

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THOMAS E. HARSCH and DEPARTMENT OF THE NAVY,
NAVAL WEAPONS STATION, Concord, Calif.

*Docket No. 95-3019; Submitted on the Record;
Issued November 16, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits as of December 22, 1994.

On January 13, 1992 appellant, a 40-year-old railroad conductor, filed a Form CA-2 claim for benefits based on occupational disease, alleging that the duties of mounting and dismounting railroad equipment, plus the "abnormalities" of the footpath in his work area had resulted in neuroma, stress, high blood pressure, and a back disorder, and that he first became aware these conditions were related to factors of employment on October 25, 1991. By letter dated March 13, 1992, the Office accepted appellant's claim for acute situational disturbance, thoracic sprain, and bilateral neuroma of both feet. Appellant received compensation for periods of wage loss intermittently from October 28, 1991 to June 3, 1992; and continuously from July 24, 1992 to March 15, 1993, and December 23, 1993 to December 22, 1994.

In a disability certificate dated June 3, 1992, Dr. Steven I. Subotnick, appellant's treating podiatrist, noted that appellant no longer had work limitations pertaining to his feet. In a report dated June 30, 1992, Dr. Subotnick, stated that appellant advised him his feet were no longer causing him any problems, and noted that a magnetic resonance imaging (MRI) scan performed on his feet showed no apparent pathology. Dr. Subotnick stated that appellant's neuromas were no longer symptomatic and were being controlled by orthotics. In a follow-up opinion dated July 30, 1992, Dr. Subotnick opined that appellant's condition was permanent and stationary with regard to his feet, with no residual deformity, disability, or work preclusions made by a more qualified physician.

By letter dated November 13, 1992, the Office scheduled a second opinion examination for appellant with Dr. Marvin B. Zwerin, an osteopath, for December 9, 1992, to determine whether appellant was still disabled by residuals from his accepted thoracic sprain condition.

Dr. Zwerin examined appellant on December 9, 1992, and in a report dated December 16, 1992, advised that appellant had a herniated disc at L4-5 which had totally disabled him from work since June 1992, but was not related to residuals from the October 25, 1991 employment injury. Dr. Zwerin related that appellant told him he did not have any significant lower back complaints or problems until he turned over in bed on December 27, 1991 and felt something rip in his lower back. Dr. Zwerin concluded that there was no industrial cause for this injury, and no basis for a finding that appellant had sustained a work-related lower back injury. Dr. Zwerin also noted that Dr. Subotnick had confirmed that he had completely recovered from the effects of his foot injury without residual disability or work impairment, and concluded that appellant had no residual physical limitations insofar as the foot and thoracic spine injuries were concerned.

Appellant was also examined by Dr. Robert W. Chow, a Board-certified neurosurgeon, on May 17, 1993. Dr. Chow stated in a report dated May 17, 1993, that appellant's symptoms were compatible with nerve root compression due to degenerative changes at the lumbosacral spine and lumbosacral joints, in addition to evidence of a herniated disc at L4-5, but did not provide an opinion regarding whether his current condition was causally related to appellant's employment-related back condition.

On February 10, 1994 the Office submitted a letter to Dr. George J. Guidry, a Board-certified neurosurgeon and appellant's treating physician, requesting that he submit an opinion regarding whether appellant still suffered residuals from his accepted thoracic sprain condition, and attached a copy of Dr. Zwerin's December 16, 1992 report for comment.

In response, Dr. Guidry stated in a letter dated March 10, 1994 that he was unable to comment further since he last saw appellant on May 5, 1993.¹

With regard to appellant's psychological condition, the Office, by letter dated November 13, 1992, scheduled a second opinion examination for appellant with Dr. Morey Weingarten, a psychiatrist, to determine whether appellant was still disabled by psychiatric residuals from his October 25, 1991 employment injury. Dr. Weingarten examined appellant on March 10, 1993, and stated in a report dated March 10, 1993 that "[appellant's] physical problems, which apparently have been accepted as work related, would add to [his] emotional distress and his psychological difficulties would, in turn, complicate the treatment of his physical ailments. However, this would be a relatively time limited phenomena and it would be anticipated that the psychological difficulties associated with the overwork would have remitted within several months and certainly by this time as [appellant] has not worked since last summer." Dr. Weingarten concluded that appellant's continuing problems were not related to employment factors but were due to a preexisting or unrelated problem, and in any case should not be considered an "industrial liability."

