

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL L. GRIGGS and DEPARTMENT OF HEALTH & HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION, Kansas City, MO

*Docket No. 97-1911; Submitted on the Record;
Issued December 10, 1999*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation, effective May 16, 1985.

The Board has duly reviewed the case on appeal and finds that the Office met its burden of proof.

This is the second appeal before the Board in this case. By decision dated April 7, 1993, the Board set aside a prior Office decision in which the Office found that appellant failed to meet his burden to establish that factors of his federal employment aggravated his preexisting back condition. The Board found that the opinion of appellant's treating physician, Dr. Mark E. Wheeler, a Board-certified orthopedic surgeon, was unclear as to whether appellant's underlying preexisting back condition was aggravated by his employment, or whether the employment merely aggravated appellant's pain and symptoms. The Board further found that the opinion of the Office referral physician, Dr. William Hamsa, a Board-certified orthopedic surgeon, lacked medical rationale explaining why only appellant's symptoms were aggravated by his employment, and not his underlying condition. Therefore, the Board remanded this case to the Office, with instructions to refer appellant to another second opinion specialist and to request a rationalized medical report addressing whether appellant's underlying condition of degenerative disc disease was aggravated by his federal employment and, if so, the nature and extent of any aggravation found. The law and facts as set forth in the previous decision is incorporated herein by reference.

Subsequent to the April 7, 1993 Board decision, on May 17, 1993, the Office referred appellant to Dr. James P. O'Hara, a Board-certified orthopedic surgeon, for a second opinion evaluation. Based on Dr. O'Hara's opinion as expressed in his June 2 and September 22, 1993 reports that the prolonged sitting required by appellant's job worked to increase pressure in the intervertebral disc, thus exacerbating appellant's back problem, on October 25, 1993, the Office accepted appellant's claim for aggravation of degenerative disc disease. The Office further

determined, however, that further medical development was required on the issue of the nature and extent of the accepted aggravation. The Office referred appellant in turn to four additional physicians, Drs. Michael J. Morrison, Martin Rosenfeld, R. Schuyler Gooding, and Peter D. Wirtz, in an effort to obtain a clear picture, through conclusive medical evidence, of whether the aggravation was temporary or permanent and, if temporary, when the aggravation ceased. In each instance, the Office provided the physician with a statement of accepted facts, copies of the relevant medical and factual evidence and a list of questions to be addressed and resolved.

By notice dated July 7, 1997, the Office proposed to terminate appellant's benefits, based primarily on the opinions of Drs. Rosenfeld and Wirtz. By decision dated May 2, 1996 and amended May 7, 1996,¹ the Office terminated appellant's compensation, effective May 16, 1985, on the grounds that the weight of the medical evidence, represented by the opinions of Drs. Rosenfeld and Wirtz, demonstrates that the accepted aggravation of degenerative disc disease was temporary in nature and ceased once appellant was no longer exposed to factors of his federal employment.² Following appellant's request for a review of the written record, in a December 9, 1996 decision, an Office hearing representative affirmed the prior decision. The instant appeal follows.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability has ceased or that it was no longer related to the employment.³ When employment factors cause an aggravation of an underlying physical condition, the employee is entitled to compensation for the periods of disability related to the aggravation. However, when the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased. This is true even though the employee is found medically disqualified to continue in such employment because of the effect which the employment factors might have on the underlying condition. Under such circumstances, his disqualification for continued employment is due to the underlying condition, without any contribution by the employment.⁴ The Office may not terminate compensation

¹ The Office's original May 2, 1996 decision contained a typographical error, the effect of which was to terminate appellant's benefits effective May 2, 1996, rather than May 16, 1985, the day appellant stopped work.

² In his report dated December 21, 1993, Dr. Morrison, a Board-certified orthopedic surgeon, opined "that to what degree [appellant's] job, an insurance representative for the employing establishment, has aggravated his degenerative disc disease in his lower back would be strictly based on his accountability of subjective pain as a result of his job description," but did not otherwise address the issue of the duration of the accepted aggravation. The Office also found the opinion of Dr. Gooding, a Board-certified neurological surgeon, to be of little probative value as he failed to differentiate between the effects of appellant's significant preexisting conditions and the effects of appellant's previous federal employment, his conclusion that appellant's back condition was caused and not aggravated by his employment was contrary to the weight of the medical evidence of file, and he repeatedly failed to adequately address several questions posed by the Office, despite numerous requests for supplemental reports.

³ *Pedro Beltran*, 44 ECAB 222 (1992).

