

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of PEDRO E. GARCIA and DEPARTMENT OF THE AIR FORCE,  
HOLLOMAN AIR FORCE BASE, NM

*Docket No. 97-2506; Submitted on the Record;  
Issued November 29, 1999*

---

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether appellant's disability causally related to his May 10, 1978 employment injury ended by July 3, 1996.

The Office of Workers' Compensation Programs accepted that appellant's May 10, 1978 employment injury, which occurred when appellant was carrying a pump, resulted in a lumbosacral strain, a chronic pain syndrome and depression. Appellant received continuation of pay from May 22, 1978, when he stopped work, until June 9, 1978, followed by compensation for temporary total disability until December 27, 1978 when he returned to light duty. The Office accepted that appellant sustained a recurrence of disability on January 2, 1979 and resumed payment of compensation for temporary total disability. The employing establishment separated appellant from employment effective November 30, 1979 on the basis that he could not perform the duties of his position of pipefitter.

On May 30, 1996 the Office issued appellant a notice of proposed termination of compensation on the basis that his injury-related conditions had ceased. By decision dated July 3, 1996, the Office terminated appellant's compensation on the basis that the weight of the medical evidence established that his accepted conditions had resolved. Appellant requested reconsideration and the Office, by decision dated April 22, 1997, refused to modify its prior decision.

Once the Office accepts 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>1</sup>

---

<sup>1</sup> *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation on July 3, 1996.

The Office has not met its burden of proof as it has not shown that appellant's other accepted conditions of chronic pain syndrome and depression were no longer disabling or no longer related to appellant's employment injury. Dr. Ernest Flores, a Board-certified psychiatrist, to whom the Office referred appellant for an opinion whether appellant's psychiatric conditions were related to his employment injury, concluded that they were and that these conditions were totally disabling. Despite this opinion and the absence of any medical evidence that the psychiatric conditions had resolved or were no longer related to appellant's employment injury, the Office did not procure an opinion from a psychiatrist or psychologist to support its termination of appellant's compensation on July 3, 1996. Instead, the Office claims examiners, in the Office's July 3, 1996 and April 22, 1997 decisions, concluded that since appellant's physical injury had resolved, his chronic pain syndrome and depression could no longer be related to his employment injury. Such a conclusion is not within the purview of a claims examiner, as causal relation is a medical question that can only be resolved by competent medical opinion evidence.<sup>2</sup>

Moreover, to justify its termination of appellant's compensation regarding the lumbosacral strain, the Office relied on the May 20, 1996 report of Dr. Edwin Kennedy, a specialist in occupational medicine, to whom the Office referred appellant for a second opinion evaluation. In this report, Dr. Kennedy reviewed appellant's history and the prior medical evidence and set forth appellant's findings on examination. He diagnosed: "(1) chronic cervicodorsal and lumbar mechanical pain syndrome without objective evidence of radiculopathy; (2) failure at physical rehabilitation; (3) major depression as a result of the chronic pain syndrome." Dr. Kennedy then concluded:

"Lumbar strain, as a result of the trauma described above, would have been expected to resolve within three to six months after the incident. There is no objective evidence that the symptomatology from the original injury is present on this examination. What is present are major subjective pain complaints in an individual who has developed a depressive episode, chronic pain syndrome and has had severe failure at physical rehabilitation."

\* \* \*

---

<sup>2</sup> *Ausberto Guzman*, 25 ECAB 362 (1974).

“The results of the lumbar strain, as a result of that injury, are not disabling for him at this time, in my opinion.”

\* \* \*

“[D]egenerative changes seen on diagnostic studies correspond poorly to pain complaints and level of functioning. There is no evidence that the cervical, thoracic and lumbar discogenic syndrome is disabling for this individual other than his subjective complaints.”

The Office properly terminated appellant’s compensation for the lumbosacral strain based on the report of Dr. Kennedy. However, with regard to a herniated disc, which has not been accepted by the Office, the Board notes that Dr. Kennedy’s opinion conflicts with that of appellant’s attending physicians. In a report dated October 31, 1996, Dr. Richard Fernandez, a specialist in physical medicine, reviewed appellant’s history and set forth his findings on examination. Dr. Fernandez diagnosed: “post-traumatic lumbar discogenic pain syndrome with herniated nucleus pulposus at L4-5 and L5-S1. Right L5-S1 and left L5-S1 radiculopathy. Chronic pain syndrome and severe depression.” He concluded:

“At this time, I would like to reiterate that the patient has never had a lumbar strain, as he does have disc injury, as demonstrated by the magnetic resonance imaging [MRI] performed on May 10, 1993, which revealed multi-level disc degeneration at L5-S1, L4-5 and L3-4 with posterior central disc herniation at the level of L4-5 and lateralization to the left of midline. Also, posterior central bulging disc at the level of L5-S1. [The] EMG [electromyogram] of the lower extremities also revealed the presence of chronic right L5-S1 radiculopathy and chronic left L4-5 radiculopathy. All of these are a direct result of his injury of May 10, 1978 which was exacerbated by the light-duty work performed in December 1978.

“My opinion is that at this time the patient is totally disabled from returning back to any type of gainful employment because of this condition. The condition is directly related to his injury of May 10, 1978.”

The opinion of Dr. Fernandez is consistent with that of appellant’s previous attending physician, Dr. Mario Palafox, a Board-certified orthopedic surgeon.<sup>3</sup> Dr. Palafox, who began treating appellant on May 23, 1978, consistently diagnosed a lumbosacral discogenic syndrome since June 15, 1978 and in a report dated June 4, 1996 noted that appellant “had an MRI on May 10, 1993 showing a herniated degenerative disc which is an objective finding that is consistent with the patient’s subjective complaints.” The opinions of appellant’s attending physicians are directly contrary to that of the Office referral physician’s opinion with regard to the diagnosis of appellant’s injury-related condition, with appellant’s physicians stating that the herniated disc was consistent with appellant’s symptoms and the Office’s referral physician stating that it was not. The Office’s referral physician, Dr. Kennedy, also did not explain his

---

<sup>3</sup> Dr. Fernandez took over appellant’s care upon the death of Dr. Palafox in June 1996.

conclusion that there was no objective evidence of radiculopathy in light of the EMG findings of radiculopathy. As the reports of appellant's attending physicians and the Office's referral physician are of substantially equal probative value, there is an unsolved conflict of medical opinion.<sup>4</sup>

The decision of the Office of Workers' Compensation Programs dated April 22, 1997 is reversed and the case is remanded for further development.

Dated, Washington, D.C.  
November 29, 1999

George E. Rivers  
Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member

---

<sup>4</sup> 5 U.S.C. § 8123(a).