

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAUL D. DaSILVA and DEPARTMENT OF AGRICULTURE,
FOREST SERVICE, Waldport, OR

*Docket No. 98-2337; Submitted on the Record;
Issued August 13, 1999*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective June 21, 1998.

In a decision dated June 15, 1998, the Office terminated appellant's compensation benefits effective June 21, 1998 on the grounds that the weight of the evidence, as represented by the opinion of Dr. Clyde E. Hunt, a Board-certified orthopedic surgeon and second opinion physician, established that appellant no longer suffered residuals due to his accepted employment injury of August 10, 1989, which the Office accepted for concussion and cervical and lumbar strain.

The Board finds that the Office has not met its burden of proof to terminate appellant's compensation benefits.

It is well established that, once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.¹ 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.² The Office's procedure manual provides that, having accepted a claim and initiated payments, the Office may not terminate compensation without a positive demonstration, by the weight of evidence, that entitlement to benefits has ceased.³

¹ *Harold S. McGough*, 36 ECAB 332 (1984).

² *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.3 (July 1993).

The Office based its decision terminating benefits on the May 20, 1997 report, of Dr. Hunt, the Board-certified orthopedic surgeon, who conducted a second opinion examination. The Board finds, however, that Dr. Hunt's opinion is too equivocal and uncertain to discharge the Office's burden of proof.

In a detailed report, Dr. Hunt related appellant's history of injury, medical course, current complaints, past medical history and current socioeconomic information. He described his findings on physical examination, including markedly limited ranges of motion of the cervical and lumbar spine, findings on neurological examination and the results of imaging studies. His diagnosis included strain in the cervical and lumbar spine, a result of an injury on August 10, 1989, superimposed on preexisting degenerative changes in both areas.

Dr. Hunt reported that he did not believe that the physical examination was very objective, making certain pronouncements and prognostications improbable. "The problem I can see at this late date," Dr. Hunt explained, "is that he is an aging 67 years old with significant preexisting degenerative changes in the cervical and lumbar spine and significant nonorganic presentation making it doubtful that questions being asked about whether or not he could return to work as a forestry technician seem somewhat moot and impossible answerable." (sic) He reported, however, that it was possible that a pathologic worsening of his preexisting degenerative changes, an aggravation from the force of the injury in question. He noted that while there were no good medical ways to measure that, there appeared to be enough of a flexion force to cause an avulsion fracture of the spinous process of C7, observed by Dr. Richard A. Arbeene on his initial x-rays. "All we have," Dr. Hunt reasoned, "are his apparent reduced neck and lumbar motions consistently through the records to present, not knowing what they were before the injury. Without other evidence it must be assumed that those reduced motions are a result of the injury and the preexisting changes." By supporting that the accepted employment injury may have caused a pathological worsening of appellant's preexisting degenerative changes, Dr. Hunt has raised a significant question whether appellant continues to suffer residuals of employment injury of August 10, 1989.

Addressing the accepted conditions of cervical and lumbar strain, Dr. Hunt stated: "It would appear that [appellant's] cervical and lumbar strains have resolved." He noted, however, that what was causing all of appellant's complaints at that late date was obscured by his nonorganic presentation and inconsistencies. Responding to the Office's question whether there were any objective residuals of the 1989 cervical and lumbar strain, Dr. Hunt replied no, "not obviously although it appears he has had restricted cervical and lumbar mobility since that injury. This is supported by today's physical exam[ination] and the records although it is not clear how reliable today's examination of those motions is in view of his nonorganic presentation."

On the question of disability, Dr. Hunt reported that appellant could not perform his duties as a forestry technician, not at his age and not with his presentation. "All the reasons are not clear," he added.

Dr. Hunt concluded his report as follows:

“[Appellant’s] total presentation is such that it [is] very doubtful that he will work again and asking hypothetical questions about that at his advanced age, presentation and physical conditioning is beginning to defy logic although I can understand the intentions.

“I am sorry I cannot be more helpful. If you have any other questions where I might be able to help, please let me know.”

Although Dr. Hunt’s report contains certain statements that tend to support a finding that residuals of the accepted injury had ceased, from the whole of the report he is unclear whether appellant continues to suffer residuals of the accepted employment. There is the possibility of an injury-related aggravation of appellant’s preexisting degenerative changes. On the issue of cervical and lumbar strain, Dr. Hunt stated that the strain appeared to have resolved, that there were no obvious objective residuals, but he qualified this statement by noting that appellant had displayed restricted cervical and lumbar mobility since the injury and that this was supported by the current findings on physical examination and by the record.⁴ Dr. Hunt qualified this, however, by observing that it was not clear how reliable the current examination of those motions was in view of appellant’s nonorganic presentation. The Board finds that his opinion is equivocal, uncertain and not expressed to a reasonable medical certainty. As he acknowledged, appellant’s age, significant preexisting degenerative changes and nonorganic presentation made certain pronouncements and prognostications “improbable.” Dr. Hunt did not state that his findings on physical examination were negative for cervical and lumbar strain. He did not present a reasoned medical explanation to support that the accepted strains had resolved. And he did not state that disability causally related to the accepted strains had ceased. Instead, Dr. Hunt left possibilities open and indicated that these issues were difficult to answer due to appellant’s advanced age, significant preexisting degenerative changes and nonorganic presentation. He apologized that he could not be more helpful.

Because the opinion expressed by Dr. Hunt is not the sort of well-reasoned and reasonably certain medical opinion necessary to make a positive demonstration that entitlement to benefits has ceased, the Board finds that the Office has not met its burden of proof to terminate appellant’s compensation benefits.

⁴ A September 16, 1997 report, from Dr. Stephen A. Christensen, appellant’s primary treating physician, supports that appellant’s medical condition did not improve during his treatment of appellant from May 1992 through November 1996.

The June 15, 1998 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, D.C.
August 13, 1999

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member