

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EZELL WILLS and DEPARTMENT OF THE NAVY,
NORTH ISLAND NAVAL AIR REWORK FACILITY,
San Diego, Calif

Docket No. 96-549;
Issued January 28, 1999

DECISION GRANTING PETITION FOR CORRECTION AND REAFFIRMING
PRIOR DECISION OF THE BOARD

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The Board issued its decision and order in the above-entitled matter on March 4, 1998. The Director of the Office of Workers' Compensation Programs filed a petition for correction contending that the Board committed an error of law when it found the burden of proof was still on the Office when the Office made its October 10, 1995 decision rescinding its prior acceptance of appellant's recurrence of disability claim; that the Board committed an error of fact when it mischaracterized the state of the medical evidence of record as of August 4, 1994 at the time the Office rescinded its acceptance of the November 1, 1989 recurrence of disability claim; and that the Board's mandate at the conclusion of its slip opinion incorrectly reverses the Office's October 10, 1995 letter decision instead of setting it aside and remanding appellant's case for further development of the medical evidence.

Turning first to the Director's contention that the Board mischaracterized the state of the medical evidence at the time the Office rescinded its acceptance of appellant's claim, the Board acknowledges that, in its decision dated March 4, 1998, it held that there was a significant conflict of medical opinion between Dr. Anthony Markarian, a Board-certified orthopedic surgeon, and Dr. Bruce A. Thompson, a Board-certified orthopedic surgeon; and that due to this conflict in the medical evidence, the Office did not meet its burden of proof in rescinding its acceptance of appellant's recurrence of disability claim. The Board also acknowledges that the report of Dr. Markarian was not submitted to the record until approximately six months following the Office's October 10, 1995 decision rescinding its acceptance of appellant's recurrence of disability claim and therefore could not have created a conflict in the medical evidence. However, the Board finds that the record contains a conflict in medical opinions between the medical reports of Dr. Thompson and Dr. Edwin W. Reiner, appellant's attending orthopedic surgeon, and that recitation to the medical report of Dr. Markarian as creating the conflict in medical opinion was harmless error.

In this connection, the Board notes that, in a letter decision dated May 27, 1992, the Office accepted appellant's claim for low back strain and noted that compensation previously claimed from August 23 through 31, 1979 be paid. The Office also accepted a recurrence of disability commencing November 11, 1989 in the same decision. In the memorandum to the Director supporting the decision, the senior claims examiner recommended the following:

“[O]n reconsideration, the Office should vacate both the May 31, 1991 and February 15, 1980 decisions and accept the case for low back strain and the herniated dis[c] (HNP [herniated nucleus pulposus] L3-4), including the claimed recurrence of November 1, 1989. A CA-7 and CA-8 are also in file, claiming compensation for August 23, 1979 through August 31, 1979 ... (intermittent COP [continuation of pay] was apparently paid through August 15, 1979).”

The existing medical report of record which contains conflicting medical opinion with that of Dr. Thompson is the report of Dr. Reiner dated March 10, 1993. It is this report which the office used to reopen appellant's claim. Dr. Reiner reported that appellant had been a patient since February 19, 1987. He stated that appellant had been disabled while under his medical supervision due to leg and back pain through the date of his report. Dr. Reiner reported that a magnetic resonance imaging scan of the lumbosacral spine revealed a central disc herniation at L3-4 producing intractable pain and symptomatology. He further noted that appellant had had these symptoms since the industrial accident of June 21, 1979. Dr. Reiner noted that on January 1, 1989 appellant was in an automobile accident in which his car was rear ended and that appellant was worse for several months following the accident.

Dr. Thompson in his June 8, 1994 supplemental report stated that appellant's June 21, 1979 low back strain would not continue to be disabling for more than six weeks following the injury; that appellant's current medical condition was due to “naturally progressive effects sustained from the [November 1, 1989] motor vehicle accident and resultant herniated disc” and that there was “no reason to suspect that the herniation ... existed prior to the motor vehicle accident” based on the medical record.

The Board finds that Dr. Thompson's statement in his June 8, 1994 supplemental report, that appellant's current disability stems from the naturally progressive effects sustained from the motor vehicle accident and resultant herniated disc and that there was no reason to suspect that the herniation actually existed prior to the motor vehicle accident, conflicts with the Office's decision dated May 11, 1992 and memorandum to the Director. Therein, the Office accepted the claim for “low back strain and the herniated disc (HNP L3-4).” Dr. Thompson's statement equally conflicts with the opinion of Dr. Reiner in his March 10, 1993 report that appellant was only worse for a few months following the automobile accident and had had his symptoms since the industrial accident of June 21, 1979. This being the case, the Board finds that its recitation of Dr. Markarian as the physician who submitted the medical report creating a conflict in the medical evidence of record with Dr. Thompson was harmless error since a conflict in medical opinions between Dr. Reiner and Dr. Thompson preexisted the Office's decision dated October 10, 1995 rescinding acceptance of appellant's recurrence of disability claim dated November 1, 1989.

In view of the Board's findings that a conflict in the medical evidence preexisted the Office's October 10, 1995 decision rescinding appellant's recurrence of disability claim, the Board concludes that it did not commit an error of law in placing the burden of proof on the Office.

