

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PHILLIP STEPHENS and TENNESSEE VALLEY AUTHORITY,
DIVISION OF HYDROPOWER, Chattanooga, Tenn.

*Docket No. 97-1229; Submitted on the Record;
Issued February 4, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant had any disability on or after February 5, 1995, the date the Office of Workers' Compensation Programs terminated his compensation benefits, causally related to his accepted left chest conditions.

Appellant, a 41-year-old boilermaker/welder, claimed left chest injury on February 4, 1988. He did not stop work until June 30, 1988, almost five months after his claimed injury.

The Office accepted that appellant sustained left chest strain and Tietze's syndrome.¹

Although several of appellant's physicians thereafter released him to work light duty beginning July 18, 1988, the employing establishment did not have any work available within his restrictions. He returned to work intermittently from November 17, 1988 to January 2, 1989 when he again stopped work and was placed on the periodic roll. Appellant was subject to a reduction-in-force on January 13, 1989.

In a report dated April 15, 1994, Dr. J. Roger Culpepper, an osteopath and appellant's treating physician, noted that appellant's musculoskeletal and neurologic examinations were normal; he diagnosed agoraphobia and failed back, and he noted that appellant was stable and was doing well.

By letter dated July 13, 1994, Dr. Culpepper responded to previous letters from the Office requesting his determination of the suitability of two selected positions to appellant's post injury condition. Dr. Culpepper replied that he felt appellant could successfully perform either

¹ Tietze's syndrome is an idiopathic painful nonsuppurative swelling of one or more costal cartilages; *see* Dorland's Illustrated *Medical Dictionary*, 27th Edition (1988), p. 1645.

of the two jobs described in the Office's prior letter. These jobs included the full-time positions of a gate guard and a security guard.

By letter dated July 14, 1994 to Dr. Culpepper, the Office requested status information specifically on appellant's accepted conditions. It noted that neither diagnosis listed in his April 15, 1994 report was accepted as being work related, and inquired as to whether appellant had any residuals of left chest strain or Tietze's syndrome. The Office also inquired as to whether appellant had any work limitations due to his accepted conditions.

By reply dated October 17, 1994, Dr. Culpepper replied that, in regard to appellant, Office case number A6-442484-P, with respect to objective findings or residuals of chest strain and Tietze's syndrome, he had no residual effects, symptoms or problems. He further noted that appellant had no limitation due to the above conditions, and indicated that appellant's limiting condition that was presently being treated was failed back syndrome.

On December 15, 1994 the Office issued appellant a notice of proposed termination of compensation explaining that termination was being proposed as appellant's treating physician had indicated that he no longer had objective findings or residual effects of his accepted conditions. The Office gave appellant 30 days within which to submit argument or further evidence supporting continuing disability.

In response appellant submitted a January 6, 1995 report from Dr. Cecil Nepomuceno, which stated that appellant was being seen because of complaints of persisting pain in the anterior chest. He noted that system review and physical examination were essentially negative, except for tenderness starting at the left fourth costochondral junction which became worse towards the sixth costochondral joint.

On January 19, 1995 the Office received a letter from appellant denying that he was being treated for any type of back injury, denying that his chronic chest pain had ceased, and stating that Dr. Culpepper had a heart attack and could not clear up and correct this matter until he recovered from triple bypass surgery. Appellant argued that Dr. Nepomuceno's report demonstrated that his disability still existed and that he was eligible to continue to receive compensation.

By decision dated January 23, 1995, the Office terminated appellant's compensation effective February 5, 1995 finding that the weight of the medical evidence established that his disability resulting from the accepted employment injuries ceased by and not later than February 5, 1995.

By letter dated February 23, 1995, appellant requested reconsideration, claimed that he continued to be unable to work, claimed that he had no improvement in his condition since its onset on February 4, 1988, claimed that loss of compensation was a substantial loss to his family's support, and claimed that without his benefits and medical payments he could not afford his medications that he had been taking for a very long time and which were a necessary part of his daily life.

