

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KENNETH JENKS and DEPARTMENT OF THE AIR FORCE,
WRIGHT-PATTERSON AIR FORCE BASE, Dayton, Ohio

*Docket No. 96-682; Submitted on the Record;
Issued January 12, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether appellant's cervical condition is casually related to his January 23, 1984 employment injury; and (2) whether the Office of Workers' Compensation Programs properly terminated appellant's temporary total disability compensation effective December 10, 1995.

On January 23, 1984 appellant, then a 41-year-old operations research analyst, was walking across the parking lot of the employing establishment when he slipped on ice and fell. The Office accepted appellant's claim for acute back strain. Appellant received continuation of pay for the period January 25 through March 4, 1984. He returned to work for five hours a day on February 27, 1984 and for eight hours a day on March 5, 1984. In an August 12, 1985 report, Dr. Laszlo Ambrus, a physiatrist, noted that appellant had a history of a lumbar laminectomy in 1981. He indicated that a June 27, 1985 computerized axial tomography (CAT) scan showed a herniated L4-5 disc. Appellant underwent surgery on August 2, 1985 for a lumbar laminectomy and removal of the ruptured disc as well as a foraminotomy of the L5 nerve root bilaterally. The Office accepted the surgery as causally related to the employment injury. Appellant lost time from work intermittently from April 16, 1985 through June 22, 1986 and was authorized to buy back leave for the hours he did not work. He stopped working on June 23, 1986. The Office began payment of temporary total disability compensation. Appellant returned to light-duty work on November 20, 1989 but stopped again on January 20, 1990. The Office resumed payment of temporary total disability compensation. On January 25, 1993 appellant underwent surgery for a laminectomy, foraminotomies at L4-5 and L5-S1 and spinal fusion from L4 to S1.

On December 1, 1994 appellant underwent an anterior cervical discectomy at C5-6 with fusion. In a February 16, 1995 decision, the Office rejected appellant's claim for his cervical condition on the grounds that he had not established a causal relationship between his cervical condition and his January 23, 1994 employment injury. Appellant requested a hearing before an Office hearing representative. In a July 7, 1995 decision, the Office hearing representative

vacated the Office's February 16, 1995 decision on the grounds that there existed a conflict in the medical evidence. He remanded the case for referral of appellant to an appropriate impartial medical specialist to resolve the conflict. In a December 7, 1995 decision, the Office rejected appellant's claim for headaches and his cervical condition on the grounds that the weight of the medical evidence established that appellant's condition was not causally related to his employment injury. The Office further terminated appellant's compensation effective December 10, 1995 on the grounds that the medical evidence from the impartial medical specialist established that appellant was capable of performing the duties of his former position.

The Board finds that appellant's cervical condition is not causally related to his January 23, 1984 employment injury.

Although appellant was injured on January 23, 1984, the first report to discuss headaches was the January 22, 1987 report of Dr. Jon H. Whisler, a Board-certified orthopedic surgeon, who indicated that appellant's current complaints continue to be persistent muscle spasms in the lower lumbar region with pain radiating to both buttocks and legs. Dr. Whisler noted that sneezing and coughing yields and severe back pain. He commented that the spasms would then travel up appellant's back and even cause occipital headaches. In a January 29, 1988 report, Dr. Whisler stated that appellant had severe degenerative disc disease of the cervical spine which would explain his neck pain and headaches.

In a May 11, 1988 report, Dr. Andrew G. Shetter, a Board-certified neurosurgeon, stated that approximately two weeks previously appellant had noted the abrupt onset swelling in the right suboccipital musculature with pain in the right cervical region. Dr. Shetter commented that there was no preceding history of trauma or injury. He recommended a cervical computerized tomography (CT) scan or magnetic resonance imaging (MRI) scan. Dr. Shetter stated that if these tests were unremarkable, he could assume that the right neck swelling represented muscle spasm associated with cervical osteoarthritic changes.

In a July 19, 1990 report, Dr. Paul E. Palmer, a Board-certified orthopedic surgeon, stated, in addition to appellant's back condition, he complained of neck pain but only when bending the neck to the left. Dr. Palmer noted that the cervical range of motion was normal. He related that appellant complained of migraine headaches and spasms in the upper back which sometimes affected his neck but appellant could not remember the onset of these symptoms. Dr. Palmer diagnosed herniated L4-5 disc with postoperative residuals and migraine headaches. He stated that appellant's back condition was directly related to the employment injury but the other symptoms of migraine headaches and symptoms in the neck and upper back were not explained by that injury.

In an August 21, 1990 report, Dr. David J.E. Cheshire, a Board-certified orthopedic surgeon, discussed appellant's back condition extensively. In regard to cervical complaints, Dr. Cheshire noted that appellant complained of spasms radiating from the low back to the cervicodorsal region. He indicate that appellant also described the development of a painful spasm in the neck of a headache which seemed classically occipitocervical. Dr. Cheshire doubted that appellant was describing a true migraine. In a January 17, 1992 report, he stated that appellant had a pattern of severe headaches which would appear to be related to muscle spasm with the muscle spasm in turn being related to the long strap muscles, attached at the

lower end to the pelvis and at the upper end to the base of the skull. Dr. Cheshire commented that it was anatomical expectation that persons with some pattern of chronic low back pain can get severe and disabling headaches.

