

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of McARTHUR ROBERTS and DEPARTMENT OF THE NAVY,  
NAVAL SHIPYARD, Philadelphia, Pa.

*Docket No. 96-1343; Submitted on the Record;  
Issued June 14, 1999*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits as of March 5, 1994.

On December 17, 1985 appellant, a 43-year-old electrician, experienced sharp pain in his lower back and in his right hip and leg while ripping out cable. Appellant filed a Form CA-1 claim for benefits on the date of injury, which the Office accepted for lumbar strain by letter dated March 17, 1986. Appellant received appropriate compensation for total disability and medical treatment, and was placed on the periodic rolls.

Dr. Raymond E. Silk, a Board-certified surgeon, began treating appellant on December 19, 1985, and in a report dated May 6, 1986, diagnosed mild degenerative spondylosis and arthritis of the lumbosacral spine, exacerbation of the lumbosacral muscle spasm and sprain, and chronic low back pain, in addition to a degenerative L5-S1 disc with bilateral foraminal entrapment.

In order to determine the cause and extent of appellant's condition, the Office scheduled a second opinion examination for appellant with Dr. Henry S. Wieder, a Board-certified orthopedic surgeon, for March 7, 1986. In a report dated March 19, 1986, Dr. Wieder stated that based on his examination, diagnostic tests, and medical records, appellant was not capable of returning to his normal occupational activities, but that it was possible that he might be capable of working part time in a sedentary situation.

In order to determine the cause and extent of appellant's condition, the Office scheduled a second opinion examination for appellant with Dr. Bong S. Lee, a Board-certified orthopedic surgeon, for December 5, 1986. Dr. Lee stated in a report issued on that date that he had reviewed appellant's computerized axial tomography (CAT) scan and magnetic resonance imaging (MRI) scan, and that the results of these tests indicated no herniated disc or extradural defect. Dr. Lee believed that appellant's injury was limited to the soft tissues based on the

results of these diagnostic tests. He opined that some of appellant's symptoms were exaggerated and out of proportion, and that there were no objective findings to support his subjective complaints. Dr. Lee expressed a reluctance to release appellant to regular duties as an electrician given his subjective complaints, but felt appellant could work limited duty.

In a report dated August 28, 1986, Dr. Wieder noted that he had reexamined appellant on August 14, 1986, which revealed no neurological abnormality. Dr. Wieder stated that appellant exhibited marked restriction of back motion, but opined that because this appeared voluntary it could not be considered strictly objective. He also diagnosed degenerative changes of the lumbar spine due to results from a CAT scan, but advised that these changes were preexisting and were not caused by the trauma of December 17, 1985. Dr. Wieder concluded that appellant was not totally disabled for all occupational activities, but would be capable of performing sedentary work if it was in accordance with his training and experience.

Dr. Silk submitted a July 5, 1990 duty status report in which he checked a box indicating appellant had been totally disabled since December 17, 1985. In a report dated August 2, 1990, Dr. Silk stated that it was evident appellant exhibited a chronic cervical spine sprain and chronic lumbosacral spine strain, in addition to cervical radiculopathy, and noted that he complained of almost constant pain in his neck and back, which had recently worsened. Dr. Silk advised that appellant was totally dysfunctional because of his persistent symptoms, and that at the present time he was unemployable.<sup>1</sup>

In an August 31, 1991 report, Dr. Lee indicated that a neurologic examination was essentially normal, with no sensory or motor deficits and normal reflexes. Dr. Lee noted that a CAT scan of the lumbar spine taken on July 15, 1991 had indicated a protruded disc at L4-5 and at L5-S1, with marked degenerative disc disease of L5-S1. Dr. Lee commented that although appellant's subjective complaints remained the same as previous examinations, with profound complaints of pain, the objective examination did not indicate any positive findings except for degenerative disc disease, with no evidence of lumbar radiculopathy.<sup>2</sup> Dr. Lee concluded that appellant's disability was based entirely on his subjective complaints of pain.

The Office determined that a conflict existed in the medical evidence between the opinion of Dr. Silk, appellant's treating physician, and the contrary opinions of Drs. Lee and Wieder, and referred appellant for an independent, referee medical examination with Dr. Leonard Klinghoffer, a Board-certified orthopedic surgeon, pursuant to section 8123(a).

