

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RONNIE L. SHOOK and DEPARTMENT OF LABOR, THE PRESIDENT'S
COMMITTEE ON EMPLOYMENT OF THE HANDICAPPED, Washington, D.C.

*Docket No. 96-862; Submitted on the Record;
Issued May 22, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective April 29, 1995, on the grounds that his employment-related residuals had ceased.

On February 2, 1979 appellant, then a 30-year-old program assistant filed a claim alleging that he injured his lower back on February 1, 1979 when he picked up a box of magazines. Appellant stopped work on February 5, 1979. The Office accepted appellant's claim for a lumbosacral strain on May 23, 1979 and subsequently accepted aggravation of preexisting lumbosacral disc disease. The Office placed him on the periodic rolls for temporary total disability effective September 12, 1980.

In a decision dated August 17, 1981, the Office terminated appellant's compensation benefits effective August 12, 1981. However, by decision dated August 16, 1983, an Office hearing representative vacated the August 17, 1981 decision terminating benefits and remanded the case to the Office for payment of compensation and a determination of appellant's wage-earning capacity as of August 13, 1981.

The record reflects that appellant underwent vocational rehabilitation services. In a report dated April 17, 1986, the vocational rehabilitation counselor assigned to appellant indicated that he started working part time as an English instructor at the Commonwealth College on April 1, 1985.

On September 29, 1987 the Office adjusted appellant's compensation based on his actual earnings as a part-time instructor of vocational training.

In a letter dated July 8, 1991, appellant requested compensation for total disability as his treating physician, Dr. William R. White, a Board-certified neurosurgeon, opined that he should not work for a period of three months to see if his increase in pain could be alleviated. In a report dated June 26, 1991, Dr. White stated:

“He is having increasingly severe pain in his back and lower extremities. He has been working five days a week now and this seems to exacerbate the problem. As you know, [appellant] has a severe problem from his low back with chronic pain due to arachnoiditis.

“We discussed the situation and I think it would be reasonable for [appellant] to take several months off from work, two to three, to see how he does. Perhaps if he improves with reduced activities, then he could return to work.”

By letter dated October 18, 1991, the Office requested appellant submit an updated medical report from his physician in support of his request for compensation for total disability. It noted that the medical evidence should show a material change in his employment-related condition.

In a report dated October 28, 1991, Dr. White noted that appellant had undergone two lumbar disc operations and had developed arachnoiditis which became progressively more symptomatic. Dr. White stated:

“There is little that can be done for [appellant] for this condition, and I expect that he will gradually get worse and worse over the years. He has been unable to work recently and I feel that he is permanently disabled from any kind of employment.”

In a note dated May 26, 1992, Dr. White opined that appellant had “no major neurologic deficits at this time but continues to have rather severe incapacitating pain.”

By letter dated May 24, 1993, Dr. White noted that appellant underwent a lumbar laminectomy in 1971 with intermittent continuing pain, but that since the accepted employment injury of February 1, 1979, appellant had continuous pain. Dr. White further noted:

“[Appellant] has become progressively more and more incapacitated, having pain when he stands and walks, and since June of 1991 I have asked him to remain out of work. He seems to be able to function on a limited capacity at home and I have considered him to be completely disabled since June of 1991.

“For arachnoiditis, there is no specific treatment except symptomatic relief. He uses a heating pad and has been taking judicious doses of narcotic pain medicine for this. We have been able to keep him off narcotics. I do not believe that [appellant] will ever recover from this problem and feel that he is permanently disabled.”

In a January 18, 1994 letter, Dr. White again noted that appellant had an increase in pain “which is a typical symptom of arachnoiditis.”

By decision dated March 7, 1994, the Office found that the medical evidence from Dr. White was insufficient to establish a material change in his injury-related condition. The Office noted that Dr. White’s reports did not provide objective physical findings to support his conclusion of total disability.

By letter dated March 23, 1994, appellant requested an oral hearing before an Office hearing representative.

In a report dated May 9, 1994, Dr. White opined that “[t]here is no question in my mind about the diagnosis of arachnoiditis and I believe that this is related to his underlying original injury.” Dr. White also noted “that arachnoiditis is a progressive neurologic problem.”

By decision dated August 23, 1994, the hearing representative found that appellant had submitted sufficient medical evidence from Dr. White to require further development of the claim. The hearing representative directed that the Office refer appellant for a second opinion medical examination.

By letter dated September 21, 1994, appellant was referred to Dr. David L. Durica, a Board-certified orthopedic surgeon, for a second opinion evaluation.