In an April 6, 1993 report, Dr. Stephen J. Dutch, a Board-certified neurologist, stated that appellant hit his head at the time of the employment injury which left him stunned. Appellant gave a history of unilateral throbbing headaches beginning within a few days of the employment injury. Dr. Dutch diagnosed chronic back pain, longstanding, periodic, vascular headaches dating from appellant's "early 20's" aggravated by his fall in 1984 and chronic depression.

In a December 7, 1993 report, Dr. Cheshire indicated that he had learned that the Office had concluded that appellant's headaches would be considered as related to the employment injury but his cervical condition would not be considered related to the injury. Dr. Cheshire stated that appellant had degenerative disc disease at C6-7 which had an uncertain etiological relationship to the employment injury. He commented that the employment injury may have initiated or aggravated the degenerative change but it was difficult to substantiate in definitive fashion. Dr. Cheshire indicated, however, that the degenerative disc had become a pain focus reflected in posterior cervical muscle spasm. He concluded that repetitive muscles spasms caused hypertrophy of the posterior cervical muscles causing inflammation and swelling of the occipital nerves.

In a May 5, 1994 memorandum, Dr. Edward D. Wilson, an Office consultant, stated that the medical evidence did not support that the degenerative disc disease in the cervical spine was connected to the lumbar spine condition either by direct cause, aggravation, precipitation or acceleration. Dr. Wilson pointed out that the cervical spine symptomatology was reported for the first time on January 29, 1988, four years after the employment injury and x-rays at that time only showed degenerative changes consistent with the aging process and natural attrition. He commented that although the cause of appellant's headaches remained somewhat in question, it would be unlikely that they were related in any manner to the lumbar condition. Dr. Wilson concluded that appellant, as a result of the employment injury, had a permanent aggravation of preexisting degenerative disc disease at L4-5 with ongoing chronic pain syndrome. He indicated that degenerative disc disease of the cervical spine appeared secondary to aging and was unconnected to the lumbar injury.

In an April 11, 1994 report, Dr. Cheshire stated that appellant, in the January 23, 1984 employment injury fell, landing on his buttocks and then fell backwards striking his head on the parking lot surface. He indicated that this was full and complete historical evidence of trauma which was appropriate to the finding of the degenerative disc disease in the cervical spine.

The Office referred appellant, together with the statement of accepted facts and the case record, to Dr. Charles Echols, a Board-certified neurologist, for an examination and second opinion. In a September 10, 1994 report, Dr. Echols stated that the degenerative disc disease of the cervical spine could not be reasonably causally related to appellant's fall on January 23, 1984. He added that there was no clearly plausible explanation as to how the cervical condition could be medically connected to the employment injury by aggravation, precipitation or acceleration. Dr. Echols indicated that appellant's headaches could not be considered occipital neuralgia because the characteristics of the headaches lacked some of the

components of an occipital nerve neuralgia. He commented that appellant's headaches could conceivably be related to the employment injury as a manifestation of chronic low back pain causing tension headaches.

The Office also referred appellant to Dr. Howard P. Aidem, a Board-certified orthopedic surgeon. In an October 12, 1994 report, Dr. Aidem stated that appellant's complaints seemed to be related to the employment injury by history. He commented that he was not certain of the relationship between the back and the neck except for the presence of symptoms in both areas. Dr. Aidem indicated that appellant had an initial history of pain in the back but added that there appeared to be adequate documentation of having neck complaints as well as back complaints. In an addendum to his report, he stated that occipital neuralgia was a commonly associated symptom with cervical spine disease.

Dr. Stephen R. Stein, a Board-certified orthopedic surgeon selected as the impartial medical specialist, stated in a September 9, 1995 report that there was a direct causal relationship between appellant's employment injury and the treatment of his low back. Dr. Stein indicated that the earliest mention of headaches or neck pain was in 1987. He concluded that there was no relationship between the employment injury and the development of degenerative disc disease of his cervical spine and subsequent need for surgery. Dr. Stein stated that there were no objective findings within the medical records to substantiate appellant's subjective complaints of relationship to the cervical degenerative disc disease and the employment injury. He noted that Dr. Cheshire gave a history of appellant striking his head in the employment injury but reported that he could find no other statement in the records.

In a recorded statement submitted on October 19, 1995, Dr. Cheshire stated that appellant's headaches were not migraine headaches which he had as a teenager. He commented that appellant's neck condition was ignored because the physicians were concentrating on treating his low back condition. Dr. Cheshire indicated that Dr. Echols' statement indicating that the headaches were in the nature of tension headaches arising from chronic low back pain was not inconsistent with the opinion that the headaches were causally related to the January 23, 1984 employment injury. He stated that there was a high degree of probability that appellant's degenerative cervical condition was accelerated and aggravated by the employment injury. Dr. Cheshire concluded that appellant's cervical condition was of long duration, compatible with a causal relationship to the employment injury with at least strong evidence of aggravation, precipitation or acceleration. He commented that all physicians had concluded that appellant did not have occipital neuritis.

