

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LAWRENCE E. SPENCER and DEPARTMENT OF THE NAVY,
NAVAL AIR STATION, Alameda, CA

*Docket No. 98-2196; Submitted on the Record;
Issued November 4, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's benefits; and (2) whether the Office abused its discretion in denying appellant's request for an oral hearing on January 8, 1998.

The Office accepted appellant's claim that he sustained a low back strain on April 17, 1957 in the performance of his federal employment and awarded appropriate benefits.

On December 15, 1994 Dr. Kevin P. Comfort, appellant's treating physician and a Board-certified family practitioner, noted that appellant injured his back at work in 1957 and that he has been disabled since that injury. Dr. Comfort indicated that appellant's condition had not changed. On examination, he noted that appellant had persistent low back pain radiating down his lower extremities. He stated that appellant had trouble stooping, bending, sitting and walking. He also stated that appellant had markedly diminished lumbar spine mobility with only 50 degrees of flexion. Dr. Comfort noted that appellant was unable to toe walk due to pain and that straight leg raising was positive at 50 degrees, bilaterally. He stated that appellant's extensor muscles remain tight. Dr. Comfort concluded that appellant's condition had not improved. He noted that appellant had chronic pain and a persistent inability to tolerate most activities. Dr. Comfort stated that appellant's condition would only progress and that appellant was not able to work in any capacity.

On April 3, 1997 the Office referred appellant to Dr. David Roberts, a Board-certified orthopedic surgeon, for a second opinion examination. Dr. Roberts performed a physical examination on April 21, 1997 and reviewed the history of appellant's injury. He noted that appellant reported a gradual worsening of his back pain over the years, but that the pain remained predominantly in his right low back. On examination, he noted tenderness in the midline from the lower thoracic spine to the sacrum as well as over the right paraspinal muscles from the upper lumbar spine to the sacrum. He also noted mild tenderness over the right trochanter. Dr. Roberts indicated that both flexion and extension of the lumbar spine produced

pain. His neurological examination of appellant's legs was normal. He indicated that the x-rays of record revealed lumbar degenerative joint disease with disc narrowing at L4-5 and L5-S1 with a mild right degenerative lumbar scoliosis. Dr. Roberts diagnosed mechanical low back pain with referred thigh pain secondary to lumbar degenerative joint disease and degenerative disc disease. He stated that there was no objective evidence that the lumbar sprain was currently active and disabling. Dr. Roberts indicated that appellant was not able to return to heavy work due to the presence of degenerative disc disease and degenerative disc disease of the lumbar spine. He stated that the lumbar sprain symptoms usually last several months at most and that it was not the cause of appellant's pain. Dr. Roberts stated that his conclusions were based on the x-ray evidence and the progressive history of appellant's condition.

On May 8, 1997 the Office issued a "[n]otice of [p]roposed [t]ermination of [c]ompensation and [m]edical [b]enefits." In an accompanying memorandum, the Office indicated that Dr. Roberts' report constituted the weight of the medical evidence and that it established that appellant no longer suffered from an employment-related condition. Appellant was given 30 days to submit additional evidence and argument.

By decision dated June 12, 1997, the Office terminated appellant's benefits because the weight of the medical evidence established that the accepted condition had resolved.

On July 9, 1997 appellant requested an oral hearing.

By decision dated January 8, 1998, the Office denied appellant's request for a hearing because appellant's accepted injury occurred prior to July 4, 1966 and he could submit additional medical evidence on reconsideration.

On May 5, 1998 appellant requested reconsideration. In support, appellant submitted a report dated May 23, 1997 from Dr. Douglas S. Denham, an osteopath, indicating that appellant's lumbar strain no longer prevented him from returning to work. He stated that appellant did have a severe degenerative joint disease and degenerative disc disease of the lumbar spine which made it difficult for appellant to work. On August 4, 1997 Dr. Denham again attributed appellant's problems to degenerative joint disease and degenerative disc disease. He stated, however, that an April 21, 1987 report from Dr. James W. Simmons, a Board-certified orthopedic surgeon, related appellant's disc injury to his accepted condition.¹ On February 6, 1998 Dr. Denham opined that appellant had disabling degenerative joint disease unrelated to his lumbar sprain. He stated that appellant was not currently able to work due to his pain. Finally, on May 1, 1998 Dr. Denham stated that appellant continued to have difficulty with back pain which precluded sustained standing or seated work.

Appellant also submitted a May 28, 1998 report from Dr. Comfort who again stated that appellant injured his back in 1957 and that he has been disabled since that injury. He stated that appellant's condition had gradually worsened. Dr. Comfort noted bilateral low back pain which

¹ In his April 27, 1987 report, Dr. Simmons indicated that appellant had an internal disc disruption of L4 and L5 with vacuum phenomenon present and a complete collapse of L4 and L5 discs. He stated that this condition was related to appellant's April 17, 1957 injury, but he did not provide an explanation for his conclusion.

was worse on the right. He noted that pain radiated down appellant's legs and that walking was painful. Dr. Comfort noted muscle stiffness in the morning and that prolonged sitting aggravated the pain. He noted diminished spinal mobility with less than 50 degrees flexion. He indicated that appellant was unable to walk on his heels or toes. Dr. Comfort stated that straight leg raising was positive at 50 degrees bilaterally. He stated that x-rays of the lumbar spine showed significant degenerative changes with sclerosis and multiple bone spurs. Dr. Comfort concluded that appellant had increased pain with greater activity limitations. He stated that appellant had chronic pain and a persistent inability to tolerate most activities. Dr. Comfort indicated that the condition was progressive and that appellant could not work in any capacity.