In a report dated November 1, 1994, Dr. Durica, based upon a statement of accepted facts, physical examination, medical history, employment history and objective evidence, recommended a detailed functional capacity evaluation to determine appellant’s ability to work. Dr. Durica noted that appellant had a herniated disc treated in approximately 1971 prior to his accepted employment injury. Dr. Durica also noted that “[f]rom approximately 1980 through 1986, his symptoms were relatively stable with intermittent lower back pain.” Appellant informed Dr. Durica “that he was in constant back pain at the present time.” Dr. Durica noted that it was “unclear to me the relationship between the 1979 injury and his current symptoms. On an objective basis, I cannot distinguish injuries or phenomena from the natural degenerative process which might be expected to occur after an laminectomy and 33 years of normal degeneration of the lumbar spine.” Dr. Durica opined that appellant was able to perform his prior part-time work as a college instructor “as there are no motor, sensory or other positive objective findings which would incapacitate this area Dr. Durica diagnosed “[d]egenerative [d]isc [d]isease [w]ith [h]istory of [a]rachnoiditis (not identified on the most recent MRI [magnetic resonance imaging])” and opined that appellant “certainly had a lumbosacral sprain and aggravated preexisting degenerative disease.” Dr. Durica stated:

“A B200 test was performed and a copy is included in this report. While this B200 test demonstrated severe back dysfunction, multiple indicators demonstrated that this was nonphysiologic. It was noted that the velocity of his back movement was above normal in flexion/extension, while the normal velocity and unresisted ranges of motion were subnormal in all planes.”

The Office found a conflict in the medical opinion evidence between Dr. Durica and Dr. White, and by letter dated December 2, 1994 referred appellant to Dr. James C. Cobey, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict in the evidence.

In a report dated December 15, 1994, Dr. Cobey, based upon a physical examination, objective evidence and medical records, opined that appellant had “severe degenerative arthritis at L4-5, secondary to degeneration post the 1971 operation, but without the x-rays taken in 1979, it is impossible to tell how much of his problem is secondary to what happened at that time.” Dr. Cobey opined that appellant was disabled due to very severe arthritis, but that he “should be able to work as a part-time college instructor but he can do no significant heavy work.”

By letter dated January 19, 1995, the Office provided Dr. Cobey with x-ray and MRI tests to review. The Office also requested Dr. Cobey to provide medical rationale for his opinion on whether appellant was disabled due to his arthritis and capable of performing part-time work as a college instructor.

In a follow-up report dated January 30, 1995, Dr. Cobey opined:

“This patient has serious degeneration of the L4-5 disk, as mentioned in my previous letter. This is probably secondary to the injury he had in 1971, when he had a disk removed at L4-5. In my experience, when the L4-5 disk is ruptured and treated by excision, very often I see progressive degenerative changes. Therefore, I would relate the patient’s condition as secondary to the 1971 injury, not the 1979 injury. In terms of the patient’s ability to work, the patient has trouble walking and standing. He could work part-time in college-level teaching but could not do any significant heavy work because of his severe degenerative arthritis at L4-5.”

By notice of proposed termination dated February 14, 1995, the Office advised appellant that the opinion of Dr. Cobey established that his employment-related disability had ceased and that his orthopedic residuals were due to his nonemployment-related laminectomy.

In a letter dated March 3, 1995, appellant contested the proposed termination of benefits on the grounds that he remained totally disabled. He enclosed a March 1, 1995 report from Dr. White who stated:

“I cannot argue with this statement in your letter to [appellant] that he may have had a prior underlying condition at the time of his injury, *i.e.*, the complete block may well have been due to arachnoiditis which existed at that time. It is possible that the arachnoiditis was related to his prior disc problem, myelography, and surgery, but the fact is that prior to his injury he did not have significant pain, and since the injury he did. There appears to be a clear temporal relationship to the onset of his pain and his work-related injury. In addition, I do not believe that there is any real doubt whether he has arachnoiditis or not based upon the enclosed studies. I realized arachnoiditis is usually a progressive condition and certainly does account for much of his pain and discomfort. However, if you will

recall that prior to his injury he did not have pain and it started at that time and the pain and discomfort followed from that. I think that the underlying injury was a significant contributing factor in his current problem.”

By decision dated March 16, 1995, the Office terminated appellant’s compensation benefits on the grounds that the weight of the medical evidence, as represented by the impartial medical examiner, Dr. Cobey, established that appellant’s employment-related residuals had ceased. The Office noted that Dr. White’s March 1, 1995 report noted only appellant’s complaint of pain without establishing a worsening of his degenerative disc disease due to the accepted work injury.

