 1986, which he opined was a herniated lumbar disc at L5-S1.

Based on Dr. Grady's opinion, appellant filed another claim with the Office for a herniated disc at L5-S1,¹ which the Office accepted by letter dated June 19, 1987.²

In a letter dated September 9, 1987, the Office scheduled a second opinion examination with Dr. Paul Hugenberger, a Board-certified orthopedic surgeon, for October 15, 1987.

In an opinion dated October 15, 1987, Dr. Hugenberger found that appellant had chronic low back pain initiated by "a rather mild injury at work" but associated with a noninjury-related, congenital condition involving the right, mild thoracic-lumbar scoliosis, associated with some shortening of the right leg, and slight atrophy of the quadriceps. Dr. Hugenberger stated that recognition and treatment of this congenital condition could help considerably in appellant's recovery.

Appellant was subsequently examined by Dr. Harold Goodman, a Board-certified orthopedic surgeon. In a report dated October 12, 1988, Dr. Goodman found that appellant had degenerative disc disease at L5-S1 as demonstrated by CAT scan, with no definite evidence of neurologic deficit. Dr. Goodman stated that appellant was still unable to do frequent bending or lifting, and that his prognosis was guarded.

In a letter dated March 3, 1993, the Office scheduled a second opinion examination with Dr. Robert Shapiro, a Board-certified orthopedic surgeon, for March 22, 1993. In a report dated March 22, 1993, Dr. Shapiro found based on his examination that there was nothing wrong with appellant and that he did not consider him disabled for any kind of work. Dr. Shapiro stated that there was no reason why appellant could not go back to his original job, or perhaps to some type of light duty.

In a letter to Dr. Goodman dated July 22, 1993, the employing establishment stated that it had reviewed his recent office notes regarding appellant and concluded that his findings were in conflict with those of Dr. Shapiro's March 22, 1993 report. The employing establishment stated that it had enclosed a copy of Dr. Shapiro's report for Dr. Goodman to review and requested that he explain why he found appellant to be disabled from work, given that he was looking for work and given that Dr. Shapiro had not found appellant disabled for employment.

In response to the employing establishment's July 22, 1993 letter, Dr. Goodman submitted a medical report dated August 6, 1993 in which he stated that he had examined appellant on July 28, 1993 and concluded that he could do a limited-light-duty job not involving heavy lifting exceeding 25 pounds or constant uninterrupted sitting, or repetitive movements of the back with gradual and progressive increase in activity. Dr. Goodman further stated that he had reviewed Dr. Shapiro's March 22, 1993 report, but would "respectfully remind" the

¹ Dr. Grady submitted a supplemental report to the Office dated May 29, 1987 in which he reiterated that appellant remained disabled from returning to work based on the employment injury of December 3, 1986, which he believed "must" be considered a ruptured lumbar disc at L5-S1.

² Although it is not included in the instant record, it can be inferred that appellant filed another claim based on an Office letter to appellant dated May 26, 1987, which requests additional information in regard to his claim for a disc herniation resulting from his December 3, 1986 employment injury.

employing establishment that he, not Dr. Shapiro, was appellant's treating physician and that he was the author of a book pertaining to the medical evaluation of orthopedic disability.

By letters dated September 30, 1993, the Office scheduled a referee examination with an independent medical examiner, Dr. Tobin Gerhart, a Board-certified orthopedic surgeon, pursuant to section 8123,³ for November 5, 1993.

In a medical report dated November 5, 1993, Dr. Gerhart stated that he had examined appellant but was unable to detect any unequivocal abnormal findings consistent with an injury to the spine. Dr. Gerhart further stated that he could find no objective evidence of nerve root injury attributable to a herniated disc at L5-S1. Dr. Gerhart opined that a herniated lumbar disk at L5-S1 would be expected to resolve within 6 months in 85 percent of the cases, and stated that while there is no evidence that conclusively can show appellant's current condition was caused by the injury of December 3, 1986, the medical evidence cannot exclude such a possibility.

By letter dated December 22, 1993, an Office claims examiner asked Dr. Gerhart to specify the degree to which appellant's current condition was related to lumbar disc disease, which was not an accepted condition, and to what extent it was related to the accepted conditions of lumbosacral strain and herniated disc at L5-S1. The claims examiner also asked Dr. Gerhart why the medical evidence could not exclude the possibility that appellant's current condition was caused by the employment injury of December 3, 1986, and to specify the degree to which his opinion was based upon subjective complaints and the degree to which it was based upon objective findings.

In a supplemental report dated December 24, 1993, Dr. Gerhart stated that appellant's current condition was probably related mostly to his lumbar disk disease and not to the lumbosacral strain of December 3, 1986 and the associated L5-S1 disk herniation seen on the February 7, 1987 CT scan. Dr. Gerhart concluded that "in his objective clinical judgment ... the objective evidence does not support that [appellant's] current condition was caused by the work injury of December 3, 1986." Dr. Gerhart stated that appellant does have subjective complaints concerning his back, but that it was very unlikely that the employment injury of December 3, 1986 could be implicated as the cause of his present condition.

