

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN L. LEWIS and DEPARTMENT OF THE NAVY,
NAVAL SHIPYARD, Philadelphia, Pa.

*Docket No. 97-1064; Submitted on the Record;
Issued January 26, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation on the grounds that he had no continuing disability from the accepted work injury.

On August 1, 1988 appellant, then a 45-year-old insulator foreman, filed a notice of traumatic injury, claiming that he hurt his lower back while picking up a vacuum cleaner at work. The Office accepted appellant's claim for low back syndrome, including a herniated disc at L4-5, and paid appropriate compensation.¹

On September 2, 1992 the Office referred appellant for a second opinion evaluation to Dr. Frank A. Mattei, a Board-certified orthopedic surgeon. Because Dr. Mattei's opinion that appellant could work eight hours a day on light duty conflicted with the conclusion of appellant's attending physician that he could work only two hours a day, the Office referred appellant to Dr. Steven Valentino, an osteopathic practitioner and Board-certified orthopedic surgeon, for an impartial medical examination.

Dr. Valentino found that appellant was fully recovered from his work injury and capable of returning to his normal duties. Thus, his opinion conflicted with that of Dr. Mattei, and the Office referred appellant for a second impartial medical examination to Dr. Leonard A. Brody, a Board-certified orthopedic surgeon.

On June 23, 1995 the Office issued a notice of proposed termination based on Dr. Brody's report that appellant had no continuing disability resulting from the August 1, 1988 injury. On July 10, 1995 appellant responded to the notice and submitted a copy of a June 4,

¹ Appellant was off work from December 6, 1988 until January 9, 1989. He again stopped work on March 2, 1989 and did not return. Appellant was terminated from the employing establishment for disability on August 28, 1993.

1995 letter from his treating physician, Dr. Jonathan P. Greco, Board-certified in internal medicine, outlining appellant's work restrictions.

On September 11, 1995 the Office terminated appellant's compensation, effective September 17, 1995, on the grounds that he had no disabling residuals of the accepted work injury. The Office noted that Dr. Greco's report did not create a conflict of medical opinion because he failed to address the issue of appellant's continuing disability.

Appellant timely requested an oral hearing and submitted the October 6, 1995 report of Dr. Bruce H. Grossinger, an osteopathic practitioner, Board-certified in psychiatry and neurology, who found a herniated disc at L4-5 caused by the 1988 work injury and stated that appellant was totally disabled. On March 1, 1996 the hearing representative vacated the termination decision and remanded the case for the Office to request that Dr. Brody review Dr. Grossinger's reports and diagnostic testing.

In a report dated April 9, 1996, Dr. Brody stated that the evidence he reviewed "in no way" changed his opinion that appellant had recovered from his work injury. On April 30, 1996 the Office again terminated appellant's compensation on the grounds that appellant had no continuing disability resulting from the accepted work injury.

Appellant again requested an oral hearing, which was held on November 22, 1996. On December 27, 1996 the hearing representative affirmed the termination of compensation, based on Dr. Brody's conclusion that appellant had no residuals of the 1988 injury.

The Board finds that the medical evidence is sufficient to establish that appellant has no disabling residuals of the accepted work injury and that, therefore, the Office properly terminated appellant's compensation.

Under the Federal Employees' Compensation Act,² when employment factors cause an aggravation of an underlying physical condition, the employee is entitled to compensation for the periods of disability related to the aggravation.³ When the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased,⁴ even if the employee is medically disqualified to continue employment because of the effect work factors may have on the underlying condition.⁵

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of compensation.⁶ Thus, after the Office determines that an employee has disability causally related to his or her employment, the Office may not terminate

² 5 U.S.C. §§ 8101-8193.

³ *Richard T. DeVito*, 39 ECAB 668, 673 (1988); *Leroy R. Rupp*, 34 ECAB 427, 430 (1982).

⁴ *Ann E. Kernander*, 37 ECAB 305, 310 (1986); *James L. Hearn*, 29 ECAB 278, 287 (1978).

⁵ *John Watkins*, 47 ECAB 597 (1996); *Marion Thornton*, 46 ECAB 899, 906 (1995).

⁶ *William Kandel*, 43 ECAB 1011, 1020 (1992).

compensation without establishing either that its original determination was erroneous or that the disability has ceased or is no longer related to the employment injury.⁷

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.⁸ The Office burden includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁹

In assessing medical evidence, the number of physicians supporting one position or another is not controlling; the weight of such evidence is determined by its reliability, its probative value, and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for, and the thoroughness of, physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.¹⁰ In cases where the Office has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹¹

In this case, the Office accepted a lumbar strain and herniated disc on the basis of medical evidence from Dr. Greco, with whom appellant treated following the August 1988 injury. The second opinion specialist, Dr. Brody, to whom the Office referred appellant stated that after a thorough physical examination on October 8, 1992, appellant had a mild decompensation of the lumbosacral area, with no objective findings to account for his complaints of pain. Dr. Mattei accepted the diagnosis of a herniated disc resulting from the 1988 incident but concluded that appellant was not totally disabled and was capable of light duty full time.

