

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROLAND H. JOHNSTON and DEPARTMENT OF THE INTERIOR,
BUREAU OF INDIAN AFFAIRS, Poplar, MT

*Docket No. 97-1774; Submitted on the Record;
Issued August 25, 1999*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation, effective May 28, 1994, on the grounds that he had no continuing disability from the accepted 1988 work injury; and (2) whether the Office met its burden of proof in rescinding its acceptance of a lumbar strain as work related.

On October 3, 1988 appellant, then a 34-year-old seasonal firefighter, filed a notice of traumatic injury after he was hit on the head by a falling branch while cutting down a tree on October 1, 1988. His claim was accepted by the Office for cervical and lumbar strains.

Following extensive rehabilitation efforts, the Office reduced appellant's compensation on March 31, 1992, which was later modified on March 16, 1993, based on his physical capacity to perform the duties of the selected position of production assembler.

Appellant requested reconsideration of the March 16, 1993 decision. On May 9, 1994 the Office issued a notice of proposed termination of compensation, based on the December 20, 1993 and February 16, 1994 reports of Dr. James R. Burton, a Board-certified orthopedic surgeon to whom the Office had referred appellant for a second opinion evaluation.

On June 10, 1994 the Office terminated appellant's compensation, effective May 28, 1994, on the grounds that the medical evidence established that he had no continuing disability from the cervical strain. The Office also rescinded its acceptance of a lumbar strain as work related and found that its determination of loss of wage-earning capacity was correct.

Appellant requested a hearing, which was held on July 26, 1995. The hearing representative determined on February 13, 1996 that the Office had acted "prematurely" in reducing appellant's disability compensation on March 31, 1992 and March 16, 1993 because it had failed to establish that appellant was physically capable of performing the duties of the

selected position.¹ The hearing representative stated that appellant was entitled to total disability compensation through May 28, 1994. However, the hearing representative also found that the weight of the medical evidence rested with the opinion of Dr. Burton that appellant no longer suffered from a work-related condition and that the Office properly terminated his disability benefits.

On February 11, 1997 appellant requested reconsideration on the grounds that the Office had failed to meet its burden of proof in terminating appellant's compensation because Dr. Burton's opinion was not based on all the medical evidence of record and conflicted with the opinions of appellant's treating physicians, thereby requiring referral to an impartial medical examiner. On April 9, 1997 the Office denied appellant's request on the grounds that the evidence submitted in support of reconsideration was insufficient to warrant modification of its prior decision.

The Board finds that, because of an unresolved conflict in the medical opinion evidence, the Office failed to meet its burden of proof in terminating appellant's disability compensation and in rescinding its acceptance of his lumbar condition as work related.²

Under the Federal Employees' Compensation Act,³ the Office has the burden of justifying modification or termination of compensation once a claim is accepted and compensation paid.⁴ The Board has noted that the power to annul an award of compensation is not arbitrary and that such an award can be set aside only in the manner provided by the compensation statute.⁵

The burden of proof remains with the Office if it later decides that it erroneously accepted a claim.⁶ To justify rescission of its acceptance of a claim, the Office must show that it based its decision on new evidence, legal argument and/or rationale.⁷

Further, after the Office determines that an employee has 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

¹ Appellant was paid total disability compensation from April 4, 1992 to May 28, 1994, less the amount of benefits he had received for loss of wage-earning capacity, a total of \$16,620.20.

² The record contains no formal notice of acceptance of a lumbar strain as work related. However, in a January 28, 1992 memorandum, the Office noted its acceptance of a lumbar strain. This acceptance was reiterated in a February 16, 1993 memorandum and in an October 12, 1993 statement of accepted facts.

³ 5 U.S.C. § 8101 *et seq.*

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

⁵ *Lorna R. Strong*, 45 ECAB 470, 480 (1994).

⁶ *Martha L. Cook*, 47 ECAB 226, 230 (1995).

⁷ See *Laura H. Hoexter (Nicholas P. Hoexter)*, 44 ECAB 987 (1993); *Alphonso Walker*, 42 ECAB 129 (1990), *petition for recon. denied*, 42 ECAB 659 (1991); *Roseanna Brennen*, 41 ECAB 92 (1989), *petition for recon. denied*, 41 ECAB 371 (1990).

to the employment injury.⁸ 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.⁹ The Office's burden includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.¹⁰

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.¹¹ Thus, the determination of probative value will depend on the opportunity for, and thoroughness of, the physical examination; the accuracy and completeness of the physician's knowledge of the facts and medical history; the care and skill of the physician's analysis, and the medical rationale expressed in support of the physician's opinion.¹²

The Board finds a conflict in the medical opinion evidence between the conclusion of Dr. Burton that appellant's lumbar condition was not causally related to the 1988 incident and reports of Dr. M. Clay Vaughan, a Board-certified orthopedic surgeon and appellant's treating physician, indicating such a causal connection.¹³

Dr. Burton reviewed the voluminous medical records, noting that they raised a lot of "unanswered questions" and that appellant had undergone six computerized tomographic (CT) scans or magnetic resonance imaging (MRI) scans of his lumbar spine within three years. Upon physical examination, Dr. Burton found full normal range of motion of the cervical spine and shoulders, elbows and wrists, with lumbar flexion limited to 30 degrees and complaints of generalized muscular pain. The MRI and CT scans of the cervical spine were normal while those of the lumbar spine showed prominent L4-5 disc bulging.