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<sup>1</sup> The record contains numerous medical reports and progress reports from Dr. Silk which describe his treatment of appellant from the date of injury through December 1993.

<sup>2</sup> Dr. Lee stated in a report dated June 28, 1990 that "[t]he reexamination for this young man since last examined December 1986 ... [does] not reveal any specific objective findings reflecting traumatic pathology. However, he has more profound subjective complaints, and he continues to demonstrate a great deal of debilitating pain ... x-ray, however, showed advanced degenerative discogenic disease interspace between L5 and S1. He also may have some degree of lumbar radiculopathy associated with the degeneration of the disc space L5, S1, although there is no clinical neurologic deficit. In my opinion, he is partially disabled, and I have filled out a work evaluation form for his physical capabilities."

Dr. Klinghoffer's examined appellant and issued a report dated February 14, 1992. Dr. Klinghoffer, after reviewing the statement of accepted facts and appellant's medical records, stated his findings on examination and concluded that appellant had preexisting degenerative disc disease at the time of his work-related lower back injury, which could have caused his symptoms to last longer than would normally be expected. He noted, however, that appellant had never demonstrated any hard neurologic findings, that he did not currently have any neurologic deficit, and that although some of his symptoms seem reasonable based on his arthritis, he did not have a herniated disc. Dr. Klinghoffer advised that degenerative disease is normally a gradual progressive condition, and that he was sure that appellant's present x-rays revealed more pathology than was the case five or six years ago. He stated, however, that while appellant's preexisting degenerative disc disease could have been aggravated by the 1985 work-related incident, there was no way to determine with any certainty whether this was the case.

Dr. Klinghoffer further stated that he agreed with the opinions of Drs. Lee and Wieder that appellant was capable of working, but that it was his arthritis which prevented him from functioning in his full capacity as a marine mechanic. He added that the role appellant's 1985 work incident played in the production of this partial disability was speculative at best. Dr. Klinghoffer recommended that appellant be examined by a neurologist.

The Office referred appellant to Dr. Richard Bennett, Board-certified in psychiatry and neurology, who examined appellant on June 12, 1992 and submitted a report on the date of his examination. He stated that his examination was neurologically intact, and opined that he was unimpressed with appellant's symptoms. Dr. Bennett advised that he did not feel appellant needed any further treatment or diagnostic tests, and that, from a neurological standpoint, appellant could return to work at his prior job without restrictions. He indicated that the acute effects of a lumbar sprain and strain had long since resolved, and that although appellant still had degenerative disc disease of the lumbar spine, it appeared to be modest at best. Dr. Bennett stated that the changes which were noted on the MRI were frequently seen in asymptomatic individuals as well as symptomatic individuals and of themselves should not be considered disabling. Dr. Bennett therefore concluded, based on his review of the medical records and his examination of appellant, that appellant had no evidence of neurological impairment related to the December 17, 1985 employment injury.<sup>3</sup>

In a supplemental report dated September 9, 1992, Dr. Bennett reiterated his opinion that appellant had no residuals from the December 17, 1985 employment injury.

In a notice of proposed termination dated December 21, 1993, the Office, based on the opinions of Drs. Klinghoffer and Bennett, the independent medical examiners, found that any residual disability appellant sustained as a result of his employment-related back condition had resolved. The Office allotted appellant 30 days to submit additional evidence or legal argument in opposition to the proposed termination.

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<sup>3</sup> Dr. Bennett also stated that he agreed with the comments of previous physicians that appellant exaggerated his symptoms.

In response to the Office's notice of proposed termination, appellant submitted additional medical evidence from Dr. Silk. This evidence included progress reports from October through December 1993, results from an MRI of appellant's lower back performed on January 10, 1994, and a December 2, 1993 report in which Dr. Silk stated his findings on examination, essentially reiterated his earlier findings and conclusions, and indicated his plans for further medical treatment.

By decision dated February 17, 1994, the Office terminated appellant's compensation as of March 5, 1994, finding that his work-related back disability had ceased.

By letter dated February 24, 1994, appellant's attorney requested reconsideration of the Office's termination decision.

By decision dated June 1, 1994, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence such that it was sufficient to require the Office to review its prior decision.

By letter dated June 8, 1994, appellant's attorney requested reconsideration of the Office's termination decision.

By decision dated September 12, 1994, the Office affirmed its February 17, 1994 decision terminating compensation, finding that appellant did not submit medical evidence sufficient to warrant modification.