On November 19, 1992 Dr. Greco stated that appellant could not tolerate the six to seven hours of standing required by his job. Dr. Greco added that his two-hour work restriction was based on his physical examination, the functional capacity evaluation dated November 15, 1989, and the results of diagnostic testing.

Following extensive physical therapy and a work-hardening program, appellant was evaluated by Dr. Valentino on September 14, 1993. His examination "revealed no evidence to substantiate an acute or ongoing orthopedic injury" and he found "no evidence of any residual injury" from the 1988 incident at work. Dr. Valentino concluded that appellant had fully, totally,

⁷ *Carl D. Johnson*, 46 ECAB 804, 809 (1995).

⁸ *Dawn Sweazey*, 44 ECAB 824, 832 (1993).

⁹ *Mary Lou Barragy*, 46 ECAB 781, 787 (1995).

¹⁰ *Connie Johns*, 44 ECAB 560, 570 (1993).

¹¹ *Gary R. Sieber*, 46 ECAB 215, 223 (1994).

and completely recovered” and was capable of returning to full-time, full-duty employment without restriction.

Dr. Brody reached the same conclusion after his examination of appellant on April 26, 1995 revealed full range of motion of the lumbar spine, no neurological findings in the lower extremities and no evidence of any muscle spasm. However, Dr. Greco continued to opine that appellant could not work an eight-hour day and stated in his June 4, 1995 report that appellant had persistent clinical evidence for discogenic disease in his back, with low back pain and radicular symptoms.

Dr. Grossinger was “unable to localize any discogenic disease” but stated in his October 6, 1995 report that appellant remained unfit to return to his preinjury position because he could not lift, carry or bend repetitively. He found appellant’s examination to be neurologically abnormal, indicating left lumbosacral radiculopathy due to the L4-5 herniated disc. Dr. Grossinger opined that the 1988 work injury caused appellant’s back condition, reasoning that he had no past medical history of other work injuries, motor vehicle accidents or treatment records of a low back condition. In his November 14, 1995 report, Dr. Grossinger reiterated that the disc herniation was work related.

The Board finds that the reports of Drs. Greco and Grossinger are insufficiently probative to detract from the determinative weight of Dr. Brody’s opinion as the impartial medical examiner. Dr. Brody stated that he had reviewed Dr. Grossinger’s reports, Dr. Greco’s letter, and the 1995 diagnostic testing showing appellant’s herniated disc. Dr. Brody concluded that this evidence did not change his opinion that appellant had no residuals of the 1988 work injury. The physician reasoned that appellant’s completely normal physical examination in April 1995 demonstrated that he had recovered from any effects of the 1988 incident.

By contrast, neither Dr. Greco nor Dr. Grossinger explained how a 1988 lumbar strain and herniation were still disabling six years later, long after appellant had ceased work. Dr. Grossinger’s basis for connecting appellant’s current back condition to the 1988 work incident is not rationalized.¹² Dr. Greco’s belief that appellant can work no more than two hours a day is unsupported by any objective evidence and based only on appellant’s statements and complaints.¹³

Given Dr. Brody’s thorough physical examination of appellant, his review of the medical and factual evidence, and his status as an impartial medical examiner, his report represents the weight of the medical evidence and establishes that appellant had no objective evidence of any

¹² See *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996) (finding that the fact that appellant was asymptomatic before an injury but symptomatic afterward is insufficient to establish, absent supporting rationale, a causal relationship); see also *Kimper Lee*, 45 ECAB 565, 574 (1994) (finding that a physician’s rationale that appellant’s condition was related to a previous lifting injury because appellant reported no similar problem prior to that accepted injury was insufficient to establish a causal relationship).

¹³ See *John L. Clark*, 32 ECAB 1618, 1624 (1981) (finding that a medical opinion based on a claimant’s complaint that he hurt too much to work, with no objective signs of disability being shown, was insufficient to establish a basis for compensation).

residuals of the accepted work injury.¹⁴ Therefore, the Office properly terminated appellant's compensation.

The December 27, 1996 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
January 26, 1999

George E. Rivers
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

¹⁴ See *Thomas Bauer*, 46 ECAB 257, 265 (1994) (finding that the additional report from appellant's physician concerning his emotional condition was insufficient to overcome the special weight accorded to the impartial medical examiner's opinion).