By letter dated February 8, 1994, the Office requested that Dr. Gerhart clarify his conclusions that appellant's current condition was "most probably" related to his lumbar disk disease and not to his two accepted, employment-related conditions, and that the objective evidence did not support that his current condition was caused by the employment injury of December 3, 1986.

In response to the Office's February 8, 1994 letter, Dr. Gerhart submitted a letter to the Office dated June 1, 1994 in which he stated that he drew these conclusions from a thorough examination and evaluation of appellant in addition to a thorough review of the documentation submitted to him by the Office.

³ 5 U.S.C. § 8123(a).

On July 7, 1994 the Office issued a notice of proposed termination of compensation to appellant. In the memorandum accompanying the notice of proposed termination, the Office stated that the weight of the medical evidence rested with the well-rationalized medical reports of Dr. Gerhart, the referee medical examiner, indicating that appellant no longer suffered residual disability from his accepted, employment-related lower back conditions, and that his current condition was not caused by the employment injury of December 3, 1986. The Office allowed appellant 30 days to submit additional evidence or legal argument in opposition to the proposed termination.

In response to the Office's July 7, 1994 notice of proposed termination, appellant submitted office notes from Dr. Goodman dated July 13, July 20, and August 5, 1994.

By decision dated August 9, 1994, the Office stated that it was terminating appellant's compensation effective August 21, 1994. In the memorandum incorporated by reference in the August 9, 1994 decision, the Office stated that appellant had submitted office notes from his treating physician, Dr. Goodman but that these notes did not account for the x-rays of March 9, 1994 showing appellant's back to be within normal limits. The Office noted that although Dr. Goodman stated appellant could not do any heavy and strenuous work, he did not relate these findings to the employment injury of December 3, 1986. The Office found that because Dr. Goodman's office notes did not address the issue of causal relationship, his opinion was not well rationalized. The Office therefore terminated appellant's compensation based on the referee opinion of Dr. Gerhart, which it found to be well reasoned and based on the medical evidence of record, diagnostic tests and his physical examination of appellant.

In a letter dated October 26, 1994, appellant's representative requested reconsideration of the Office's August 9, 1994 termination decision. Accompanying the letter was a July 27, 1994 medical report from Dr. Goodman. Dr. Goodman reiterated his previously stated opinion that appellant had a chronic low back syndrome with disc bulging at L5-S1, and was unable to do any work involving constant uninterrupted sitting, lifting exceeding 25 pounds or repetitive movements of the back. Dr. Goodman noted that he was still "actively" treating appellant for his low back condition, and concluded that causal relationship to a reasonable medical certainty must be attributed to the employment accident of December 3, 1986.⁴ Appellant also submitted office notes from Dr. Goodman dated July 27, August 3, August 10, and August 17, 1994, in addition to an magnetic resonance imaging test (MRI) dated August 2, 1994 which detected mild degenerative changes with anterior osteophyte formation at L3-4 but was otherwise normal.

In a decision dated August 1, 1995, the Office denied appellant's claim on reconsideration. The Office found that Dr. Goodman's July 27, 1994 report was insufficient to warrant modification of its August 26, 1994 decision because he merely restated his previous opinion which the Office had rejected in that decision. The Office further stated that Dr. Goodman's report lacked probative value, as it was based on subjective complaints with no

⁴ Appellant's representative had previously submitted Dr. Goodman's July 27, 1994 report, along with a letter dated August 5, 1994, in response to the Office's July 7, 1994 notice of proposed termination. The Office, however, apparently did not receive these documents until after it had rendered its August 9, 1994 termination decision, and was therefore unable to consider Dr. Goodman's report prior to its termination decision. Appellant's representative therefore resubmitted Dr. Goodman's report with her October 26, 1994 request for reconsideration.

objective substantiation. The Office reiterated that the case had been submitted to an IME, Dr. Gerhart, who found based on the weight of the medical evidence of record that appellant no longer had any disability or residuals causally related to factors of employment, and that there was no objective evidence of any disability that would prohibit appellant from performing these duties.

The Board finds the Office met its burden of proof in terminating appellant's compensation benefits.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.⁵ 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.⁶

In the present case, the Office based its decision to terminate appellant's compensation on the medical reports of Dr. Gerhart, the referee medical examiner, who found that appellant no longer suffered residual disability from his accepted, employment-related lower back conditions, and that his current condition was not caused by the employment injury of December 3, 1986. The Board finds that the Office properly relied on Dr. Gerhart's opinion in finding that all residuals of the accepted condition had ceased and that appellant therefore was no longer entitled to compensation based on his employment-related accepted conditions. It is well established that when there are opposing medical reports of virtually equal weight and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist must be given special weight where sufficiently rationalized and based upon a proper factual background.⁷ The Board therefore affirms the Office's August 1, 1995 decision denying reconsideration of its August 9, 1994 termination decision.

⁵ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

⁶ *Id.*

⁷ *Thomas Bauer*, 46 ECAB 257 (1994).

The decision of the Office of Workers' Compensation Programs dated August 1, 1995 is hereby affirmed.

Dated, Washington, D.C.
May 22, 1998

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member