Appellant submitted a report dated February 17, 1995 from Dr. Culpepper, which stated that he was initially seen in 1988 for a chest injury and at that time was referred to an orthopedist, that in 1992 he agreed to treat appellant when the orthopedist closed his office, that appellant had been seen on a routine basis for the last few years mostly for medication refills and that his condition had not changed. Dr. Culpepper noted that upon examination in February 1995 appellant still suffered tenderness in the left costochondral junction with radiation into the left lateral chest. He explained that appellant was seen as needed, usually on a quarterly basis. Dr. Culpepper also stated that he had reviewed Dr. Nepomuceno's findings and concurred with them.

By decision dated March 31, 1995, the Office denied modification of its prior decision finding that the information submitted was insufficient to warrant modification. The Office noted that the medical reports submitted with appellant's reconsideration request and the case record, were referred to an Office medical adviser who opined that there was no medical evidence to support that appellant's current condition was related to the February 4, 1988 employment injury. The Office noted that the Office medical adviser determined that on April 15, 1994 Dr. Culpepper examined appellant and found no abnormality of his chest or elsewhere, and that Dr. Culpepper merely reiterated his findings in his October 17, 1994 report. It further noted that the Office medical adviser found that neither of the 1995 medical reports provided any objective evidence of disability related to the February 4, 1988 incident, and in fact, that Dr. Nepomuceno stated that system review and physical examination were essentially negative. The Office concluded that none of the submitted evidence supported continuing injury-related disability.

By letters dated February 6, 1996 and following, appellant, through his representative, requested reconsideration. Appellant's representative argued that appellant was not given an opportunity to comment upon the opinion of the Office medical adviser.

By decision dated June 3, 1996, the Office denied modification of its prior decision finding that the evidence submitted in support was insufficient to warrant modification of its prior decision. The Office found that appellant's representative's argument was without merit as appellant had been advised of the deficiencies of his evidence by formal decision.

On August 23, 1996 appellant's representative again requested reconsideration. She argued that the Office medical adviser's assessment of the medical evidence of record was incorrect, that Dr. Culpepper did not examine appellant on the date of his letter to the Office responding to their request for information, that Dr. Culpepper apparently confused appellant with another patient, and that Dr. Nepomuceno provided an abundance of objective medical evidence supporting that appellant remained disabled. In support appellant's representative submitted an August 9, 1996 letter from Dr. Culpepper which stated that appellant had been treated by his office on an ongoing basis since the inception of this injury, that appellant's complaints had been constant and ongoing with back problems being a secondary problem, that his office "may have inadvertently mixed up [appellant's] information with that of another [employing establishment] employee that [they] were treating with similar injuries at the same time," that the letter written February 17, 1995 superseded the letter written October 7, 1994,

that he was continuing to treat appellant for Tietze's syndrome/costochondritis, and that he felt appellant was "unable to sustain employment due to this injury."

By decision dated January 9, 1997, the Office again denied modification of its prior decision finding that the evidence submitted in support was not sufficient to warrant modification. The Office found that the evidence submitted did not prove that the October 17, 1994 report was about another patient, and did not provide any objective medical findings supporting that appellant had ongoing injury-related disability. The Office explained that "pain" was not an objective medical finding of disability.

The Board finds that appellant had no disability on or after February 5, 1995, the date the Office terminated his compensation benefits, causally related to his accepted left chest conditions.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.² 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.³

In this case, the Office met its burden to terminate compensation based upon the reports of Dr. Culpepper, appellant's treating physician. On April 15, 1994 Dr. Culpepper noted that appellant's musculoskeletal and neurologic examinations were normal, and he noted that appellant was stable and doing well, and the only conditions he diagnosed, for which he was treating appellant, were two conditions that were unrelated to appellant's employment. This report does not support that appellant was even being treated, let alone remained disabled, due to his accepted employment conditions. In his July 13, 1994 letter, Dr. Culpepper further indicated that appellant could work, and could successfully perform the full-time positions of gate guard and/or security guard. This report does not support continued disability due to the accepted employment conditions. Finally, in his October 17, 1994 reply to the Office's specific inquiry, Dr. Culpepper explicitly stated that appellant had no objective findings or residuals of his left chest strain or Tietze's syndrome and had no limitations due to these accepted conditions. He indicated that he was treating appellant for failed back syndrome. This report clearly does not support that appellant had any residuals of his employment conditions or had any work limitations due to them.