⁴ *John Watkins*, 47 ECAB 597 (1996).

without establishing that the disability ceased or that it was no longer related to the employment.⁵

In this case, the Office principally relied on the opinions of Drs. Rosenfeld and Wirtz in terminating appellant's benefits effective May 16, 1985, the date appellant last worked. In his report dated March 28, 1994, Dr. Rosenfeld, a Board-certified orthopedic surgeon and Office referral physician, reviewed appellant's medical history, listed his findings on physical examination and diagnosed failed back surgery syndrome with chronic back pain, recurring leg pain and degenerative lumbar disc disease. In a May 23, 1994 follow-up report, in which the physician states his final conclusions with respect to the questions posed by the Office, Dr. Rosenfeld stated that without the prolonged sitting necessitated by appellant's job his degenerative disc disease would probably have progressed to the same degree, but would not have been as symptomatic. He agreed that the sitting required by appellant's job had aggravated appellant's condition, but explained that this was only "on a temporary basis, causing increased symptoms at times" but that the overall continued deterioration of the back was due to the inherent fractures caused by the original nonemployment-related injury and the multiple surgeries that followed. Dr. Rosenfeld was unable to say however, exactly when the temporary aggravation ceased. The Office, therefore, referred appellant to Dr. Wirtz, a Board-certified orthopedic surgeon. In a report dated February 15, 1996, Dr. Wirtz reviewed appellant's medical and employment history as well as the material provided by the Office and listed his findings on physical examination. He diagnosed multiple level degenerative disc disease, stiffness, low back, secondary to degenerative disc disease and laminectomies, and status postop multiple level laminectomies. In answering the Office's inquiry as to the nature and extent of the accepted aggravation, Dr. Wirtz stated:

"It has been my experience, education and dealing with his physical examination that any present symptomology would be a symptom complex from his degenerative disc disease. These degenerative disc conditions are aggravated by activities such as standing, walking, sitting, bending and twisting beyond the capability of that area of the spine. These aggravations are temporary in nature. The condition of degenerative disc disease is permanent and will become symptomatic with such aggravations. In the [s]tatement of [a]ccepted [f]acts, if he was able to return to work periodically, each incident of returning to work, such as January 16 through May 16, 1985 would have been a period of time when he had reached his resolution of a previous exacerbation of his back pain. Based on his present physical examination, the worsening of the condition which occurred with the multiple surgical procedures has become static without further progression. Based on his history of similar symptoms over the last several years, there is no further progression as it relates to the previous work aggravation conditions. The degenerative process has become restrictive in activities without change in the last 10 years or since his last surgery. It has been my experience and education that this type of degenerative disc disease would have developed to this point irrespective of any factor or single incident or multiple incidents as noted by his employment."

⁵ *Id.*; see *Henry P. Eanes*, 43 ECAB 510 (1992).

Dr. Wirtz concluded that based on his physical examination, appellant is capable of employment within his physical limitations, which would be intermittent sitting and standing and limitations of lifting within his physiological capabilities.

In assessing medical opinion evidence, the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors that enter into such evaluation include the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of the analysis manifested and the medical rationale expressed in support of the physician's opinion.⁶ Based on the well-rationalized reports of Drs. Rosenfeld and Wirtz, the Office properly determined that the accepted aggravation of appellant's degenerative disc disease was temporary in nature and, based on the report of Dr. Wirtz, properly determined that the temporary aggravation ceased when appellant was no longer exposed to the aggravating factors of his federal employment.⁷ Compensation is not payable after that date, determined by the Office to be May 16, 1985, the day appellant retired from his employment, as the medical evidence of record does not establish that appellant's employment resulted in any permanent residuals or contributed to his disqualification for continued employment. The Board, therefore, finds that appellant had no employment-related disability on or after May 16, 1985, and the Office met its burden of proof to terminate his compensation benefits effective that date.

⁶ Gary R. Sieber, 46 ECAB 215 (1994).

⁷ The Board notes that in its decisions, the Office treated Drs. Rosenfeld and Wirtz as impartial medical specialists selected to resolve a conflict in medical opinion between Drs. O'Hara and Morrison. The Board finds, however, that as Dr. O'Hara and Dr. Morrison were both Office second opinion physicians, they may not be found to be in conflict. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Referee Examinations*, Chapter 3.500.4a(1) (March 1994). Therefore, Drs. Rosenfeld and Wirtz acted as additional second opinion physicians.

The decisions of the Office of Workers' Compensation Programs dated May 7, 1997 and December 9, 1996 are hereby affirmed.

Dated, Washington, D.C.
December 10, 1999

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member