Dr. Weingarten issued follow-up reports on October 26 and December 23, 1993, at which time he essentially reiterated his earlier findings.

¹ In his May 5, 1993 report, Dr. Guidry noted appellant's recent complaints of leg and back pain stating that appellant continued to be a difficult historian with multiple complaints, but did not provide an opinion regarding whether appellant's back condition to the October 24, 1991 employment injury.

On October 19, 1995 the Office issued a notice of proposed termination of compensation to appellant. In the October 18, 1995 memorandum accompanying the notice of proposed termination, the Office found that appellant no longer suffered any residual disability causally related to his employment, stating that residuals from the accepted conditions of thoracic sprain, acute situational disturbance, and bilateral neuroma had all resolved.

The Office stated that with regard to appellant's accepted bilateral neuroma, both Dr. Zwerin and Dr. Subotnick agreed that appellant's neuroma in his feet had resolved and that appellant suffered no further disability. The Office stated that Dr. Zwerin had opined that appellant had also completely recovered from his thoracic sprain, and that although he remained totally disabled from a herniated disc at L4-5, this injury was not caused by factors of employment. With regard to appellant's psychological condition, the Office stated that Dr. Weingarten's opinion clearly established that symptoms from appellant's psychological condition had completely resolved, and that he had no ongoing difficulties as a result of the disorder. The Office allowed appellant 30 days to submit additional evidence or legal argument in opposition to the proposed termination.

Appellant did not respond to the Office's request for additional medical evidence, but submitted a December 2, 1994 letter objecting to the proposed termination.

By decision dated December 22, 1994, the Office terminated appellant's compensation. In the memorandum incorporated by reference in its decision, the Office noted that no additional medical evidence was submitted to support appellant's entitlement to continued compensation.

In a letter dated June 19, 1995, appellant requested reconsideration of the Office's previous decision. Accompanying appellant's letter was an employability/medical statement and work restriction evaluation from a social services agency dated April 25, 1995.

By decision dated August 15, 1995, the Office found that the medical evidence appellant submitted was not sufficient to warrant modification of its December 22, 1994 decision terminating benefits.

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.² 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.³

In the present case, the Office based its decision to terminate appellant's compensation as of December 22, 1994 on the reports of Drs. Subotnick, Zwerin, and Weingarten. Dr. Subotnick

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

³ *Id.*

noted on June 3, 1992 that appellant no longer had work limitations pertaining to his feet and opined in his July 30, 1992 report that appellant's condition was permanent and stationary with regard to his feet, with no residual deformity, disability, or work preclusions. Dr. Zwerin stated in his December 16, 1992 report that he concurred with Dr. Subotnick's opinion that appellant's foot condition had resolved, and opined that appellant had no residuals from the accepted thoracic sprain condition. Dr. Zwerin stated that although appellant had a herniated disc at L4-5, this was not employment related given appellant's statement that this injury stemmed from an incident which occurred at home in bed on December 27, 1991. With regard to appellant's psychological condition, Dr. Weingarten examined appellant on three occasions and concluded that appellant's continuing psychological problems were not related to employment factors but were due to a preexisting or unrelated problem which did not affect his ability to work. The Board finds that the Office properly relied on the opinions from these three physicians, which are uncontested by any other medical report in the record, in finding that all residuals from the October 25, 1991 employment injury had ceased as of December 22, 1994 and that appellant therefore was no longer entitled to compensation based on his employment-related accepted conditions.

Finally, the medical evidence appellant submitted with his request for reconsideration did not provide a rationalized, probative opinion that he continued to suffer residuals from his accepted October 25, 1991 employment injuries. The Board therefore affirms the Office's August 15, 1995 decision denying reconsideration of its December 22, 1994 termination decision.

The decisions of the Office of Workers' Compensation Programs dated August 15, 1995 and December 22, 1994 are hereby affirmed.

Dated, Washington, D.C.
November 16, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member