

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HERBERT D. SNYDER, JR. and DEPARTMENT OF THE AIR FORCE,
PENNSYLVANIA AIR NATIONAL GUARD, Coraopolis, Pa.

*Docket No. 96-1408; Submitted on the Record;
Issued May 24, 1999*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits as of April 2, 1995.

The present case was before the Board on a prior appeal. By decision and order dated October 28, 1991, the Board found that the Office did not meet its burden of proof to terminate appellant's compensation effective July 29, 1990.¹

Appellant, a 31-year-old missile technician, sustained an injury to his lower back while lifting a missile. The Office accepted appellant's claim for a ruptured disc at L5 and paid appropriate compensation benefits. Appellant returned to light duty on February 28, 1967, and on December 16, 1967, the Office reduced his compensation based on his loss of wage-earning capacity.

In an April 12, 1990 letter, the Office issued appellant a notice of proposed termination of compensation based on the grounds that his work-related disability had ceased. By decision dated July 10, 1990, the Office terminated appellant's compensation effective July 29, 1990.

By decision dated October 28, 1991, the Board reversed the Office's July 10, 1990 decision finding that the medical evidence was insufficient to terminate compensation.

In letters to appellant dated June 17, 1992, February 24, June 9 and December 23, 1993, the Office requested that he provide a comprehensive medical report updating his medical condition from his treating physician, Dr. Ronald G. Mehok, a Board-certified orthopedic surgeon. In its December 23, 1993 letter, the Office advised appellant that if it received no response by January 15, 1994, he would be scheduled for an examination by a Board-certified specialist.

¹ Docket No. 91-899 (issued October 28, 1991).

In a letter dated June 9, 1994, the Office scheduled a second opinion examination with Dr. Robert M. Yankus, a Board-certified orthopedic surgeon. Dr. Yankus reviewed appellant's history of injury, examined appellant on July 19, 1994, and stated his conclusions in a report dated July 19, 1994. Dr. Yankus addressed appellant's 1966 laminectomy and subsequent medical treatment and diagnosed that appellant had postoperative L5 disc herniation with degenerative postoperative changes and degenerative changes of the L4-5 disc space. Dr. Yankus stated that the herniated disc at L5 was the direct result of the November 9, 1966 work injury, and that the changes at the L4-5 level were a natural progression of his underlying degenerative condition. Dr. Yankus advised that at that point in time, nearly 28 years after the injury, the effects of the work injury had long since abated, and that appellant's present symptoms resulted from degenerative changes natural to the lumbar spine consistent with the aging process. Dr. Yankus stated that appellant was capable of "medium" work.

On December 22, 1994 the Office issued a notice of proposed termination of compensation to appellant. In the memorandum accompanying the notice of proposed termination, the Office stated that the weight of the medical evidence rested with Dr. Yankus' July 19, 1994 report. The Office indicated that, although it had received a May 7, 1990 treatment note from Dr. Mehok, this note did not address whether appellant's current condition or disability remained causally related to the accepted November 9, 1966 employment injury. The Office allowed appellant 30 days to submit additional evidence or legal argument in opposition to the proposed termination.

In response to the Office's December 22, 1994 notice of proposed termination, appellant submitted an undated, handwritten letter which contested the Office's proposed termination of compensation, in addition to copies of past medical bills. Appellant did not, however, submit any additional medical evidence supporting his claim that he continued to suffer residual disability from his accepted November 9, 1966 employment injury.

By decision dated March 28, 1995, the Office terminated appellant's compensation effective April 2, 1995, finding that the weight of the medical evidence established that appellant no longer had any disability or medical condition causally related to the accepted November 9, 1966 employment injury.

In a letter dated April 11, 1995, appellant, through his attorney, requested an oral hearing, which the Office scheduled for October 25, 1995 by letter dated September 25, 1995. In support of his request, appellant submitted a June 19, 1995 medical report from Dr. Mehok. Dr. Mehok stated that he had recently examined appellant on April 17, 1995, at which time appellant advised that his back problems remained much the same with intermittent low back pain and occasional flare-ups. Dr. Mehok noted that x-rays taken at that time once again revealed evidence for degenerative changes at L4-5 and the L3-4 area. He stated that appellant was referred for a physical capacity evaluation on May 16, 1995 which indicated that he still had physical limitations, which included appellant's ability to function at a medium physical demand level regarding his lower back, and would be limited to lifting of up to a maximum of 50 pounds.² Dr. Mehok concluded that appellant's degenerative disc disease regarding the lumbar

² The record also contains a December 1, 1993 treatment note from Dr. Mehok.

spine was superimposed on his postlaminectomy-discectomy problem, and that he continued to have a disability causally related to his accepted November 9, 1966 employment injury. Dr. Mehok concluded appellant would only be physically capable of handling up to 50 pounds lifting and a medium-type job, and could not return to his previous occupation as a cement contractor.

In a decision dated March 5, 1996, an Office hearing representative affirmed the Office's March 28, 1995 decision. The hearing representative found that the weight of the medical evidence resided with the report of Dr. Yankus.

The Board finds that case is not in posture for decision.

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.³ 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.⁴

In the present case, the Office based its March 28, 1995 decision to terminate appellant's compensation on the June 19, 1994 medical report of Dr. Yankus, the second opinion physician, who found that appellant no longer suffered residual disability stemming from his accepted, employment-related lower back condition, and that his current condition resulted from a natural progression of his degenerative disc condition and not from his accepted employment injury of November 9, 1966. In his March 5, 1996 decision, the hearing representative correctly found that the weight of the medical evidence rested with Dr. Yankus' June 19, 1994 medical report, and relied on his opinion in affirming the Office's March 28, 1995 termination decision. This decision was proper, as Dr. Yankus' opinion represented the weight of medical opinion at the time of the Office's termination decision. Subsequent to the Office's March 28, 1995 termination decision, however, the burden of proof in this case shifted to appellant, who thereafter submitted Dr. Mehok's June 19, 1995 medical report. This report presented contrary, probative medical evidence that appellant continued to have residual disability from his accepted November 9, 1966 employment injury, and created a conflict in the medical evidence.

In order to resolve the conflict of medical opinion, the Office should, pursuant to 5 U.S.C. § 8123(a), refer appellant, the case record, a statement of accepted facts to an appropriate, impartial medical specialist or specialists for a reasoned opinion to determine whether appellant currently has any residual disability stemming from his accepted, employment-related lower back condition, and whether his current condition resulted from a natural progression of his degenerative disc condition or his accepted employment injury of November 9, 1966. Where there exists a conflict of medical opinion 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, is entitled to special

³ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

⁴ *Id.*

weight.⁵ After such development as it deems necessary, the Office shall issue a *de novo* decision.

The Office of Workers' Compensation Programs' decision of March 5, 1996 is therefore set aside and the case is remanded to the Office for further action consistent with this decision of the Board.

Dated, Washington, D.C.
May 24, 1999

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

⁵ *Aubrey Belnavis*, 37 ECAB 206 (1985).