

U. S. DEPARTMENT OF LABOR

Employees Compensation Appeals Board

In the Matter of MICHAEL A. CAMPBELL and DEPARTMENT OF THE AIR FORCE,
McCLELLAN AIR FORCE BASE, Sacramento, CA

*Docket No. 98-488; Submitted on the Record;
Issued December 27, 1999*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective February 7, 1993 on the grounds that appellant no longer had any disability causally related to his January 16, 1986 employment injury; and (2) whether appellant has met his burden of proof to establish that he sustained a recurrence of disability causally related to his January 16, 1986 employment injury.

On January 22, 1986 appellant, then a 30-year-old bus driver, filed a traumatic injury claim (Form CA-1) alleging that on January 16, 1986 he injured his left side and lower back when he slipped on the steps of the bus while stepping out of it. Appellant stopped work on January 17, 1986. He received total disability compensation beginning May 11, 1986.

By letter dated June 25, 1986, the Office accepted appellant's claim for a lumbosacral strain.

In a notice of proposed termination of compensation dated November 12, 1992, the Office advised appellant that it proposed to terminate his compensation based on the July 2, 1992 medical opinion of Dr. Earl F. King, a Board-certified surgeon and appellant's treating physician, that appellant had rheumatoid arthritis which was not caused by traumatic injury. The Office noted that he did not cite any findings of dorsal or lumbar back strain. The Office also advised appellant to submit additional medical evidence supportive of his continued disability within 30 days.

By decision dated February 4, 1993, the Office terminated appellant's compensation benefits effective February 7, 1993 on the grounds that appellant no longer had any disability causally related to his January 16, 1986 employment injury. In a February 8, 1992 letter received by the Office on February 16, 1993, appellant requested an oral hearing before an Office representative.

By decision dated April 26, 1994, the hearing representative remanded the case to the Office for an impartial medical evaluation due to a conflict in the medical opinion evidence.

By letter dated June 3, 1994, the Office referred appellant along with a statement of accepted facts, a list of specific questions and medical records to Dr. Stephen P. Abelow, a Board-certified orthopedic surgeon, for an impartial medical examination. By letter of the same date, the Office advised Dr. Abelow of the referral.

In a September 16, 1994 decision, the Office terminated appellant's compensation benefits based on Dr. Abelow's July 7, 1994 medical opinion that appellant did not have any continuing disability causally related to his January 16, 1986 employment injury. In an undated letter that was received by the Office on April 7, 1995, appellant requested a "reconsideration hearing." In a March 31, 1995 letter, appellant requested reconsideration of the Office's decision.

By decision dated April 17, 1995, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that the evidence submitted was irrelevant and immaterial and thus, insufficient to warrant review of the claim.

Appellant appealed the Office's decision to the Board. In a June 12, 1996 letter, appellant requested that his appeal be withdrawn so that he could submit new medical evidence to the Office. By decision dated August 22, 1996, the Board dismissed appellant's appeal.

In letters dated February 8 and March 18, 1997, appellant requested reconsideration of the Office's decision.

By letter dated April 21, 1997, the Office advised appellant that it had received evidence indicating that he had sustained a recurrence of disability. The Office then advised appellant to submit factual and medical evidence supportive of a recurrence claim. In response, appellant submitted a claim (Form CA-2a) dated May 14, 1997 alleging that he sustained a recurrence of disability due to his January 16, 1986 employment injury accompanied by medical evidence.

By decision dated June 4, 1997, the Office found the evidence of record insufficient to establish that appellant sustained a recurrence of disability causally related to his January 16, 1986 employment injury.

In a July 13, 1997 letter, appellant requested reconsideration of the Office's decision. Appellant stated that he never indicated that he had a recurrence of disability rather, he stated that he had never recovered from his January 16, 1986 employment injury.

By decision dated October 16, 1997, the Office denied appellant's request for modification based on a merit review of the claim.

The Board finds that the Office properly terminated appellant's compensation effective February 7, 1993 on the grounds that appellant no longer had any disability causally related to his January 16, 1986 employment injury.