As there was no other medical evidence submitted to the record during this period of time that supported that appellant remained totally disabled or had residuals due to his accepted employment conditions, the weight of the medical opinion evidence of record clearly supported that appellant had no continuing residuals of his employment injuries nor had any limitations due to these conditions, and the Office met its burden of proof to terminate appellant's compensation based upon these reports.

² *Harold S. McGough*, 36 ECAB 332 (1984).

³ See *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

Thereafter, the evidence appellant submitted in support of his allegations of continued disability failed to be sufficiently probative to create a conflict with the existing evidence of record. The January 6, 1995 report from Dr. Nepomuceno merely noted that appellant was complaining of anterior chest pain; it did not identify any objective evidence of injury residuals or continued disability, noting that appellant's system review and physical examination were essentially negative. Although the report identified subjective tenderness in one rib area, the Board notes that medical statements referring only to pain and discomfort as distinguished from disability for work do not support a claim of disablement for work.⁴ Consequently, this report is insufficient to create a conflict with the medical evidence of record. Dr. Culpepper, in his February 17, 1995 report, merely concurred with Dr. Nepomuceno's findings and failed to identify any objective evidence of continuing disability or injury residuals which would support the continuation of compensation. The only condition this report identified was the subjective symptom of tenderness of the left costochondral junction. This evidence is therefore insufficient to create a conflict with the previous evidence of record. Appellant also submitted an August 9, 1996 report from Dr. Culpepper which stated that appellant had been treated by his office on an ongoing basis since the inception of his injury, that appellant's complaints had been constant and ongoing, that appellant complained of back problems, that his office "may have inadvertently mixed up appellant's information with that of another," and that appellant was unable to sustain employment due to Tietze's syndrome/costochondritis. The Board notes, however, that the evidence of record demonstrates that Dr. Culpepper had not treated appellant on an ongoing basis since the inception of his injury as he referred appellant to an orthopedist in early summer of 1988 and did not resume appellant's care until 1992, that no complaints of appellant's left chest problems were noted in the April 1994 visit report such that they could not be considered to be constant and ongoing, that his opinion on appellant's inability to sustain employment was contradicted by his July 1994 report approving jobs for appellant in the positions of gate guard/security guard, and that Dr. Culpepper's October 17, 1994 report was not a report dealing with another patient, as every digit of appellant's Office claim number was accurate and correct, and as the October 17, 1994 report was consistent with his July and April 1994 reports regarding appellant. Further, Dr. Culpepper's suggestion that his office might have inadvertently mixed up records was couched in equivocal terms and was speculative at best and hence is of greatly diminished probative value.⁵

Appellant argues that Dr. Culpepper's October 17, 1994 report was not about him as he denied having any back problem, but the Board notes that appellant's back problems were also mentioned in reports dated August 9, 1996 and April 15, 1994. Appellant also argues that he remains disabled but no objective disability was identified in reports dated February 17, January 6, 1995, October 17, July 13 or April 15, 1994. The Board further notes that Dr. Culpepper's August 9, 1996 statement regarding disability is purely conclusory and is

⁴ See *John W. Jackson*, 25 ECAB 153 (1974); *Harry K. Canty*, 5 ECAB 257 (1952); *Estella R. Whittlesey*, 5 ECAB 249 (1952).

⁵ See *Philip J. Deroo*, 39 ECAB 1294 (1988) (although the medical opinion of a physician does not have to be absolute, neither can such opinion be speculative or equivocal); *Jennifer Beville*, 33 ECAB 1970 (1982) (statement of a Board-certified internist that the employee's complaints "could have been" related to her work injury was speculative and of limited probative value).

unsupported by any objective findings or medical rationale, hence it is of greatly diminished probative value.⁶

As the Office met its burden of proof to terminate compensation, and as appellant has failed to submit any further rationalized medical evidence supporting that he continues to have objective residuals or disability due to his accepted employment conditions, the Board finds that the prior Office decisions are correct with respect to the facts and the law of this case.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated January 9, 1997 and June 3, 1996 are hereby affirmed.

Dated, Washington, D.C.
February 4, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁶ See *Leon Harris Ford*, 31 ECAB 514 (1980); *Neil Oliver*, 31 ECAB 400 (1980); *Leontine F. Lucas*, 30 ECAB 925 (1979).