

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EARL T. REED, SR. and DEPARTMENT OF AGRICULTURE,
AGRICULTURAL MARKETING SERVICE, Washington, D.C.

*Docket No. 97-689; Submitted on the Record;
Issued January 15, 1999*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation benefits effective December 7, 1996.

On January 11, 1985 appellant, then a 48-year-old tobacco grader, filed a notice of traumatic injury and claim, alleging that while he was on travel duty status on January 10, 1985 in Lexington, Kentucky, he was involved in an automobile accident while on his way to work. Appellant did not stop work. The Office accepted appellant's claim for multiple contusions, lumbar and cervical strains and aggravation of scoliosis. Appellant continued to work until June 3, 1985 when he was furloughed due to lack of work. He returned to regular-duty work on July 22, 1985 and worked until November 19, 1985 when he alleged that he was suffering from back problems. On February 26, 1987 appellant filed a claim for recurrence of disability which began gradually starting November 20, 1985. In a decision dated October 15, 1987, the Office denied appellant's claim for recurrence of disability. By decision dated October 22, 1988, the Office vacated its October 15, 1987 decision and accepted appellant's claim for recurrence of disability. On December 1, 1988 appellant filed a claim for continuing compensation for the period of February 19, 1986, when he exhausted his leave, to December 1, 1988. On April 4, 1989 appellant elected to receive Federal Employees' Compensation Act benefits and received appropriate compensation for temporary total disability. In a letter dated September 17, 1996, the Office notified appellant that it proposed termination of his compensation on the grounds that he no longer had any continuing disability as a result of his accepted injuries. In a decision dated November 26, 1996, the Office terminated appellant's compensation benefits effective December 7, 1996 on the grounds that his disability due to his accepted employment injuries had ceased.

The Board finds that the Office improperly terminated appellant's compensation benefits effective December 7, 1996.

Under the Federal Employees' Compensation Act,¹ once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of compensation.² 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.³

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.⁴ Therefore, the Office must establish that appellant's condition was no longer aggravated by employment factors after December 7, 1996, and the Office's burden includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵

In the present case, the Office terminated appellant's compensation benefits based on the second opinion report of Dr. Philip O. Lichtblau, a Board-certified orthopedic surgeon. In a report dated August 21, 1996, Dr. Lichtblau provided a thorough history of injury and medical history for appellant and noted that appellant had sustained a lumbar sprain/strain. He diagnosed chronic low back syndrome with no objective evidence to support any neurologic problems. Dr. Lichtblau indicated that appellant's multiple contusions, lumbar and cervical strains had resolved and that there was no aggravation of appellant's scoliosis which appeared to be idiopathic in nature and was just a variation of normal. He concluded that none of appellant's accepted injuries were active, that appellant could work in his date-of-injury job as long as he did not have to do a lot of bending at the waist or work with heavy objects. Dr. Lichtblau also indicated that appellant could work in lawn service if he was careful with the equipment or as a security guard and that appellant could be gainfully employed with proper back care. A review of the position description for appellant's date-of-injury job, tobacco grader, reveals that this position requires "constant bending, stooping, crouching and standing as well as exertion of pulling samples from lots weighing several hundred pounds." In light of this position description Dr. Lichtblau's report is not sufficient to establish that appellant had no continuing disability from his employment injuries as his report is internally inconsistent. Although he indicates that appellant's employment injuries had ceased, he also diagnosed chronic back syndrome. Dr. Lichtblau also provided limitations on appellant's ability to perform his date-of-injury job which would have prevented him from performing the duties of his position. As Dr. Lichtblau has not provided an explanation of the source of these restrictions and has provided a diagnosis for a chronic back condition without definitively indicating that this

¹ 5 U.S.C. § 8101 *et seq.* (1974).

² *William Kandel*, 43 ECAB 1011 (1992).

³ *Carl D. Johnson*, 46 ECAB 804 (1995).

⁴ *Dawn Sweazey*, 44 ECAB 824 (1993).

⁵ *Mary Lou Barragy*, 46 ECAB 781 (1995).

condition is not related to appellant's accepted injuries, his opinion is not sufficient to establish that appellant has no residuals of his employment injuries. The Office has not met its burden of proof.

The decision of the Office of Workers' Compensation Programs dated November 26, 1996 is hereby reversed.

Dated, Washington, D.C.
January 15, 1999

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member