Once the Office has accepted a claim and pays compensation, it has the burden of proof of justifying 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

Section 8123(a) of the Federal Employees' Compensation Act provides that if there is a 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.³ When there exists 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 a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁴

In the present case, Dr. Edward Michael Tapper, a Board-certified orthopedic surgeon, and Dr. George Ewing, a Board-certified orthopedic surgeon, opined that appellant continued to have back problems due to his January 16, 1986 employment injury. Dr. Zubeda Seyal, a Board-certified family practitioner and appellant's treating physician and Dr. Andrew M. Hazen, a Board-certified orthopedic surgeon and second opinion physician, opined that appellant had no residuals of his employment injury. The Board finds that there was a conflict in the medical opinion evidence between Drs. Tapper and Ewing on the one hand and Dr. Hazen on the other hand. The Office, therefore, properly referred appellant to Dr. Abelow for an impartial medical examination pursuant to section 8123(a) of the Act.

The Office terminated appellant's compensation benefits based on the medical opinion of Dr. Abelow. In a July 7, 1994 medical report, he provided a history of appellant's January 16, 1986 employment injury, employment, family, habits and medical treatment. Dr. Abelow indicated a review of medical records, appellant's complaints regarding his back and his findings on physical and objective examination. He opined that appellant had a chronic lumbosacral strain that resulted in a 20 percent service-connected disability and a lumbosacral strain sustained on January 17, 1986 with no current residuals from this injury. Dr. Abelow specifically stated that appellant did not continue to have any condition/disability on or after February 2, 1993 which was causally related to his January 16, 1986 employment injury. He explained that x-rays of the lumbosacral spine on March 18, 1994 did not reveal any significant finding. Dr. Abelow further explained that a May 9, 1994 magnetic resonance imaging (MRI) scan of the lumbosacral spine did not reveal any significant encroachment on the neural foramina. He noted that although there was a mild bulging of the L5-S1 disc, this was a rather normal finding inasmuch as discs function by bulging. Dr. Abelow then noted the normal

¹ *Curtis Hall*, 45 ECAB 316 (1994); *John E. Lemker*, 45 ECAB 258 (1993); *Robert C. Fay*, 39 ECAB 163 (1987).

² *Jason C. Armstrong*, 40 ECAB 907 (1989).

³ 5 U.S.C. § 8123(a); *see also Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

⁴ *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

findings of Drs. Tapper and Hazen and stated that on his examination appellant had a rather normal physical examination of the lumbosacral spine with no “hard” neurological findings. He further stated that appellant’s deep tendon reflexes were normal and there were no sciatic stretch signs, a rather normal range of motion of the lumbosacral spine and a normal muscle examination. Dr. Abelow also stated that there was some nondermatomal hypesthesia of the right and left lower extremities, but stated that this was rather unreliable. He concluded:

“Based upon a rather normal physical examination by me on July 9, 1994, rather normal MRI [scan] of the lumbosacral spine May 9, 1994 (for [appellant]’s age), normal x-rays of the lumbosacral spine March 28, 1994, no objective factors of disability reported by [Dr.] Tapper, December 5, 1988, and normal physical examination by [Dr.] Hazen, in his report of April 6, 1987, there does not appear to be any condition and/or disability on or after February 2, 1993 which is causally related to his work injury of January 16, 1986.”

Dr. Abelow stated that appellant was disabled from January 16, 1986 through April 6, 1987, the time of Dr. Hazen’s evaluation. He noted that Dr. Hazen found appellant’s condition permanent and stationary. Dr. Abelow also noted that Dr. Hazen did not find any significant neurological compromise and felt that appellant had a muscular strain of the low back region with a contusion to the right flank area. Regarding appellant’s ability to work, Dr. Abelow stated that appellant did not have any disability due to his January 16, 1986 employment injury only a 20 percent service-connected disability for chronic low back strain. He concluded that there was no reason why appellant could not resume his duties as a driver/mechanic, including the operation of a bus or vehicle. Dr. Abelow’s accompanying work restriction evaluation revealed that appellant could work eight hours per day with hand restrictions.

In support of his continued disability, appellant submitted medical treatment notes from the employing establishment regarding his back, right leg and hand pain that covered the period June 14 through August 23, 1993. These treatment notes, however, failed to address whether appellant’s current back condition was caused by his January 16, 1986 employment injury. Appellant also submitted the October 21, 1993 treatment notes from the employing establishment revealing that he had a recurrent back condition due to his 1986 employment injury. These notes, however, failed to provide any medical rationale explaining how or why appellant’s current back condition was caused by his employment injury.

