U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KENNETH P. FOX and DEPARTMENT OF THE ARMY, FORT SILL, Okla.

Docket No. 96-1624; Submitted on the Record;
Issued November 25, 1998

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation effective December 12, 1993 on the grounds that he had no residual disability or medical condition causally related to his accepted employment injury.

On January 25, 1989 appellant, then a 44-year-old former motor vehicle operator, filed an occupational disease claim, alleging that he injured his back beginning November 20, 1987 while lifting desks off a truck.[1] On May 9, 1989 the Office accepted appellant's claim for aggravation of spondylolisthesis at L5. On November 27, 1990 the Office accepted the additional condition of subluxation at the L5-S1 level. On July 8, 1992 the Office notified appellant that it proposed termination of his compensation benefits. By decision dated August 18, 1992, the Office terminated appellant's compensation effective August 23, 1992 on the grounds that he had no continuing disability causally related to his accepted employment injury. In a decision dated April 24, 1993, an Office hearing representative vacated the Office's termination of compensation, reinstated appellant's monetary compensation retroactive to the date of termination and remanded the case for further development of the evidence due to a conflict in the medical evidence. In a letter dated October 19, 1993, the Office notified appellant that it proposed termination of his compensation benefits. By decision dated November 24, 1993, the Office terminated appellant's compensation effective November 25, 1993 on the grounds that any residual disability had ceased by that date. In a decision dated April 24, 1995, an Office hearing representative affirmed the Office's November 24, 1993 decision, however, the date for termination of compensation was modified to December 12, 1993 to coincide with the beginning date of a periodic roll cycle. In a decision dated March 8, 1996, the Office denied modification of its prior decision.

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[1] Appellant lost his position due to reduction in forces effective September 30, 1988. Based on appellant's supplemental statement his date of injury was revised to October 30, 1987.

The Board finds that the Office properly terminated appellant's compensation effective December 12, 1993.[2]

Under the Federal Employees' Compensation Act,[3] once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of compensation.[4] After the Office determines than an employee has a disability causally related to his or her employment, the Office may not terminate compensation without establishing that its original determination was erroneous or that the disability has ceased or is no longer related to the employment injury.[5]

The fact that the Office accepts appellant's claim for a specified period of disability does not shift the burden of proof to appellant to show that he or she is still disabled. The burden is on the Office to demonstrate an absence of employment-related disability in the period subsequent to the date when compensation is terminated or modified.[6] Therefore, the Office must establish that appellant's condition was no longer aggravated by employment factors after December 12, 1993, and the Office's burden includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[7]

In the present case, an Office hearing representative properly remanded the case after determining that there was a conflict in the medical opinion evidence between Dr. Neal D. Perry, a chiropractor and appellant's treating physician, and Dr. H.J. Freede, a Board-certified orthopedic surgeon and Office referral physician. In numerous reports, Dr. Perry indicated that appellant continued to be disabled due to the aggravation and exacerbation of his underlying condition of spondylolisthesis by his employment duties and his accepted employment injury. On the other hand, Dr. Freede found that appellant had congenital spondylolisthesis but there were no subjective findings or residual findings. He noted intermittent soreness of appellant's back which was related to appellant's underlying condition of congenital spondylolisthesis. Dr. Freede concluded that based on his fifty years of experience as an orthopedic surgeon, appellant was not totally disabled and could do many types of work. In order to resolve the conflict in the medical evidence concerning the extent and etiology of appellant's disability, the Office referred appellant to Dr. Samuel T. Moore, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion.[8]

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[2] The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal. As appellant filed his appeal with the Board on May 1, 1996, the only decision before the Board is the Office's March 8, 1996 decision. *See* 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[3] 5 U.S.C. § 8101 *et seq.* (1974).

[4] *William Kandel*, 43 ECAB 1011 (1992).

[5] *Carl D. Johnson,* 46 ECAB 804 (1995).

[6] *Dawn Sweazey*, 44 ECAB 824 (1993).

[7] *Mary Lou Barragy,* 46 ECAB 781 (1995).

[8] Section 8123(a) of the Federal Employees' Compensation Act provides: "An employee shall submit to

In situations where there exists 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 upon a proper factual background, must be given special weight.[9] The Board has carefully reviewed the opinion of Dr. Moore and finds that it has sufficient probative value, regarding the relevant issue in the present case, to be accorded such special weight.

In a report dated August 17, 1993, Dr. Moore diagnosed Grade I spondylolisthesis of L5 on S1 which was frequently of a congenital nature and lumbosacral strain superimposed on the aforementioned condition. He noted that spondylolisthesis predisposes the body to back strain, sometimes with only a minor injury. Dr. Moore reported that the underlying condition had not really caused any objective evidence of pathology, other than appellant's symptoms were ongoing, causing pain followed by "heavy-duty" activities which according to appellant's history of injury was not present before his employment injury. Dr. Moore indicated that he could not find any signs of a current aggravation of the underlying condition, and he also stated that the symptoms of the aggravation were present on an intermittent basis and that while normal activities did not cause aggravation, heavy manual labor did cause symptoms. Dr. Moore further found that appellant could not return to his previous work as a warehouse worker, however, he also indicated that "[appellant's] disability [w]as very minor for carrying out the light duty, not involving lifting over 20 to 25 pounds [which appellant was doing before he stopped work.]" Thus, Dr. Moore concluded that appellant did not have aggravation of his underlying condition at the time of examination although symptoms would be present intermittently. As he also indicated that normal activities would not cause any aggravation and that appellant could work eight hours a day, any limitations he provided were prophylactic in nature and were prescribed to prevent future injury should appellant engage in heavy manual labor. Consequently, the Office properly terminated appellant's compensation since Dr. Moore found no current residuals of or medical condition related to appellant's employment injury. The Office met its burden of proof.

examination by a medical officer of the Unites States, or by physician designated or approved by the Secretary of Labor, after the injury and as frequently and at the times and places as may be reasonable required…. 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).

[9] *Jack R. Smith*, 41 ECAB 691 (1990); *James P. Roberts*, 31 ECAB 1010 (1980).

The decision of the Office of Workers' Compensation Programs dated March 8, 1996 is hereby affirmed.

Dated, Washington, D.C.
November 25, 1998

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member