

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLARD T. MERRITT and U.S. POSTAL SERVICE,
POST OFFICE, Philadelphia, PA

*Docket No. 97-2657; Submitted on the Record;
Issued December 13, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation effective July 23, 1990 on the grounds that his disability resulting from a February 22, 1979 employment injury had ceased by that date.

This is the fifth appeal in this case.¹ In the first appeal, the Board set aside the decisions of the Office dated March 25, 1985 and March 17, 1986 and remanded the case to the Office to obtain a supplemental medical report from the impartial medical specialist, Dr. John L. Sbarbaro, a Board-certified orthopedic surgeon, whose report on appellant's medical condition was not sufficiently detailed or rationalized.² The Board instructed the Office that if it was unable to obtain an appropriate supplemental report, it should refer appellant and the case record to another impartial medical specialist to resolve the conflict in the medical evidence as to whether appellant's continuing disability was causally related to the February 22, 1979 employment injury. In the second appeal,³ the Board affirmed the Office's September 14, 1987 decision, finding that the Office properly determined that the opinion of the second impartial medical specialist, Dr. Martin A. Blaker, a Board-certified orthopedic surgeon, who determined that appellant had no employment-related residuals and could perform his usual work constituted the weight of the evidence. In the third appeal, the Board set aside the Office's May 4, 1989 decision denying appellant's request for reconsideration as untimely.⁴ The Board found that the Office failed to demonstrate that it had exercised its discretionary authority under 5 U.S.C. § 8128(a), and the case was remanded for the Office to determine whether appellant's

¹ The facts and history surrounding the prior appeals are set forth in the prior decisions and are hereby incorporated by reference.

² Docket No. 86-1392 (issued August 28, 1986).

³ Docket No. 88-428 (issued March 22, 1988).

⁴ Docket No. 89-1599 (issued January 11, 1990).

application for review presented clear evidence of error. In the fourth appeal, the Board affirmed the Office's decision dated July 11, 1991 finding that the Office properly discredited Dr. Blaker's opinion because he was biased, and properly determined that the opinion of the third impartial medical specialist, Dr. Parviz Kambin, a Board-certified orthopedic surgeon, that appellant had no work-related residuals and could return to light-duty work constituted the weight of the evidence.⁵ The Board therefore found that the Office met its burden of proof in terminating appellant's compensation effective July 23, 1990.

On October 20, 1993 appellant subsequently requested reconsideration of the Office's July 11, 1991 decision and submitted additional evidence including a medical report from his treating physician, Dr. Donald M. Qualls, a Board-certified orthopedic surgeon, dated December 2, 1991, Forms 3956, "authorization for medical attention," dated from August 9, 1988 through July 26, 1994, progress notes dated from December 6, 1991 through December 20, 1993 from the employing establishment's medical center and from the Lankenau Hospital dated December 30, 1993 and disability slips, mostly undated. In his December 2, 1991 report, Dr. Qualls performed a physical examination, prescribed medication and stated that appellant was at about the same level as he had previously seen him on March 28, 1990.

By decision dated February 4, 1994, the Office denied appellant's request for modification.

On January 31, 1995 appellant requested reconsideration of the Office's decision and submitted additional evidence consisting of progress notes dated from March 16 through August 19, 1994 documenting treatment of his back.

By decision dated April 25, 1995, the Office denied appellant's request for modification.

On April 23, 1997 appellant requested reconsideration of the Office's decision and submitted additional evidence including medical reports from Dr. Qualls dated July 3 and 19, 1995, progress notes or results of diagnostic tests from November 16, 1981 through April 25, 1996 from the employing establishment's medical center and work restrictions dated June 25, 1990 from Dr. Kambin indicating appellant could work eight hours a day with limited bending, lifting, walking and sitting. In his July 3, 1995 report, Dr. Qualls noted that he had not seen appellant since January 1992 and appellant was still having trouble with his back. He performed a physical examination and found that appellant had marked restrictions in his lumbar motion, restricted mobility in the cervical spine and marked spasms over his lumbar spine even as he sat. In his July 19, 1995 medical report, Dr. Qualls performed a physical examination showing limited motion and marked spasms and tenderness throughout the lumbosacral area. He concluded that appellant had chronic intractable low back pain secondary to deconditioning and degenerative joint disease. Dr. Qualls also diagnosed chronic lumbosacral spine strain syndrome with periodic right lumbar radicular pain and stated that appellant had these problems due only to the February 22, 1979 employment injury. He reviewed the medical opinions of record including those of Drs. Blaker and Kambin and opined that he did not understand how they could find that appellant was not disabled. Dr. Qualls stated that appellant had the same complaints for

⁵ Docket No. 92-488 (issued March 3, 1993).

over 15 years, that appellant had not “varied too far from the facts,” and that the employing establishment treated appellant for the same conditions in the past 15 years. He stated that the employing establishment’s x-rays in 1991 and 1994 showed ossification or ossification within a tendon and that might be one of the reasons that no one was able to break the pain to spasm cycle.

By decision dated May 3, 1996, the Office denied appellant’s request for modification.