Further, appellant submitted a December 20, 1993 report of Dr. Todd J. Antovich, a chiropractor, indicating that he slipped and fell on bus stairs. He stated that an x-ray examination revealed early degenerative disc disease at L5-S1, facet syndrome and biomechanical changes causing abherent spinal motion. Dr. Antovich diagnosed chronic lumbar sprain/strain causing lumbalgia, radicular symptoms into the right lower extremity and articular dysfunction of the facet joints. He stated that appellant was temporarily totally disabled from December 19, 1993 through January 14, 1994. In an undated report, Dr. Antovich provided a history of appellant’s January 16, 1986 employment injury and diagnosed chronic lumbar spine, chronic lumbalgia and radiculitis. Under section 8101(2) of the Act,⁵ “[t]he term ‘physician’

⁵ 5 U.S.C. §§ 8101-8193.

includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation of the spine as demonstrated by x-ray to exist and subject to regulation by the Secretary.”⁶ If a chiropractor’s reports are not based on a diagnosis of subluxation as demonstrated by x-ray to exist, they do not constitute competent medical evidence to support a claim for compensation.⁷ Inasmuch as Dr. Antovich failed to diagnose subluxation by x-ray, his reports do not constitute competent medical evidence.

In a May 18, 1994 report, Dr. Antovich opined that appellant received his injuries as a result of the January 16, 1986 employment injury based on an assessment of appellant’s condition, examination, x-ray findings, evaluation, complaints and treatment response to date. He further opined that as previously noted, a plain film radiographic examination demonstrated spinal degeneration and facet syndrome. Dr. Antovich then stated that chiropractic subluxations were present at the following levels: (1) L5-S1 PIEX; (2) L1-L4 PI; (3) L3-L4 Facet Imbrication. Dr. Antovich’s report is insufficient to establish continued disability because he failed to provide any medical rationale explaining how or why appellant’s current back condition was caused by the January 16, 1986 employment injury.

Appellant submitted an undated medical report of Dr. Lorraine E. Abate, a family practitioner, indicating a history of the January 16, 1986 employment injury and a diagnosis of low back spasm and chronic pain. In a January 7, 1997 medical report, Dr. Abate provided a history of appellant’s 1986 employment injury and medical treatment. Dr. Abate provided her findings on physical examination and diagnosed a chronic low back condition secondary to an injury 11 years ago. She stated that appellant had a recent exacerbation that seemed fairly mild and that his current medication was not working for him. Dr. Abate’s medical reports are insufficient to establish continued disability because they failed to address whether appellant’s back condition was caused by his employment injury.

Dr. Abate’s January 7, 1997 disability certificate revealed the date of appellant’s employment injury, a diagnosis of lumbar spasm and that appellant was excused from work through January 21, 1997. Her disability certificate is insufficient to establish continued disability because it failed to discuss whether or how the diagnosed condition was caused by appellant’s January 16, 1986 employment-related injury.⁸

The Board finds that Dr. Abelow’s opinion constitutes the weight of the evidence inasmuch as it is rationalized and based on an accurate factual and medical background. Therefore, the Office properly terminated appellant’s compensation benefits effective February 7, 1993.

⁶ 5 U.S.C. § 8101(2); *see also* 20 C.F.R. § 10.400(a); *Robert J. McLennan*, 41 ECAB 599 (1990); *Robert F. Hamilton*, 41 ECAB 431 (1990).

⁷ *Loras C. Dignann*, 34 ECAB 1049 (1983).

⁸ *Daniel Deparini*, 44 ECAB 657, 659 (1993).

The Board further finds that appellant has failed to meet his burden of proof to establish that he sustained a recurrence of disability causally related to his January 16, 1986 employment injury.

An individual who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which compensation is claimed is causally related to the accepted injury. This burden includes the necessity of furnishing medical evidence from a qualified physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.⁹

In this case, appellant has not submitted rationalized medical evidence establishing that his current back condition was caused by his January 16, 1986 employment injury. In support of his recurrence claim, appellant submitted Dr. Ewing's August 1 and December 27, 1993 and November 22, 1994 medical treatment notes revealing that he had chronic back strain and rheumatoid arthritis of the hands. In further support of his recurrence claim, appellant submitted Dr. Ewing's March 19, 1996 prescription for a lumbosacral support. His treatment notes and prescription are insufficient to establish appellant's burden because they failed to address whether appellant's back condition was caused by his January 16, 1986 employment injury.

