

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JAMES H. WHITTON and DEPARTMENT OF THE AIR FORCE,  
CASTLE AIR FORCE BASE, Colo.

*Docket No. 97-1131; Submitted on the Record;  
Issued February 2, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits effective May 24, 1993 on the grounds that he had no further disability causally related to his accepted employment injury.

On June 1, 1973 appellant filed claims for injuries occurring on November 17, 1972 and January 12, 1973 in the performance of duty. The Office accepted appellant's claim for low back sprain. The Office further accepted that appellant sustained a recurrence of disability on August 20, 1974 and placed him on the periodic rolls effective February 6, 1975.

By decision dated June 7, 1978, the Office terminated appellant's compensation effective June 19, 1978 after finding that he had no further injury-related disability. By decision dated May 8, 1979, the Office again notified appellant that his compensation benefits were terminated effective June 19, 1978.

Appellant, through his representative, requested a hearing before an Office hearing representative. By decision dated December 3, 1980 and finalized December 4, 1980, the Office hearing representative set aside the Office's May 8, 1979 decision and remanded the case for resolution of a conflict in medical opinion.

By letters dated February 5, 1981, the Office referred appellant, together with the case record and a statement of accepted facts, to Dr. Alan H. Pierrot, a Board-certified orthopedic surgeon, for an examination.

In a report dated April 30, 1981, Dr. Pierrot discussed appellant's history of injury, reviewed the medical evidence of record, and listed findings on physical examination. Dr. Pierrot diagnosed mechanical low back pain and found that appellant showed "no objective evidence of impairment" and that his subjective complaints were intermittent to slight. He opined that appellant could not perform his usual employment of a meat cutter and stated, "I

believe his injury of 1973 and possibly that of November 1972 have left him with disability precluding heavy lifting.”

In a report dated June 5, 1981, an Office medical adviser reviewed Dr. Pierrot’s April 30, 1981 report. He noted that the diagnosis of mechanical low back pain was based solely on appellant’s subjective complaints and found that appellant “has some mechanical low back pain intermittent and slight in nature as a residual disability of his injuries of November 1972 and January 1973.” The Office medical adviser opined that appellant could return to full-time employment with restrictions on heavy lifting, bending and stooping.

On April 23, 1993 the Office notified appellant that it proposed to terminate his compensation based on Dr. Pierrot’s impartial medical examination of June 5, 1981. By decision dated May 24, 1993, the Office terminated appellant’s compensation effective May 24, 1993.

Appellant, through his attorney, requested a hearing. Appellant submitted a report dated June 17, 1993 from Dr. Don T. Williams, a Board-certified orthopedic surgeon. Dr. Williams diagnosed lumbar degenerative disc disease at L4-5 and L5-S1 with a possible herniation. He found that appellant could perform light work with restrictions on heavy lifting, bending and stooping and stated that it “does seem that the current problems [are] because of the injuries in 1972 and 1973 and the natural progression.” He noted that appellant currently worked in sales.

In a decision dated October 31, 1996 and finalized November 4, 1996, the hearing representative affirmed the Office’s May 24, 1993 decision. The hearing representative found that Dr. Pierrot’s 1981 medical report represented the weight of the medical evidence as he performed an impartial medical examination.

The Board finds that the Office did not meet its burden of proof to terminate appellant’s compensation benefits effective May 24, 1993 on the grounds that he had no further disability causally related to his accepted employment injury.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. The Office may not terminate or modify compensation without establishing that the disabling condition ceased or that it was no longer related to the employment.<sup>1</sup>

In this case, the record contains no current medical evidence establishing that appellant has no further disability due to his accepted employment-related condition. The Office based its decision to terminate appellant’s compensation on the April 30, 1981 report of Dr. Pierrot, a Board-certified orthopedic surgeon to whom the Office referred appellant for an impartial medical examination. In his April 30, 1981 report, Dr. Pierrot found that appellant had no objective evidence of impairment. The Office determined that Dr. Pierrot’s opinion was entitled to special weight due to his status as impartial medical examiner. However, Dr. Pierrot’s April 30, 1981 report did not provide a sufficient basis for the Office to terminate appellant’s compensation in view of the length of time between his report and the Office’s termination of

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<sup>1</sup> *David W. Green*, 43 ECAB 883 (1992).

benefits. The Office did not actually terminate appellant's compensation until May 24, 1993, 12 years after Dr. Pierrot's report. The Office's decision to terminate compensation was therefore based on extremely dated medical evidence. In the most recent medical report of record, dated June 17, 1993, Dr. Williams, a Board-certified orthopedic surgeon, found that appellant could perform light work with restrictions on heavy lifting, bending and stooping. He attributed appellant's restrictions to his 1972 and 1973 employment injuries and to the natural progression of his degenerative disc disease.

As there is no current medical evidence of record which would meet the Office's burden to proof to establish that appellant's accepted employment injuries have resolved, the Office improperly terminated appellant's compensation benefits.

The decision of the Office of Workers' Compensation Programs dated October 31, 1996 and finalized November 4, 1996 is reversed.

Dated, Washington, D.C.  
February 2, 1999

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member