On May 1, 1997 appellant requested reconsideration of the Office’s decision. Appellant submitted additional medical evidence including medical notes form Roxborough Chiropractor Center dated from April 8 to 25, 1997 stating that appellant had subluxations particularly at T8-10. Appellant also submitted x-rays of the lumbosacral spine dated April 8, 1997 showing hypertrophic degenerative spurring of the lumbar spine and a 5 x 1 centimeter ossific structure extending caudad from the left anterior inferior iliac spine, and cervical spine, possibly on the basis of prior trauma. An x-ray of the cervical spine dated April 8, 1997 that appellant submitted showed mild hypertrophic degenerative spurring of the cervical spine. Appellant additionally submitted progress notes from the employing establishment dated from September 8, 1986 to April 1, 1996, progress notes from Formedic dated from February 24 through April 29, 1997 and medical reports from Dr. Qualls which he previously submitted. A report from an employing establishment neurologist, Dr. Peter Siao, stated that appellant had not been able to work since 1984 primarily because of low back pain. Dr. Siao stated that appellant suffered from pulmonary sarcoidosis, diabetes and depression. He stated that appellant would not be able to return to his previous job until his medical problems improve.

By decision dated July 22, 1997, the Office denied appellant’s request for modification.

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits. 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.⁶ The Office’s burden of proof includes the necessity of furnishing rationalized medical evidence based on a proper factual and medical background.⁷

As noted in the Board’s prior decision issued on March 3, 1993,⁸ the report of the impartial medical specialist, Dr. Kambin, a Board-certified orthopedic surgeon, in which he found no objective orthopedic findings and no neurologic deficits and concluded that appellant had no work-related residuals and should be encouraged to return to at least light-duty work is well rationalized. Dr. Kambin found that there were no changes in the height of appellant’s lumbar disc spaces which one would have expected in a serious injury. The evidence appellant submitted to the Office subsequent to the Board’s decision is not sufficient to overcome the weight of Dr. Kambin’s report.

⁶ *Wallace B. Page*, 46 ECAB 227, 229-30 (1994); *Jason C. Armstrong*, 40 ECAB 907, 916 (1989).

⁷ *Larry Warner*, 46 ECAB 1027, 1032 (1992); *see Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁸ Docket No. 92-488.

The numerous progress notes appellant submitted from the employing establishment's medical center dated from December 6, 1991 through April 25, 1996, from Formedic dated February 24 through April 29, 1997 and from Lankenau Hospital dated December 30, 1993 document that appellant was treated during those years for his back problem but do not address causation. None of the medical reports of appellant's treating physician, Dr. Qualls, dated December 2, 1991, July 3 and 19, 1995, are sufficient to create a new conflict with Dr. Kambin's report. Dr. Qualls did not address causation in his December 2, 1991 report. In his July 3, 1995 report, he found restrictions of motion of appellant's lumbar and cervical spine and marked spasms over the lumbar spine but did not address causation. In his July 15, 1995 medical report, based on his physical examination of appellant showing limited motion and marked spasms, he concluded that appellant had chronic intractable low back pain secondary to deconditioning and degenerative joint disease, and chronic lumbosacral spine strain syndrome with periodic right lumbar radicular pain which were due to the February 22, 1979 employment injury. He further noted that appellant had the same complaints for over 15 years, that appellant had not "varied too far from the facts," and that the employing establishment treated appellant for the same conditions in the past 15 years. Dr. Qualls stated that the 1991 and 1994 x-rays showing ossification or ossification within a tendon might be one of the reasons that no one was able to break the pain to spasm cycle. While Dr. Qualls addressed causation in this opinion and attributed appellant's medical condition to the February 22, 1979 employment injury, his opinion is not based on any findings that had not previously been considered. Further, his reference to ossification is speculative and unclear.⁹

Further, the medical notes appellant submitted from the Roxborough Chiropractor Center dated from April 8 to 25, 1997 are not probative because they state that appellant had subluxations particularly at T8-10 but are not accompanied by x-rays. No doctor's name is provided on the notes but absent subluxations shown by x-rays, a chiropractor does not qualify as a physician within the meaning of the Act.¹⁰ The April 8, 1997 x-ray showing mild hypertrophic degenerative spurring of the cervical spine which does not show subluxations does not cure the defect in the chiropractor's reports and is not probative by itself as it does not address causation. Further, the other April 8, 1997 x-ray showing hypertrophic degenerative spurring of the lumbar spine and a 5 x 1 centimeter ossific structure extending caudad from the left anterior inferior iliac spine and cervical spine, possibly on the basis of prior trauma also does not cure the defect in the chiropractor's reports. It also is not probative because the x-ray report is vague and speculative in addressing a possible cause of appellant's condition.¹¹ Dr. Siao's April 3, 1996 report in which he diagnosed pulmonary sarcoidosis, diabetes and depression and opined that appellant could not return to his usual work is not probative because Dr. Siao did not address causation.¹²

⁹ See *Alberta S. Williamson*, 47 ECAB 569, 574 (1996); *William S. Wright*, 45 ECAB 498, 504 (1994).

¹⁰ See 5 U.S.C. § 8107(a); *Carolyn M. Leek*, 47 ECAB 374, 380 (1996).

¹¹ See *Alberta S. Williamson*, *supra* note 9 at 574; *William S. Wright*, *supra* note 9 at 504.

¹² See *John Watkins*, 47 ECAB 597, 602 (1996); *William C. Thomas*, 45 ECAB 591, 594 (1994).

In situations where there are 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 on a proper factual background, must be given special weight.¹³ Appellant has not submitted sufficient additional evidence to counter the weight of Dr. Kambin's June 25, 1990 report which is complete and well rationalized. As the impartial medical specialist, Dr. Kambin's report constitutes the weight of the evidence and justifies the Office's termination of benefits on July 23, 1990.

The decision of the Office of Workers' Compensation Programs dated July 22, 1997 is hereby affirmed.

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

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

¹³ *Kathryn Haggerty*, 45 ECAB 383, 389 (1994); *Jane B. Roanhaus*, 42 ECAB 288 (1990).