In addition, appellant submitted medical treatment notes covering the period October 5, 1995 through February 6, 1997 from the employing establishment which failed to address a causal relationship between his current back condition and the January 16, 1986 employment injury.

Appellant also submitted a January 10, 1996 medical report of Dr. Stanley Naguwa, a Board-certified internist, revealing a diagnosis of "714.0" and that he was unable to work an eight-hour day, five days per week. Because Dr. Naguwa failed to provide a specific diagnosis in that he merely indicated a number representing appellant's diagnosis and he failed to address whether the diagnosed condition was caused by appellant's January 16, 1986 employment injury, his medical report is insufficient to establish appellant's burden.

As previously noted, Dr. Abate's January 7, 1997 medical report revealed a diagnosis of a chronic low back condition secondary to an injury 11 years ago. She stated that appellant had a recent exacerbation that seemed fairly mild. In a January 13, 1997 medical report, Dr. Abate revealed appellant's medical, social and family histories and her findings on physical examination. She indicated that appellant had hypertension, rheumatoid arthritis, back pain, a small left inguinal hernia and a history of elevated cholesterol. Dr. Abate's March 10, 1997 medical report provided appellant's medical treatment and her findings on physical examination. She opined that appellant had continued lumbar spasm with radicular symptomatology which had worsened since his last visit. In an undated medical report, Dr. Abate indicated a history of the January 16, 1986 employment injury and a diagnosis of low back spasm and chronic pain.

⁹ *Louise G. Malloy*, 45 ECAB 613 (1994); *Lourdes Davila*, 45 ECAB 139 (1993); *Robert H. St. Onge*, 43 ECAB 169 (1992).

Inasmuch as her medical reports failed to address a causal relationship between appellant's current back condition and his January 16, 1986 employment, they are insufficient to establish appellant's burden.

Appellant further submitted a March 27, 1997 medical report of Dr. Karen Anne Reardon, a rheumatologist, indicating his medical history including, treatment for his rheumatoid arthritis in both hands and 1986 employment-related back injury. She noted appellant's social and family histories and her findings on physical and objective examination. Dr. Reardon diagnosed symmetric inflammatory arthritis which was rheumatoid-like in its distribution, but stated that appellant also seemed to have some spondyloarthropathy type involvement based on his spinous and right sacroiliac tenderness. She failed to address whether appellant's current back condition was caused by his January 16, 1986 employment injury and thus, it is insufficient to establish appellant's burden.

Dr. Reardon's April 10, 1997 medical report revealed appellant's complaints regarding his rheumatoid arthritis of the hands and medical treatment. Dr. Reardon provided her findings on physical and objective examination and diagnosed seronegative rheumatoid arthritis and low back pain. Regarding appellant's back pain, she stated that appellant's complaints were soft tissue related. Because Dr. Reardon's medical report failed to attribute appellant's current back condition to his January 16, 1986 employment injury, it fails to establish appellant's burden.

Appellant submitted an undated radiograph report of his pelvis from Dr. Vincent L. Quilici, a Board-certified radiologist, revealing normal sacroiliac joints. Inasmuch as he failed to indicate that appellant had a back condition that was causally related to his January 16, 1986 employment injury, his report did not establish appellant's burden.

An April 16, 1997 medical report of Dr. Colin B. Arnold, a Board-certified ophthalmologist, indicating that appellant's vision without correction was 20/20 and that his color plates, Amsler grid and fundus examinations were normal failed to address whether appellant had a back condition that was caused by his January 16, 1986 employment injury.

As noted above, part of appellant's burden of proof includes the submission of reasoned medical evidence which addresses whether the claimed disability is causally related to the employment injury. Although the Office advised appellant of the type of medical evidence needed to establish his claim for a recurrence of disability, appellant failed to submit medical evidence responsive to the Office's request. Accordingly, the Board finds that appellant has not established that he sustained a recurrence of disability causally related to his January 16, 1986 employment injury.

The October 16 and June 4, 1997 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, D.C.
December 27, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member