

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WALTER L. SETTLE and DEPARTMENT OF THE NAVY,
NAVAL SEA SYSTEMS COMMAND, Philadelphia, PA

*Docket No. 97-2582; Submitted on the Record;
Issued December 15, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective November 12, 1995 on the grounds that he no longer had disability due to his August 15, 1975 employment injury after that date.

The Board finds that the Office properly terminated appellant's compensation effective November 12, 1995 on the grounds that he no longer had disability due to his August 15, 1975 employment injury after that date.

Under the Federal Employees' Compensation Act,¹ once the Office has accepted a claim it has the burden of justifying termination or modification of compensation benefits.² The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.³ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁴ After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that he had an employment-related disability which continued after termination of compensation benefits.⁵

¹ 5 U.S.C. §§ 8101-8193.

² *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

³ *Id.*

⁴ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁵ *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

On August 15, 1975 appellant, then a 31-year-old painter, sustained an employment-related post-traumatic lumbosacral sprain and strain and sciatic neuritis while loading heavy paint cans onto a skid; the Office paid appellant appropriate disability compensation. The Office determined that there was a conflict in the medical opinion between Dr. Gerald Skobinsky, appellant's attending Board-certified osteopath surgeon and the government physician, Dr. Henry Weider, a Board-certified orthopedic surgeon acting as an Office referral physician, on the issue of whether appellant continued to have residuals of the August 15, 1975 employment injury.

In a report dated May 17, 1991, Dr. Skobinsky reported that appellant exhibited pain, tenderness, restricted motion and spasm in the lumbosacral spine and paraspinal muscles. He diagnosed herniated disc radiculitis, chronic lumbar sprain and strain, chronic lumbar instability and sciatic neuritis. Dr. Skobinsky stated that all of appellant's symptoms were related to his August 15, 1975 employment injury and noted that he had certain restrictions on lifting, sitting, walking, standing, pushing, pulling and climbing. In contrast, Dr. Weider determined, in a report dated May 23, 1991, that appellant did not have any disability due to his August 15, 1975 employment injury. He noted that the physical examination revealed findings consistent with a diagnosis of chronic low back strain/sprain, but indicated that there was no objective basis for such a diagnosis. Dr. Weider stated that appellant's sensory aberration was unphysiologic and nonanatomic in distribution; that his restricted back motion was voluntary and nonobjective; and that his leg signs elicited back pain but no radicular radiation.⁶

In order to resolve the conflict, the Office properly referred appellant, pursuant to section 8123(a) of the Act, to Dr. Roy T. Lefkoe, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the matter.⁷ By decision dated October 27, 1995, the Office terminated appellant's compensation effective November 12, 1995 on the grounds that he did not have disability due to his August 15, 1975 employment injury after that date. The Office based its termination on the opinion of Dr. Lefkoe. By decision dated and finalized July 21, 1997, an Office hearing representative denied modification of the Office's October 27, 1995 decision.

In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁸ The Board finds that the weight of

⁶ Dr. Weider indicated that appellant could return to gainful employment with some restrictions but did not indicate that these restrictions were necessitated by an employment injury.

⁷ Section 8123(a) of the Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." 5 U.S.C. § 8123(a). Appellant alleged that the impartial medical examiner was not properly selected but he did not adequately articulate or support this claim. A review of the record reveals that the impartial medical examiner was selected in accordance with the appropriate Office procedures; see Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4 (March 1994).

⁸ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Lefkoe, the impartial medical specialist selected to resolve the conflict in the medical opinion. The February 7, 1994 and May 23, 1995 reports of Dr. Lefkoe establish that appellant had no disability due to his August 15, 1975 employment injury after November 12, 1995.

