

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JAMES F. O'NEAL and DEPARTMENT OF VETERANS AFFAIRS,  
FORT LYON VETERANS HOSPITAL, Fort Lyon, Colo.

*Docket No. 97-419; Submitted on the Record;  
Issued March 2, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,  
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation effective September 18, 1994.

The Office accepted appellant's claim for left knee contusion and appellant began receiving compensation for temporary total disability benefits.

On August 9, 1994 the Office proposed to terminate appellant's benefits, stating that the most recent medical note from appellant's treating physician, Dr. Rudolf A. Hofmann, a Board-certified orthopedic surgeon, dated February 1, 1994, showed no objective evidence of appellant's symptoms of knee pain and, therefore, appellant had no continuing disability as a result of the September 4, 1989 employment injury. In his February 1, 1994 report, Dr. Hofmann noted appellant's ongoing symptoms of left knee pain, performed a physical examination and diagnosed continued left anterior pain "as previously."

Appellant submitted a medical report from Dr. Hofmann dated September 13, 1994, in which Dr. Hofmann stated that appellant had continued symptoms since the September 4, 1989 employment injury and that he had full passive range of motion with discomfort over the anterior aspect of the left knee at the maximum of flexion and tenderness over the medial and lateral joint spaces. By decision dated September 16, 1994, the Office terminated appellant's benefits, stating that the medical evidence showed no objective findings to support a continued medical condition caused by the September 4, 1989 employment injury.<sup>1</sup>

Appellant requested an oral hearing before an Office hearing representative which was held on March 29, 1995. Appellant testified that he was forced to walk with either a cane or a knee brace and was unable to do activities such as mowing and "odd jobs" that he did prior to his

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<sup>1</sup> The Office recommended that the rehabilitation plan and obligation to pay for the semester and the necessary books be honored.

knee injury. He testified that his knee gave out on him without warning and he had pain and swelling if he was on his feet too long. Appellant stated that he returned to school and obtained an associate degree as a microcomputer specialist. He also stated that he was looking for work. Appellant submitted an additional report from Dr. Hofmann dated March 15, 1995, in which Dr. Hofmann stated that appellant had continued symptoms since his September 4, 1989 employment injury, that he should wear a knee brace and was subject to restrictions of no kneeling, squatting or lifting or carrying of more than 50 pounds.

By report dated April 3, 1991, Dr. Arches Chester Sudan, a Board-certified orthopedic surgeon and second opinion physician, considered appellant's history of injury, performed a physical examination, x-rays and diagnosed residual infrapatellar tendinitis caused by a direct blow to the infrapatellar in appellant's September 4, 1989 fall. He opined that appellant required a functional capacity evaluation or a work-hardening program. The Office subsequently referred appellant to Dr. Karl F. Gross, a Board-certified psychiatrist and neurologist, who in his report dated September 25, 1991, diagnosed left knee pain because of orthopedic etiology as per Dr. Sudan but he found no clinical abnormalities on clinical and electrophysiologic examination.

By decision dated June 12, 1995, the Office hearing representative reversed the Office's September 16, 1994 decision, finding that although Dr. Hofmann's and Dr. Sudan's opinions were deficient in citing objective findings of appellant's ongoing knee problem, their opinions indicated that appellant's knee condition was work related and were uncontradicted by any other medical evidence in the record. The Office hearing representative, therefore, remanded the case with instructions for the Office to refer appellant with a statement of accepted facts and the medical evidence to a Board-certified orthopedic surgeon, for an opinion on the cause of appellant's left knee condition.

Appellant was subsequently examined by Dr. Richard Talbott, a Board-certified orthopedic surgeon and second opinion physician, on August 18, 1995. In his report of the visit dated August 22, 1995, Dr. Talbott considered appellant's history of injury and performed a physical examination which he found was normal. He opined that appellant had no residuals from the September 4, 1989 employment injury and diagnosed symptom embellishment with the possibility of a hysterical component. He found that there were no objective findings of the accepted injury and appellant could return to work. By letter dated October 6, 1995, the Office forwarded a copy of Dr. Talbott's August 22, 1995 report to Dr. Hofmann and stated that if the Office did not hear from him by October 21, 1995, the Office would assume that he agreed with Dr. Talbott's opinion. Dr. Hofmann did not respond.

By decision dated October 24, 1995, the Office terminated appellant's compensation benefits, effective August 28, 1995 based on Dr. Talbott's report, which established he had no residuals and no objective findings of his September 4, 1989 employment injury.

Appellant requested a hearing before an Office hearing representative which was held on May 6, 1996.

At the hearing appellant testified that he saw Dr. Talbott for 15 minutes. He also testified that it was not possible for his treating physician to respond to the Office's letter because he had not seen his treating physician for over a year because his medical benefits had been terminated.

He reiterated his earlier testimony that since September 1989 his knee continued to bother him as it gave out on him when on a stair or a step, he could only walk for an hour, and experienced prolonged pain and swelling after he was on his legs for a long time. Appellant testified that he was working full time as a drug and alcohol counselor.

By decision dated July 6, 1996, the Office hearing representative affirmed the Office's October 24, 1995 decision.

The Board finds that the Office met its burden of proof to terminate compensation benefits.

Once the Office has accepted 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.<sup>2</sup> The Office's burden of proof includes the necessity of furnishing rationalized medical evidence based on a proper factual and medical background.<sup>3</sup>

In the present case, the August 22, 1995 opinion of Dr. Talbott, the second opinion physician, constitutes the weight of the evidence. In his report Dr. Talbott found no objective evidence of appellant's ongoing knee symptoms and diagnosed symptom embellishment with the possibility of a hysterical component. He found that appellant had no residuals from the September 4, 1989 employment injury and could return to work. While Dr. Hofmann, appellant's treating physician, opined in his recent reports dated February 1 and September 13, 1994 and March 15, 1995, that appellant continued to have pain in his left knee since the September 4, 1989, employment injury and in his March 15, 1995 report, that appellant needed a knee brace and work restrictions, he did not provide a rationalized opinion as to how appellant's ongoing knee symptoms were causally related to the September 4, 1989 employment injury. His opinion is, therefore, entitled to less weight.<sup>4</sup> In his September 25, 1991 report, Dr. Gross found appellant's neurological examination was normal. In his April 3, 1991 report, Dr. Sudan diagnosed residual infrapatellar tendinitis, which was not the accepted injury but Dr. Sudan also did not provide a rationalized medical opinion how appellant's knee condition was work related. Dr. Talbott's August 22, 1995 opinion, therefore, justifies the Office's termination of benefits.

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<sup>2</sup> *Wallace B. Page*, 46 ECAB 46 ECAB 227, 229-30 (1994); *Jason C. Armstrong*, 40 ECAB 907, 916 (1989).

<sup>3</sup> *Larry Warner*, 43 ECAB 1027, 1032 (1992); *see Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>4</sup> *See Jeannine E. Swanson*, 45 ECAB 325, 336 (1993); *Ceferino L. Gonzales*, 32 ECAB 1591, 1594 (1981).

The decisions of the Office of Workers' Compensation Programs dated July 6, 1996 and October 24, 1995 are hereby affirmed.

Dated, Washington, D.C.  
March 2, 1999

Michael J. Walsh  
Chairman

George E. Rivers  
Member

David S. Gerson  
Member