By letter dated September 23, 1994, appellant's attorney requested reconsideration of the Office's previous decision.

By decision dated December 21, 1994, the Office affirmed its prior decision, finding that appellant did not submit medical evidence sufficient to warrant modification.

By letter dated December 15, 1995, appellant's attorney requested reconsideration of the Office's previous decision. In support of his request, appellant submitted additional progress reports from Dr. Silk, covering April through December 1995, plus reports dated March 23, April 4 and December 22, 1995 in which he restated his earlier findings and conclusions regarding appellant's back condition. Appellant also submitted a February 15, 1995 report from a psychiatrist, Dr. Clancy D. McKenzie, who had previously submitted a report regarding appellant's psychological condition on March 6, 1990.<sup>4</sup>

By decision dated February 8, 1996, the Office affirmed its prior decision, finding that appellant did not submit medical evidence sufficient to warrant modification.

The Board finds that the Office met its burden of proof in terminating appellant's compensation benefits as of March 5, 1994.

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<sup>4</sup> The Office had authorized payment for Dr. McKenzie's services on an "adjunct" basis, based on an alleged psychiatric condition which was never accepted by the Office.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.<sup>5</sup> 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.<sup>6</sup>

In the present case, the Office based its February 17, 1994 decision to terminate appellant's compensation on the medical reports of Drs. Klinghoffer and Bennett. In his February 14, 1992 report, Dr. Klinghoffer noted that appellant had never demonstrated any hard neurologic findings, and advised that he did not currently have any neurologic deficit. Dr. Klinghoffer, while conceding that appellant's preexisting degenerative disc disease may have been aggravated by the 1985 work-related incident, opined that there was no way to definitively conclude that this had occurred in appellant's case. He concurred with Drs. Lee and Wieder that appellant was capable of working, that his arthritis had prevented him from functioning in his full capacity as a marine mechanic, and concluded that the extent to which appellant's 1985 employment injury caused his disability was speculative at best. Dr. Bennett advised in his June 12, 1992 report that he did not feel appellant required further treatment or diagnostic tests, and that appellant could return to work at his prior job without restrictions from a neurological standpoint. He indicated that the acute effects of a lumbar sprain and strain had long since resolved, and that although appellant still had degenerative disc disease of the lumbar spine, it appeared to be modest at best. Dr. Bennett opined that appellant had no evidence of neurological impairment related to the December 17, 1985 employment injury, and stated in his September 9, 1992 report that appellant had no residuals from his December 17, 1985 employment injury.

The Office correctly found in its February 17, 1994 decision that the weight of the medical evidence rested with the independent medical opinions of Drs. Klinghoffer and Bennett, which are sufficiently probative, rationalized, and based upon a proper factual background. Therefore, the Office acted correctly in according the opinions of these physicians the special weight of an impartial medical examiner.<sup>7</sup> This decision was proper, as the opinions of these two referee physicians represented the weight of medical opinion at the time of the Office's termination decision. Subsequent to the Office's February 17, 1994 termination decision, the burden of proof in this case shifted to appellant, who thereafter submitted Dr. Silk's updated medical reports and progress reports in support of his December 15, 1995 request for reconsideration. These reports, however, merely contain Dr. Silk's findings on examination and restatements of conclusions presented before prior Office decisions, and do not present contrary, probative medical evidence that appellant continued to have residual disability from his accepted December 17, 1985 employment injury. The psychological report submitted by Dr. McKenzie is irrelevant to the issues involved in the instant decision, as appellant did not submit nor did the Office ever accept a claim based on an emotional or psychological condition.

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<sup>5</sup> *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

<sup>6</sup> *Id.*

<sup>7</sup> *Gary R. Seiber*, 46 ECAB 215 (1994).

Dr. Silk's medical reports failed to provide a rationalized, probative medical opinion establishing that, as of March 5, 1994, appellant still had residuals from his December 17, 1985 employment-related lower back injury. The Board therefore affirms the Office's February 8, 1996 decision affirming its decision that he was no longer totally disabled due to this injury as of that date.

The decision of the Office of Workers' Compensation Programs dated February 8, 1996 is hereby affirmed.

Dated, Washington, D.C.  
June 14, 1999

George E. Rivers  
Member

David S. Gerson  
Member

A. Peter Kanjorski  
Alternate Member