

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RAYMOND SMITH and MARINE CORPS,
AIR GROUND COMBAT CENTER, Twenty Nine Palms, Calif.

*Docket No. 96-951; Submitted on the Record;
Issued September 15, 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 in terminating appellant's compensation as of July 17, 1995.

On December 1, 1989 appellant, a 44-year-old store worker, sustained an injury to his lower back when he pulled a jack out of a pallet. Appellant filed a Form CA-1 claim for benefits based on traumatic injury on December 4, 1989, which the Office accepted lumbosacral strain.

Appellant was examined by his treating physician, Dr. Leonard M. Kalfuss, a Board-certified orthopedic surgeon, on January 2, 1990, who stated in a January 3, 1990 medical report that appellant was temporarily totally disabled based on L4-5 and L5-S1 disc degeneration with probable spinal stenosis syndrome and right lumbosacral radiculitis. In a report dated March 13, 1990, Dr. Kalfuss released appellant to return to work on full duty without restrictions.

In a report dated December 6, 1990, Dr. Kalfuss stated that appellant had experienced increasing back pain due to an incident which had occurred at home three days earlier, in which appellant claimed to have hurt his back while wrestling with his dogs. Dr. Kalfuss placed appellant on temporary total disability for one week. In an affidavit dated December 10, 1990, appellant indicated that he had joined a flag football team, but had quit because it was too rough. Subsequent to this time, appellant was periodically examined and treated for his back condition by Dr. Kalfuss, who submitted numerous medical reports and periodically placed appellant on medical leave when his back pain worsened, and then released him to return to work when his condition improved.

In a January 27, 1993 report, updating appellant's condition, Dr. Kalfuss stated that although the initial injury of December 1, 1989, a disc protrusion with progressive left lumbosacral radiculopathy, had responded favorably to treatment and that therefore appellant was able to return to work, the pathology of his injury was such that his lower back condition would never "resolve," and that with the increasing stress associated with his work activities and the natural progression of degenerative changes, he could anticipate residuals and intermittent

exacerbations. Dr. Kalfuss now recommended a permanent restriction from repetitive heavy lifting which would render appellant unable to perform his prior job activities. Dr. Kalfuss concluded that appellant's permanent disability resulted from work-related injuries, as there was no evidence that it was caused by anything other than the December 1, 1989 employment incident.

On May 10, 1993 an Office medical adviser, Dr. Edward H. Wilson, Board-certified in orthopedic surgery, reviewed appellant's file and found that the evidence of record suggested appellant had recovered from the lumbar strain of December 1, 1989 employment injury at the time of Dr. Kalfuss' March 13, 1990 examination. Dr. Wilson stated that the left leg pain and disc herniation were the result of either of two nonwork-related incidents,¹ or to the natural progression of degenerative disc disease, with spontaneous disc herniation, or both. Dr. Wilson opined that the history and clinical findings tended to support this scenario.

The Office arranged a second opinion examination on July 7, 1993 with Dr. Ronald P. Portnoff, a Board-certified orthopedic surgeon, who submitted reports dated July 7 and September 20, 1993. In his amended report of September 20, 1993, Dr. Portnoff attributed 100 percent of appellant's back condition to his nonwork-related injury of December 1, 1989.

In a letter dated August 23, 1994, the Office issued a notice of proposed termination to appellant, stating that the weight of medical opinion rested with Dr. Portnoff. The Office stated that Dr. Kalfuss, in his report of June 14, 1994,² was either unaware of or failed to take into account the home injury of December 5, 1990, and that therefore his reports were of diminished probative value and insufficient to overcome the "well-reasoned" report of Dr. Portnoff. In a decision dated September 26, 1994, the Office, noting that appellant had failed to submit additional evidence within 30 days, terminated appellant's compensation as of October 16, 1994 based on its finding that the effects of the December 1, 1989 injury had ceased without residuals.

In a letter dated October 16, 1994, appellant requested a review before an Office hearing representative.