In a November 29, 1995 report, Dr. Stein indicated that he had reviewed the transcript of the record statement from Dr. Cheshire. He repeated that he had reviewed appellant's medical records and had noted no mention of headaches until 1987 or 1988. Dr. Stein commented that he also failed to notice any documentation of the initial injuries which included a history of appellant hitting his head in the fall on January 23, 1984. He indicated that, noting the absence of symptomatology directly following an injury to the cervical spine, he concluded that there was no relationship between the degenerative disc disease of the cervical spine and the employment injury. Dr. Stein commented that, as Dr. Cheshire had stated, people do develop headaches from spasms in the muscles of the back or cervical spine and these can be, at times,

related to injuries to the lumbar spine. He added, however, that one would expect such headaches to appear much sooner than recorded. Dr. Stein stated that the absence of any record documentation of headaches following the employment injury left one to assume that these headaches came on later and perhaps were related to the development of degenerative disc disease independent of any injury.

In situations when there exists opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹ In this case, Dr. Stein was resolving a conflict between Drs. Cheshire and Wilson on whether appellant's cervical condition and headaches were causally related to the January 23, 1984 employment injury. As Dr. Stein pointed out, there was no mention of appellant's degenerative cervical condition until Dr. Whisler's January 29, 1988 report, four years after the employment injury. There was no history that appellant struck his head when he fell until Dr. Dutch's April 6, 1993 report, nine years after the employment injury. Dr. Stein pointed out that the length of time between the employment injury and complaints arising out of the cervical condition led to the conclusion that the cervical condition was unrelated to the employment injury. His report, based on an accurate history and supported by adequate rationale, is entitled to special weight and, in the context of this case, constitutes the weight of the medical evidence in regard to the relationship between appellant's employment injury and his degenerative disc disease of the cervical spine.

The Board finds, however, that the Office improperly terminated appellant's compensation.

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

Dr. Stein was selected to resolve a conflict in the medical evidence on whether appellant's cervical condition was casually related to his January 23, 1984 employment injury. This was the only conflict in the medical evidence identified by the Office when appellant was referred to Dr. Stein. While he was asked to give his opinion of appellant's ability to return to his former position as an operations research analyst, there was no medical evidence or opinion of record at that time that appellant could return to his former position. Dr. Echols had stated in his September 10, 1994 report that appellant was capable of performing a sedentary job with the caveat that it would be significantly stressing for appellant to be in a high pressure situation requiring frequent air flights and sustained walking. Dr. Cheshire stated in his July 18, 1994 report, that appellant's headaches and cervical condition had retarded his rehabilitation following the fusion surgery on his lumbar spine to the extent that he was not fit to return to gainful

¹ *James P. Roberts*, 31 ECAB 1010 (1980)

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

employment in his preinjury occupation. Dr. Wilson indicated that appellant's capacity for work due to his lumbar condition was unknown, although he commented that most of appellant's current disability for work was due to his cervical condition and headache problem. He recommended further development. Therefore, as there was no conflict in the medical evidence on whether appellant could return to his former position, Dr. Stein's opinion on this point cannot be considered the opinion of an impartial specialist and therefore cannot be considered to have special weight. In addition, he only stated that appellant could return to his former position as an operations research analyst. Dr. Stein did not give any rationale for this statement such as describing appellant's physical work limitations and comparing those limitations to the physical work requirements of appellant's former position.

The only reason Dr. Stein gave for appellant's ability to return to his former position was the successful lumbar spinal fusion surgery performed on appellant. In an October 24, 1995 report, Dr. Robert B. Dzioba, an orthopedic surgeon of professorial rank who performed the lumbar fusion surgery, noted that even if appellant's cervical condition was completely treated, he would have a two-level successful fusion in the neck and a two-level successful fusion in the lumbar spine but would have residual back spasm and residual numbness and tingling in the right arm. Dr. Dzioba stated that he would release appellant only for the lightest of duties, 4 hours a day, 5 days a week with a limitation of 10 pounds in lifting infrequently and no frequent lifting. He stated that appellant should avoid bending, stooping, standing, crawling, squatting, heights such as ladders and cold, damp places. Therefore, the surgeon who performed the successful surgery on appellant's lumbar spine concluded that appellant could only return to the lightest of work and only part time. The evidence of record therefore does not support the Office's conclusion that appellant could return to his former position with no restrictions. The Office did not meet its burden of proof in terminating appellant's compensation.

The decision of the Office of Workers' Compensation Programs dated December 7, 1995 is hereby affirmed insofar as it finds that appellant's cervical condition and headaches are not causally related to his January 23, 1984 employment injury. The decision is reversed insofar as it finds that appellant's compensation should be terminated.

Dated, Washington, D.C.
January 12, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member