By letter dated April 3, 1995, appellant requested an oral hearing before an Office hearing representative.

In a letter dated July 26, 1995, Dr. White opined that appellant remained totally disabled from any kind of work due to his back condition. Dr. White stated that appellant’s arachnoiditis predated appellant’s 1979 employment injury, but opined that appellant’s “work-related injury was a factor which precipitated his current painful condition even though he may well have had an underlying preexisting condition.”

At an oral hearing held on August 8, 1995, appellant testified that he received total disability benefits from 1979 through 1986 when he went back to school and rehabilitated himself. Appellant also testified that the weight of the medical evidence should be with his treating physician whom he has seen for the past nine years instead of Dr. Dureca, whom he saw for an hour, or Dr. Cobey, whom he saw for 30 to 40 minutes. Appellant also testified that he had surgery in 1971 and was pain free until his employment injury in 1979.

By decision dated October 20, 1995, the hearing representative affirmed the March 16, 1995 decision. The hearing representative found that Dr. Cobey’s referee opinion represented the weight of the medical evidence and established that appellant was no longer disabled due to his accepted employment injury.

By letter dated December 15, 1995, appellant requested reconsideration of the hearing representative’s decision and submitted a November 14, 1995 report from Dr. White in support of his request. In his November 14, 1995 report, Dr. White again repeated his opinion that appellant’s accepted employment injury aggravated his underlying arachnoiditis.

By decision dated January 19, 1996, the Office denied appellant’s request for reconsideration on the basis that the evidence he submitted was cumulative and repetitive.

The Board finds that the Office properly terminated appellant’s compensation benefits effective April 29, 1995, on the grounds that his employment-related residuals had ceased.

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.¹ 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.²

In the present case, the Office found that a conflict existed in the medical opinion evidence between Dr. White, appellant's treating physician who opined that appellant became totally disabled due to arachnoiditis which the physician attributed to the accepted employment injury; and Dr. Durica, an Office second opinion physician, who opined that appellant could continue working part time as an instructor and that if appellant had arachnoiditis, it would not be due to the accepted lifting incident. The Office thereafter referred appellant to Dr. Cobey for an impartial medical evaluation. The Office terminated appellant's compensation on the grounds that the report of the impartial medical specialist, Dr. Cobey established that appellant's accepted condition had ceased and constituted the weight of the medical evidence.

Section 8123(a)³ 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." The Office properly found a conflict of medical opinion evidence between Dr. Durica, the Office referral physician and Dr. White.

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

In his reports Dr. Cobey reviewed appellant's history of injury and medical treatment, noted appellant's current physical examination findings and concluded that appellant was disabled due to his arthritis at L4-5 which was secondary to the 1971 lammectomy operation. Following receipt and review of diagnostic tests, Dr. Cobey explained that following the 1971 surgery, progressive degenerative changes of the spine occurred which related to the operation and not the 1979 employment injury. He concluded that appellant could continue in his part-time employment.

The Board finds that Dr. Cobey's December 15, 1994 and January 19, 1995 medical reports are sufficiently well rationalized and based upon a proper factual background. Where opposing medical reports of virtually equal weight and rationale exist, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such

¹ *David W. Green*, 43 ECAB 883 (1992); *Jason C. Armstrong*, 40 ECAB 907 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986); *Harold S. McGough*, 36 ECAB 332 (1984); *David Lee Dawley*, 30 ECAB 530 (1979); and *Anna M. Blaine*, 26 ECAB 351 (1975).

² *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

³ 5 U.S.C. § 8123(a).

specialist, if sufficiently rationalized and based upon a proper factual background, must be given special weight.⁴ Thus, Dr. Cobey's report represents the weight of the medical evidence and establishes that appellant had no continuing disability related to his February 2, 1979 employment injury.

Appellant submitted additional reports from Dr. White subsequent to Dr. Cobey's reports and the hearing representative's decision. As Dr. White was on one side of the conflict that Dr. Cobey resolved, his additional reports are insufficient to overcome the weight accorded Dr. Cobey's reports as the impartial medical specialist or to create a new conflict with it.⁵

The decisions of the Office of Workers' Compensation Programs dated January 19, 1996 and October 20, 1995 are hereby affirmed.

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

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member

⁴ *Brady L. Fowler*, 44 ECAB 343, 352 (1992).

⁵ *Dorothy Sidwell*, 41 ECAB 857, 874 (1990).