In a decision dated January 17, 1995, the Office vacated its previous decision terminating benefits, stating that the medical evidence failed to support the Office's conclusion that appellant's accepted condition had resolved by October 16, 1994. An Office hearing representative found that Dr. Portnoff's September 20, 1993 report should be excluded because it contained no medical rationale to explain the changes in his opinion on causal relationship (from his July 7, 1993 report), and because his results were obtained based on inappropriate "leading questions" from the Office. The hearing representative remanded the case back to the district office, ordered appellant's compensation reinstated as of October 16, 1994, and instructed that the case be referred to an impartial, referee, Board-certified orthopedist to resolve the conflict in medical evidence between Dr. Kalfuss and Dr. Wilson regarding whether appellant continued to have any condition causally related to the accepted employment incident of December 1, 1989.

¹ Dr. Wilson noted that appellant allegedly sustained an injury at home in April 1989, but did not elaborate.

² Dr. Kalfuss' report of June 14, 1994 contained an update on appellant's condition which essentially reiterated the findings and conclusions in his January 27, 1993 report.

In a letter dated March 8, 1995, the Office scheduled a referee examination under section 8123(a)³ with Dr. Vincent Picchione, a Board-certified orthopedist, on April 17, 1995.

In a report dated April 17, 1995, Dr. Picchione opined that appellant's problems were 100 percent due to his December 1990 nonwork-related injury, and that the records indicated he had recovered from his December 1, 1989 injury. Dr. Picchione noted that Dr. Kalfuss had initially found that appellant's lumbosacral strain condition had resolved on March 13, 1990, when he released appellant to return to full work without restrictions. Dr. Picchione also noted that appellant was playing in a flag football league as of October 1990, and had sustained an injury at home in December 1990. Dr. Picchione stated that, contrary to the opinion of Dr. Kalfuss, appellant did not have ruptured disc or degenerative disc disease since there were no objective findings in the record to support such findings, and that all of the diagnostic tests had been negative.

Based on Dr. Picchione's opinion, the Office issued a proposed notice of termination on May 16, 1995.

In a decision dated July 17, 1995, the Office terminated appellant's benefits. The Office stated that it had received no countervailing medical evidence from appellant within 30 days, and found based on the weight of the medical evidence that the December 1, 1989 injury had resolved.

In a letter dated July 31, 1995, appellant requested a review before an Office hearing representative.

In a decision dated November 9, 1995, the Office affirmed its previous decision. An Office hearing representative stated that the Office had referred the case to a third party, independent medical examiner, Dr. Picchione, a Board-certified orthopedic specialist, who submitted a thorough, well-rationalized, unequivocal report, based on a complete and accurate history of appellant's injury and condition, which contained a clear explanation of why the effects of his accepted injury had resolved. The hearing representative concluded that the weight of the evidence established that appellant's December 1, 1989 injury resolved without residuals no later than July 17, 1995, the date the Office terminated compensation.

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.⁴ 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.⁵

In the present case, the Office based its decision to terminate appellant's compensation on the April 17, 1995 medical report of Dr. Piccione, who concluded there was no basis to

³ 5 U.S.C. § 8123(a).

⁴ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

⁵ *Id.*

attribute any continuing disability or residuals to appellant's accepted December 1, 1989 low back injury. Dr. Piccione based his conclusions on objective findings on examination indicating appellant didn't have ruptured disc or degenerative disc disease and on the results of negative diagnostic tests. Dr. Picchione also noted that appellant had been released to return to work without restrictions on March 13, 1990, when he was released to return to full work without restrictions, that he was playing in a flag football league as of October 1990, and that he had sustained an injury at home in December 1990.

The Board finds that the Office properly found that Dr. Picchione's referee opinion negating a causal relationship between appellant's claimed condition and his December 1, 1989 employment was sufficiently well reasoned and based upon a proper factual background, and that, therefore, the Office acted correctly in according to his April 17, 1995 report the special weight of an impartial medical examiner.⁶ Accordingly, the Board finds that the April 17, 1995 report of Dr. Picchione constituted sufficient medical rationale to terminate appellant's compensation benefits. The Board therefore affirms the Office's July 17, 1995 termination decision.

The decisions of the Office of Workers' Compensation Programs dated November 9 and July 17, 1995 are hereby affirmed.

Dated, Washington, D.C.
September 15, 1998

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

⁶ Gary R. Seiber, 46 ECAB 215 (1994).