By decision dated June 15, 1998, the Office reviewed the merits of the case and found that the newly submitted evidence was insufficient to warrant modification of its previous decision. The Office noted that the newly submitted opinions from Drs. Denham and Comfort were not rationalized and that, therefore, appellant failed to establish that his current disability was attributable to his accepted condition.

The Board finds that the Office met its burden in terminating appellant's benefits.

Once the Office accepts a claim, it has the burden of proving that the disability ceased or lessened in order to justify termination or modification of compensation benefits.² After it has determined that an employee has disability causally related to his federal employment, the Office may not terminate compensation without establishing that disability has ceased or that it is no longer related to the employment.³ Furthermore, the right to medical benefits for the accepted condition is not limited to the period of entitlement to disability.⁴ To terminate authorization of medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which no longer requires medical treatment.⁵

In the present case, the Office accepted appellant's claim for a low back strain only. On April 3, 1997 Dr. Roberts, a Board-certified orthopedic surgeon, provided a second opinion examination explaining that lumbar sprain symptoms last several months at most. He, therefore, concluded that appellant's accepted condition had resolved. Dr. Roberts, however, found that appellant's x-rays revealed degenerative joint and disc disease with disc narrowing at L4-5 and L5-S1 and mild right degenerative lumbar scoliosis. He opined that based on the progressive nature of appellant's condition and this x-ray evidence that appellant was disabled due to his degenerative joint and disc disease rather than to his accepted condition of a low back sprain. Consequently, Dr. Roberts provided a well-rationalized medical opinion indicating that appellant's employment-related condition had resolved.

² *Frederick Justiniano*, 45 ECAB 491 (1994).

³ *Id.*

⁴ *Furman G. Peake*, 41 ECAB 361, 364 (1990).

⁵ *Id.*

In his reports dated December 15, 1994 and May 28, 1998, Dr. Comfort, appellant's treating physician and a Board-certified family practitioner, indicated that appellant remained disabled due to his 1957 accepted injury, a low back sprain. Nevertheless, on May 28, 1998 Dr. Comfort noted that appellant's x-rays showed significant degenerative changes with sclerosis and multiple bone spurs. Dr. Comfort, however, failed to explain the relationship of these degenerative changes to appellant's accepted condition of a low back sprain and to his continuing disability. Because Dr. Comfort failed to discuss this medical evidence and failed to provide a medical rationale demonstrating a causal relationship between appellant's current condition and any employment-related residuals, his opinion is entitled to little weight.⁶

Similarly, Dr. Denham, an osteopath, diagnosed appellant with disabling degenerative joint and disc disease in his reports dated May 23 and August 4, 1997, February 6 and May 1, 1998, but failed to explain how this condition related to appellant's accepted condition of a low back strain. In fact, Dr. Denham concluded in his May 23, 1997 report that appellant's lumbar strain was no longer disabling. Consequently, because Dr. Denham failed to explain the relationship of appellant's degenerative conditions to his accepted employment injury and continued disability, his opinion is entitled to little weight.⁷

Accordingly, the well-rationalized opinion of Dr. Roberts establishing that appellant's employment-related condition has resolved outweighs the unexplained opinions of Drs. Comfort and Denham.⁸ The Office, therefore, met its burden to terminate benefits.

The Board also finds that the Office properly denied appellant's request for a hearing in its January 8, 1998 decision.

As the Board held in *Rudolph Bermann*,⁹ the Federal Employees' Compensation Act¹⁰ conferred no right to a hearing before the Office until the enactment of the amendment in 1966. Since the amendment was not retroactive, there is no right to a hearing for injuries like appellant's which occurred prior to 1966.¹¹ The Office, however, could exercise its discretion and grant a hearing.¹² In this case, the Office exercised its discretion and determined that the issue in this case could be resolved without a hearing by the submission of additional evidence on reconsideration. The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and

⁶ *Larry Warner*, 43 ECAB 1027 (1992).

⁷ *Id.*

⁸ *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996); *Melvina Jackson*, 38 ECAB 443 (1987).

⁹ 26 ECAB 354.

¹⁰ 5 U.S.C. §§ 8101-8193.

¹¹ *Id.*

¹² *Id.*

probable deduction from established facts.¹³ In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's hearing request which could be found to be an abuse of discretion. For these reasons, the Office properly denied appellant's request for a hearing.

The decisions of the Office of Workers' Compensation Programs dated June 15 and January 8, 1998 are affirmed.

Dated, Washington, D.C.
November 4, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹³ *Daniel J. Perea*, 42 ECAB 214, 221 (1990).