

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TERRY BARNES and DEPARTMENT OF JUSTICE, IMMIGRATION &
NATURALIZATION SERVICE PROCESSING CENTER, New York, N.Y.

*Docket No. 98-2119; Submitted on the Record;
Issued February 24, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective May 18, 1998 on the grounds that he was no longer disabled as a result of his accepted December 28, 1991 employment injury.

On January 2, 1992 appellant, then a 31-year-old detention enforcement officer, filed a notice of traumatic injury and claim, alleging that he sustained injury to his right hand when he was struck with a chair during a riot at the detention center on December 28, 1991. Appellant stopped work on December 29, 1991. On January 7, 1992 appellant underwent surgery on his right hand, and on January 29, 1992, the Office accepted appellant's claim for fracture and dislocation of the right fifth finger. Appellant returned to work on April 15, 1992. On June 22, 1992 appellant filed a claim for recurrence of disability beginning June 1, 1992 with dizzy spells and numbness on the left side of his body. By decision dated August 12, 1992, the Office denied appellant's claim for recurrence of disability beginning June 1, 1992. On October 5, 1992 and March 23, 1993 appellant filed additional claims for recurrences of disability beginning September 27, 1992 and January 1, 1993, respectively. The employing establishment terminated appellant effective June 12, 1993 as he was a temporary employee and his services were no longer needed. On June 7, 1993 the Office denied appellant's March 1992 claim for recurrence of disability on the grounds that there was no causal relationship between the accepted employment injury and the claimed recurrence. Pursuant to appellant's request for a hearing, a decision was issued August 10, 1993 and finalized on August 13, 1993 by an Office hearing representative, affirming the decision of the Office dated August 12, 1992.

In a letter dated October 31, 1995, the Office notified appellant that it proposed termination of his compensation benefits on the grounds that he had no continuing disability related to his accepted employment injury. By decision dated December 1, 1995, appellant's compensation benefits were terminated on that date. However, in a decision dated July 15, 1996, an Office hearing representative reversed the December 1, 1995 decision of the Office on the

grounds that the medical evidence concerning residual disability was not conclusive and remanded the case for further development of the evidence.

On August 20, 1996 appellant was referred to a vocational rehabilitation counselor. By agreement signed November 22, 1996, appellant agreed to participate in job searches for four hours per day. However, by facsimile received December 19, 1996, appellant advised the Office that he had moved to Hattiesburg, Mississippi effective December 8, 1996. He indicated that he was undergoing training at the Hattiesburg Police Academy beginning January 22, 1997. Subsequently, appellant notified the Office that he had dropped out of the police academy due to pain in his right hand while participating in physical exercises and that on or around February 14, 1997 he became employed with the Forrest County Sheriff's Office as a correctional officer at a pay rate of \$13,500.00 per year.

In a decision dated March 26, 1997, the Office determined that appellant had been reemployed as a correction officer at a weekly wage of \$259.62 per week effective February 4, 1997. The Office reduced appellant's compensation and determined that this position did not fairly or reasonably represent appellant's wage-earning capacity. On July 22, 1997 appellant advised the Office that he no longer worked as a correction officer, alleging that his right hand caused him injuries while he was working and that he left his position due to fear of serious future injury. By letter dated August 18, 1997, the Forrest County Sheriff's Office confirmed that appellant had resigned May 8, 1997, but indicated that it was because appellant perceived a conflict with his federal employing establishment and the sheriff's office.

By letter dated January 13, 1998, the Office notified appellant that it proposed reduction of his monetary compensation on the grounds that he was no longer totally disabled, could work as a retail manager, and that such work reasonably and fairly represented his wage-earning capacity and was reasonably available in the New York City area. This determination was not finalized.

In a letter dated April 15, 1998, the Office proposed termination of appellant's compensation on the grounds that he had no continuing disability as a result of his accepted employment injury. By decision dated May 18, 1998, appellant's compensation benefits were terminated effective that date on the grounds that appellant had no continuing disability as a result of his December 28, 1991 injury.

The Board has carefully reviewed the entire case record on appeal and finds that the Office properly terminated appellant's compensation benefits effective May 18, 1998 on the grounds that he had no continuing disability due to his accepted employment injury.¹

Under the Federal Employees' Compensation Act,² once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of compensation.³

¹ The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal. As appellant filed his appeal with the Board on June 22, 1998, the only decision before the Board is the Office's May 18, 1998 decision. See 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

² 5 U.S.C. § 8101 *et seq.* (1974).

After the Office determines that an employee has a disability causally related to his or her employment, the Office may not terminate compensation without establishing that its original determination was erroneous or that the disability has ceased or is no longer related to the employment injury.⁴

The fact that the Office accepts appellant's claim for a specified period of disability does not shift the burden of proof to appellant to show that he or she is still disabled. The burden is on the Office to demonstrate an absence of employment-related disability in the period subsequent to the date when compensation is terminated or modified.⁵ Therefore, the Office must establish that appellant's condition was no longer aggravated by employment factors after May 18, 1998, and the Office's burden includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁶

In the present case, the Office proposed termination of appellant's compensation benefits based on the August 13, 1997 report of Dr. J. Michael Weaver, a Board-certified orthopedic surgeon and appellant's treating physician. In Dr. Weaver's report, he provided a complete history of injury to appellant's right hand and indicated that appellant sustained a fracture and dislocation of the distal interphalangeal joint of the right fifth finger in December 1991. He reported that appellant was not having any significant symptoms and that this injury "had just been a moderate nuisance." Dr. Weaver noted some extension range of motion problems, minor ulnar nerve neuropathy and concurred with the previously evaluated 13 percent disability rating in appellant's fifth finger. Nonetheless, he indicated that appellant could return to his previous work with the employing establishment and that there were no limitations on appellant whatsoever. Dr. Weaver concluded that he would not restrict appellant in "any form or fashion." Although appellant was provided with the opportunity to respond to the proposed termination, he did not submit any medical evidence which refutes the conclusions of his treating physician, that he could return to his date-of-injury employment without restriction. Thus, the weight of the medical evidence establishes that appellant did not have any continuing disability related to his accepted employment injury which prevented him from working. The Office has met its burden of proof in terminating appellant's compensation benefits effective May 18, 1998.

³ *William Kandel*, 43 ECAB 1011 (1992).

⁴ *Carl D. Johnson*, 46 ECAB 804 (1995).

⁵ *Dawn Sweazey*, 44 ECAB 824 (1993).

⁶ *Mary Lou Barragy*, 46 ECAB 781 (1995).

The decision of the Office of Workers' Compensation Programs dated May 18, 1998 is hereby affirmed.

Dated, Washington, D.C.
February 24, 1999

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member