IT IS ORDERED that the Director's petition for correction be granted. The Board finds that its decision of March 4, 1998 was proper with the exception of citing to Dr. Markarian as creating a conflict in medical opinion rather than Dr. Reiner; that the error of fact regarding the medical evidence was harmless error; and that the decision of March 4, 1998, as modified herein, is affirmed.

Dated, Washington, D.C.
January 28, 1999

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

Michael J. Walsh, Chairman, concurring in part, and dissenting in part:

In its initial decision the Board found the Office of Workers' Compensation Programs decision dated August 4, 1994 was faulty because a "conflict" in medical opinion existed between Dr. Bruce A. Thompson, an Office referral physician Board-certified in orthopedic surgery, and Dr. Anthony Markarian, appellant's physician Board-certified in orthopedic surgery. The Director correctly points out in a petition for reconsideration that Dr. Markarian's examination and subsequent report were not introduced into the case record until approximately 11 months after the Office's decision to rescind.¹ This report, therefore, could have no bearing on the Office's decision. I concur with the panel's finding on this point.

¹ Appellant's attorney filed a reconsideration request on July 14, 1995, attaching Dr. Markarian's report.

In view of this, the issue becomes: did the Office sustain its burden of proof in revoking prior acceptance of the claim on the record before it.² I believe it did and respectfully dissent from the majority view to the contrary.

At the time of the rescission the Office had medical evidence in the record from appellant's treating physician, Dr. Edwin W. Reiner, appellant's attending orthopedic surgeon, in the form of three reports. In the first report dated March 10, 1993, Dr. Reiner points out he treated appellant since 1987; that he had back and leg pain since that time; that he had an automobile accident (nonindustrial) on January 9, 1989; that he was worse following the accident and, except for his initial injury of June 21, 1979 and the automobile accident of January 9, 1989, he had been in good health. This report, does not discuss the impact of the automobile rear-end accident on appellant's disability (his ability to work). In a subsequent report dated, October 7, 1993, Dr. Reiner points out appellant's symptoms are causing disability but does not mention the cause of the symptoms. Finally, in a short report, undated, but received by the Office January 25, 1994, he states the patient's condition has not changed materially since his March 10, 1993 report. He stated he continued to be disabled due to his advanced discongenetic disease. No reference is made to either of the injuries referred to in his March 10, 1993 report.

The Office next referred the case to Dr. Thompson who rendered two reports. In the first of these he pointed out that after his 1979 injury appellant worked at his regular job until he retired in 1987 without any disability and, beyond that, with B & M associates during 1990. He diagnosed disc disease and mild degenerative changes at L3-4. He felt it would be helpful to have Dr. Reiner's records from 1987 to 1990 to clearly determine the effect of the motor vehicle accident upon appellant's disability since his retirement. He pointed out: "the preponderance of the evidence would seem to point to the June 21, 1979 injury as being responsible for his current symptoms." However, he further pointed out the motor vehicle accident increased his symptoms and residuals. He stated having Dr. Reiner's records to review would fill the gap between February 19, 1987 through 1990. This report did not directly answer the question the Office was asking -- did the automobile accident or the original injury cause appellant's disability?

At the request of the Office, Dr. Thompson rendered a supplemental opinion dated June 8, 1994. In this report he indicates he obtained and reviewed all the records of Dr. Reiner including those between 1987 and 1990 and he noted, again, appellant's involvement in the automobile accident, concluding that his current inability to work was the result of the accident and resulted in the herniated disc seen on a magnetic resonance imaging scan in 1990. While he restated that appellant's current condition was partially due to the June 21, 1979 injury -- that injury was not the cause of his inability to work. He based his opinion, on the fact that appellant worked from 1979 until the time of the automobile accident in 1989 after which his condition slowly deteriorated. No further medical report was received from Dr. Reiner contradicting this conclusion. The reports of Dr. Thompson, the Office referral physician, rendered after examining appellant, and reviewing the records and medical reports of appellant's treating physician, Dr. Reiner, provided reliable convincing rationale that appellant's disability was no longer related to his 1979 work injury but to his automobile accident. The three reports of

² *Daniel E. Phillips*, 40 ECAB 1111 (1989), *petition for recon. denied*, 41 ECAB 201 (1990).

Dr. Reiner of record at the time of the rescission taken collectively or individually do not rise to the station of creating a conflict with the opinion of Dr. Thompson and, therefore, I believe Dr. Thompson's reports were sufficient to sustain the rescission.³

However, as noted in the Board's decision, almost a year later appellant filed a request for reconsideration, enclosing a medical opinion dated January 26, 1995 from Dr. Markarian who, in a well-rationalized medical report, set forth his theory that appellant's disability was due to his work injury and not the automobile accident. This opinion does "conflict" with that of Dr. Thompson and thus, I believe, requires resolution by an impartial medical specialist. I would therefore remand the case to the Office to resolve the existing medical conflict. In summary, the Office met its burden of proof to rescind in its decision dated August 4, 1994; a conflict is now created by the later report of Dr. Markarian and should be resolved by an impartial medical specialist. Rather than reversing the Office's decisions of August 4, 1994 and October 10, 1995, I would remand as set forth above.

Michael J. Walsh
Chairman

³ *Elizabeth Pinero*, 46 ECAB 123 (1994); *Shelia A. Johnson*, 46 ECAB 323 (1994).