Responding to the Office's questions, Dr. Burton diagnosed a cervical sprain with hyperextension involving C5-6 and C6-7 resulting from the 1988 work injury, which had since resolved, as shown by the normal test results. Dr. Burton stated that residuals related to the work injury were "purely subjective and symptomatic," and there were no objective findings to substantiate appellant's complaints. Dr. Burton added that appellant had the upper body

⁸ *Carl D. Johnson*, 46 ECAB 804, 809 (1995).

⁹ *Dawn Sweazey*, 44 ECAB 824, 832 (1993).

¹⁰ *Mary Lou Barragy*, 46 ECAB 781, 787 (1995).

¹¹ *Connie Johns*, 44 ECAB 560, 570 (1993).

¹² *Melvina Jackson*, 38 ECAB 443, 449 (1987).

¹³ *See Craig M. Crenshaw Jr.*, 40 ECAB 919, 923 (1989) (finding that Office failed to meet its burden of proof because a conflict in the medical evidence was unresolved).

dexterity to perform the duties of the production assembler position, but that he should avoid prolonged sitting or standing.

Asked whether appellant's lumbar condition was causally related to the 1988 incident, Dr. Burton stated on February 16, 1994 that no lumbar symptoms were noted in the initial treatment reports of October 1988. He added that had appellant injured his lumbar spine during the October 1, 1988 incident, he would have experienced pain when he first came to the emergency room on October 4, 1988.

Further, Dr. Burton opined that, with the type of injury appellant sustained from the falling tree branch, it would have been "extremely unusual" for the lumbar L4-5 and L5-S1 to have been involved. Therefore, appellant's degenerative disc disease in his lumbar spine did not result from the 1988 injury, but rather was the natural progression of age or related to some other injury.

By contrast, Dr. Vaughan, a Board-certified orthopedic surgeon and appellant's treating physician, diagnosed an acute lumbar strain and bulging lumbar discs as well as a cervical strain on January 19, 1989, causally related to the October 1, 1988 incident. He noted that appellant had had chronic low back pain following an "industrial accident."

While a medical note dated October 3, 1988 and an emergency room report dated October 4, 1988 did not mention any lumbar complaints, appellant explained at the hearing that he told physicians initially his back was hurting but was more concerned with his neck pain. In addition, Dr. Cindy E. Nielsen, an osteopathic practitioner, stated on November 14, 1989 that appellant had related the onset of lower back pain the day after the 1988 incident, which "affected his entire back with the appearance of bulging discs at several levels."

Dr. Vaughan reported on January 20, 1989 that appellant had sustained a flexion injury to his cervical spine and lower back, resulting from the tree branch falling on his head in October. A lumbar CT scan showed annular bulging at L4-5. Dr. Vaughan stated on May 30, 1989 that appellant's acute cervical and lumbar sprains along with bulging intervertebral discs were causally related to the 1988 incident. On March 1, 1991 Dr. Vaughan stated that appellant had experienced recurrent lower back pain since his severe injury in October 1988 and noted that his bulging disc might have herniated.

Inasmuch as the opinions of Drs. Burton and Vaughan, both Board-certified in orthopedic surgery, are conflicting and section 8123 of the Act¹⁴ provides that if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician to resolve the conflict,¹⁵ the Board finds that the Office erred in failing to refer the case to an impartial medical examiner.

The Office determined in its April 9, 1997 reconsideration decision that referral to an impartial medical examiner was unnecessary because the issue was not whether appellant also

¹⁴ 5 U.S.C. § 8123(a); 20 C.F.R. § 10.408.

¹⁵ *Shirley L. Steib*, 46 ECAB 309, 316 (1994).

hurt his back on October 1, 1988 but whether his ongoing lower back problems were related to that injury.

Having accepted a lumbar strain as work related, however, the burden of proof rested with the Office to establish that appellant's ongoing back problems were not related to the 1988 incident. While Dr. Burton mentioned Dr. Vaughan's January 19, 1989 report and an epidural steroid injection, Dr. Burton failed to discuss Dr. Vaughan's conclusions in determining that appellant's lumbar condition was not causally related to the October 1988 injury. Thus, Dr. Burton's opinion was based on an incomplete medical history and is therefore of diminished probative value.¹⁶

Finally, the Board finds that the rationale for Dr. Burton's conclusion is somewhat speculative. Dr. Burton explained that with the type of injury caused by a falling tree branch, it would have been "extremely unusual" for the lumbar discs to have been involved. Dr. Burton failed to elaborate, and Dr. Vaughan stated that appellant had sustained a flexion type of injury and diagnosed lumbar bulging when he first saw appellant three months later.

Dr. Burton explained that appellant's degenerative disc disease in his lumbar spine was the natural progression of age or related to some other injury because if appellant had injured his lumbar spine on October 1, 1988, he would have reported pain when he came to the emergency room on October 4, 1988. Appellant testified that he did complain of pain in his lower back during his initial treatment but was more concerned with his neck pain. Therefore, the Board finds that Dr. Burton's opinion is insufficiently rationalized to meet the Office's burden of proof in terminating appellant's disability compensation and rescinding its acceptance of a work-related lumbar strain.¹⁷

¹⁶ See *Patricia M. Mitchell*, 48 ECAB ____ (Docket No. 95-834, issued February 27, 1997) (finding that medical opinions based on an incomplete history have little probative value).

¹⁷ Cf. *Alfredo Rodriguez*, 47 ECAB 437, 444 (1996) (finding that the Office failed to meet its burden of proof in terminating compensation because, while appellant returned to full-duty work, the medical evidence contained no objective clinical findings showing that appellant's work-related disability had resolved).

The April 9, 1997 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, D.C.
August 25, 1999

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member