In his February 7, 1994 report, Dr. Lefkoe detailed appellant's factual and medical history and reported the findings on examination and diagnostic testing. He stated that appellant had degenerative disc disease without any objective evidence of disc herniation and that there was no atrophy of the thigh or calf to suggest a long-standing nerve root impingement. Dr. Lefkoe stated, "His complaints of back pain are those of an ongoing degenerative disc disease at L4-5 and although the cause of that degenerative disc disease appears to be the injury of August 15, 1975 and its sequelae, certainly the acute effects of that injury are no longer present 19 years later." Dr. Lefkoe indicated that appellant could not perform his painter job but would be able to perform sedentary work. He recommended that appellant undergo formal functional capacity evaluation and attached a work restriction evaluation form (OWCP-5) completed on February 7, 1994.

The Office requested that Dr. Lefkoe provide clarification of his opinion and, in a report dated May 23, 1995, Dr. Lefkoe stated:

"I would like to clarify my opinion and state that he is now almost 20 years following a lumbosacral strain and sprain. The finding of disc desiccation and loss of signal in a [magnetic resonance imaging] scan many years later is the result of passage of time and the normal aging process and cannot be attributed to any single injury. This opinion is further strengthened by the fact that no evidence exists to implicate that specific disc as the site of injury. Myelograms and [computerized tomography] scans have been negative and he has no positive neurologic findings which would point to any specific disc level."

The Board has carefully reviewed the opinion of Dr. Lefkoe and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. His opinion is based on a proper factual and medical history in that he had the benefit of an accurate and up-to-date statement of accepted facts, provided a thorough factual and medical history and accurately summarized the relevant medical evidence.⁹ Moreover, Dr. Lefkoe provided a proper analysis of the factual and medical history and the findings on examination, including the results of diagnostic testing and reached conclusions regarding appellant's condition which comported with this analysis.¹⁰ Dr. Lefkoe provided medical rationale for his opinion by explaining that there was no objective evidence that appellant had continuing disability due to August 15, 1975 employment injury, a soft-tissue injury which had occurred almost 20 years earlier. Dr. Lefkoe explained that appellant's

⁹ Appellant alleged that Dr. Lefkoe was not provided with an adequate statement of accepted facts, but a review of the statement of accepted facts provided to Dr. Lefkoe prior to his examination reveals that it is complete and accurate. Appellant also asserted that Dr. Lefkoe was not presented with a list of questions to be answered, but the record does in fact contain such a list which was provided to Dr. Lefkoe.

¹⁰ See *Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

problems were due to the natural progression of his degenerative disc disease. Although he suggested in his February 7, 1994 report that the August 15, 1975 injury caused degenerative disc disease, Dr. Lefkoe noted in the same report that appellant did not have disabling residuals of that injury. Moreover, he later clarified in his May 23, 1995 report that the results of diagnostic testing showed that the degenerative disc disease was not attributable to an employment-related cause and that appellant did not have continuing employment-related disability.

Prior to the initial termination of appellant's compensation, the record also contained reports dated March 17 and April 14, 1995, in which Dr. Skobinsky indicated that appellant continued to have employment-related disability. In his March 17, 1995 report, he diagnosed herniated spinal disc radiculitis, chronic lumbar sprain and strain, chronic lumbar instability and sciatic neuritis and indicated that appellant was "disabled from gainful employment." In a report dated April 14, 1995, Dr. Skobinsky stated that appellant remained symptomatic and that he was completely disabled from work. Dr. Skobinsky noted that he disagreed with the opinion of Dr. Lefkoe. These reports are of limited probative value on the relevant issue of the present case, in that they do not contain adequate medical rationale in support of their opinion on causal relationship.¹¹ The reports are also insufficient to overcome the weight accorded Dr. Lefkoe's opinion or to create a new conflict with it as Dr. Skobinsky was on one side of the conflict that Dr. Lefkoe was selected to resolve.¹²

After the Office's October 27, 1995 decision, terminating appellant's compensation effective November 12, 1995, appellant submitted additional medical evidence, which he felt showed that he was entitled to compensation after November 12, 1995, due to residuals of his August 15, 1975 employment injury. Given that the Board has found that the Office properly relied on the opinion of the impartial medical examiner, Dr. Lefkoe, in terminating appellant's compensation effective November 12, 1995, the burden shifts to appellant to establish that he is entitled to compensation after that date. The Board has reviewed the additional evidence submitted by appellant and notes that it is not of sufficient probative value to establish that he had residuals of his August 15, 1975 employment injury after November 12, 1995.

