

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VERNON LEE HARPER and DEPARTMENT OF THE NAVY,
NAVAL AIR STATION, Alameda, Calif.

*Docket No. 96-2538; Submitted on the Record;
Issued September 28, 1998*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's disability compensation, effective November 12, 1995, on the grounds that he had no work-related residuals of his accepted condition.

On October 21, 1987 appellant, then a 46-year-old painter, filed a notice of occupational disease, claiming that his work sanding and painting aircraft had aggravated his degenerative arthritis over the years and that his various injuries were never properly treated.¹ Appellant was terminated as unfit for duty, effective October 9, 1987.

Based on the January 11, 1989 report of Dr. Linda F. Staiger, a Board-certified orthopedic surgeon, the Office accepted appellant's claim for temporary aggravation of degenerative arthritis of the cervical spine and paid appropriate compensation.² Subsequently, appellant was referred for vocational rehabilitation.

On September 28, 1995 the Office issued a notice of proposed termination based on the July 17, 1995 report of Dr. William K. Fleming, a Board-certified orthopedic surgeon, that appellant had no objective findings of recurrent aggravation of his arthritic condition and was completely asymptomatic. Appellant was provided 30 days in which to provide evidence contesting the notice.

¹ Appellant filed five previous claims, all for traumatic injuries, between 1976 and 1986; none of these claims are germane to this case.

² Upon termination appellant was paid retirement benefits from October 10, 1987 through June 30, 1989 when he elected disability compensation.

Receiving no response, the Office on November 1, 1995 terminated appellant's disability compensation, effective November 12, 1995 on the grounds that the medical evidence established that his work-related condition had ceased.

Appellant timely requested reconsideration on the grounds that he had been retired on disability, that the employing establishment had no work for him, and that the medical evidence had not been considered. On July 24, 1996 the Office denied appellant's request on the grounds that the evidence submitted in support of reconsideration was insufficient to warrant merit review of the prior decision.

The Board finds that the Office met its burden of proof in terminating appellant's compensation on the grounds that the temporary aggravation of his arthritic condition had ceased.

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 Thus, after the Office determines that an employee has a disability causally related to his or her employment, the Office may not terminate compensation without establishing either 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 The Office burden includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁷

In assessing medical evidence, the number of physicians supporting one position or another is not controlling; the weight of such evidence is determined by its reliability, its probative value, and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for, and the thoroughness of, physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.⁸

³ 5 U.S.C § 8101 *et seq.*

⁴ *William Kandel*, 43 ECAB 1011, 1020 (1992).

⁵ *Carl D. Johnson*, 46 ECAB 804, 809 (1995).

⁶ *Dawn Sweazey*, 44 ECAB 824, 832 (1993).

⁷ *Mary Lou Barragy*, 46 ECAB 781, 787 (1995).

⁸ *Connie Johns*, 44 ECAB 560, 570 (1993).

In this case, the Office accepted a temporary aggravation of appellant's preexisting cervical arthritis caused by his job requirement that he work with his arms extended overhead. Appellant has not worked since October 10, 1987 and resisted the Office's rehabilitation efforts because he considered himself retired. As early as March 21, 1990 appellant's treating physician, Dr. Thomas J. Smith, indicated that appellant could work eight hours a day with the sole restriction of no reaching above the shoulders. In a June 29, 1992 report, Dr. Smith related that appellant was "leading a normal life without difficulty," but that he was unable to do his previous job because he could not raise his arms above his shoulders for extended periods of time.

Subsequently, appellant was referred for a second opinion evaluation by a Board-certified specialist. Dr. Fleming reviewed the medical treatment records and the history of appellant's previous work injuries. Upon physical examination, Dr. Fleming found normal range of motion of appellant's cervical spine with symmetrical reflexes in the upper extremities and no sensory defect or muscular deficiency in the arms. He diagnosed mild to moderate cervical arthritis as shown by x-rays and degenerative disc disease.

In response to the Office's questions, Dr. Fleming stated that he found no objective signs of any current aggravation of appellant's arthritic condition, which preexisted the 1987 work injury sustained while performing overhead duties. Dr. Fleming concluded that appellant had returned to his baseline arthritic condition, as expected for the normal progression of cervical arthritis. Dr. Fleming added that appellant was asymptomatic as long as he was not required to continue the overhead work that exacerbated his condition initially. Finally, Dr. Fleming indicated that appellant needed no medical treatment to return to gainful employment and should be offered a position that would not aggravate his cervical arthritis.

By contrast, the record indicates that appellant failed to respond to the Office's notice of proposed termination and submitted no medical evidence in support of his continued total disability. On reconsideration, appellant submitted a February 10, 1987 report from Dr. William C. Lyon, a Board-certified orthopedic surgeon who indicated that appellant could perform duties that did not require overhead use of his arms. Appellant also submitted a July 2, 1996 report from Dr. Smith, who stated that appellant continued to have shoulder and neck problems and was unable to do the work for which he was trained.

The Board finds that these reports have no probative value because neither physician addressed the issue of whether appellant continued to have employment-related residuals of the accepted condition. Inasmuch as Dr. Fleming reviewed the case record and a statement of accepted facts, examined appellant thoroughly, found no objective evidence to support any residuals of the accepted temporary aggravation of appellant's arthritic condition,⁹ and provided a detailed and well-rationalized medical explanation of why the accepted condition had resolved, the Board finds that his conclusion represents the weight of the medical evidence¹⁰ and is

⁹ See *Anna Chrun*, 33 ECAB 829, 835 (1982) (finding that the absence of objective evidence of disability is more compatible with the absence of disability than with its presence).

¹⁰ See *Cleopatra McDougal-Saddler*, 47 ECAB ____ (Docket No. 95-2634, issued March 20, 1996) (finding that the Office referral physician provided convincing rationale, bolstered by the opinion of another Board-certified specialist, that appellant's continuing disability was not work related).

sufficient to carry the Office's burden of proof.¹¹ Therefore, the Board finds that the Office properly terminated appellant's compensation.¹²

The July 24, 1996 and November 1, 1995 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
September 28, 1998

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

¹¹ See *Samuel Theriault*, 45 ECAB 586, 590 (1994) (finding that physician's opinion was thorough, well-rationalized, and based on an accurate factual background and thus constituted the weight of the medical evidence that appellant's accepted injury had resolved).

¹² See *Larry Warner*, 43 ECAB 1027, 1033 (1992) (finding that the weight of the medical evidence rests with the second opinion physician whose well-rationalized conclusion that appellant had no residuals of the accepted injury was sufficient to carry the Office's burden of proof).