Appellant submitted an October 13, 1995 report of Dr. Mark D. Avart, an attending osteopath.¹³ Dr. Avart diagnosed degenerative disc disease of the lumbar spine and chronic lumbar strain.¹⁴ He noted that appellant remained completely disabled secondary to his

¹¹ See *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (finding that a medical opinion not fortified by medical rationale is of little probative value).

¹² See *Dorothy Sidwell*, 41 ECAB 857, 874 (1990).

¹³ Appellant had contended in his oral argument before an Office hearing representative that the Office should have considered Dr. Avart's report in conjunction with its October 27, 1995 decision. Although the report is date stamped October 27, 1995, the context of the report and its placement in the case record shows that it was received after the Office had issued its October 27, 1995 decision. The Office appropriately considered the report in conjunction with its July 21, 1997 decision.

¹⁴ Dr. Avart indicated that on examination appellant exhibited moderate midline tenderness with local trigger points at L4 to S1 and moderate paraspinal muscle weakness.

August 15, 1975 injury, but also noted that he could perhaps work in a sedentary light-duty position for three to four hours per day. Dr. Avart stated, “I do not feel that the patient is capable of working eight hours a day even in a sedentary occupation because of his back injury with resultant degenerative disc changes which clearly are worsening with time since his injury is nearly 20 years ago.

However, Dr. Avart’s report is of limited probative value on the relevant issue of the present case, in that it does not contain adequate medical rationale in support of its conclusions on causal relationship.¹⁵ Dr. Avart did not describe appellant’s employment injury in any detail or explain the medical process through which such a soft-tissue injury could cause injury more than 20 years after the fact. He suggested that appellant’s worsening condition since 1975 showed an employment-related cause for his problems, but the Board has held that the fact that a condition manifests itself or worsens during a period of employment¹⁶ does not raise an inference of causal relationship between a claimed condition and employment factors. Nor did Dr. Avart explain why appellant’s condition was not solely due to the natural progression of his degenerative disc disease.¹⁷

Appellant also submitted a transcript of an April 1, 1997 deposition, in which his attorney asked Dr. Lefkoe questions regarding his February 7, 1994 report. In the deposition, he responded “yes” to the question, “And just to make it clear, the restrictions that you [a]re noting here [in the February 7, 1994 Form OWCP-5], these are on account of the work injury from August 15, 1975?”¹⁸ The Board notes, however, that Dr. Lefkoe’s response is equivocal in nature in that the deposition contains no discussion of the fact that Dr. Lefkoe had indicated in both his February 7, 1994 and May 23, 1995 reports that appellant did not have continuing disabling residuals of his August 15, 1975 employment injury.¹⁹ Even if Dr. Lefkoe’s opinion could be interpreted as a change in his opinion regarding the cause of appellant’s disability, the deposition does not contain any medical rationale which would explain such a change in opinion and must be considered to have limited probative value.

¹⁵ See *Leon Harris Ford*, 31 ECAB 514, 518 (1980) (finding that a medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship which is unsupported by medical rationale).

¹⁶ *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

¹⁷ Moreover, Dr. Avart gave an inconsistent opinion on the extent of appellant’s disability.

¹⁸ Dr. Lefkoe also indicated that he had recommended that appellant undergo formal functional capacity evaluation because he had not worked in 20 years.

¹⁹ See *Leonard J. O’Keefe*, 14 ECAB 42, 48 (1962); *James P. Reed*, 9 ECAB 193, 195 (1956) (finding that an opinion which is equivocal is of limited probative value regarding the issue of causal relationship). The deposition does not contain any reference to Dr. Lefkoe’s May 23, 1995 report.

The decision of the Office of Workers' Compensation Programs dated and finalized July 21, 1997 is affirmed.

Dated, Washington, D.C.
December 15, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member