

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN H. CARTER and DEPARTMENT OF THE NAVY,
NAVAL MEDICAL COMMAND, Philadelphia, PA

*Docket No. 99-62; Submitted on the Record;
Issued November 2, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective June 21, 1998.

On April 11, 1988 appellant, a custodial worker, sustained an injury while in the performance of duty. The Office accepted his claim for the conditions of lumbosacral strain and herniated nucleus pulposus at the L5-S1 level. Appellant sustained a recurrence of disability on June 13, 1990. The Office placed him on the periodic compensation rolls effective September 23, 1990.

To resolve a conflict in medical opinion between appellant's attending physician, Dr. William L. Chollak, and a second-opinion physician, Dr. Noubar Didizian, the Office referred appellant to a third physician Dr. Joseph J. Tolan. All three physicians were Board-certified orthopedic surgeons. In his report of September 5, 1996, Dr. Tolan found that while routine x-rays were negative, an electromyogram (EMG) showed bilateral S1 and left L5 neuropathy and a computerized axial tomography (CAT) scan showed L5-S1 herniated discs "with the lower one being central and to the right." The impartial medical specialist observed that the laboratory evaluations, magnetic resonance imaging (MRI) scan, CAT scan and EMG did indicate that there was some resolving neuropathy of the nerves of the lower extremities. He stated that there was also evidence of mild bulging and herniated discs, though the disc protrusions were evidently not causing any marked irritation of the cord or sciatic nerve roots. Dr. Toland noted that after such a long period of time appellant had decompensated muscles, and that appellant never had any problems with his back prior to the initial injury in January 1988. He concluded:

"It must, therefore, be stated that all of the signs and symptoms he is showing are secondary to the traumatic incidents he experienced at work.

“The effects of this injury have not yet completely ceased since he still has pain and limited function.

“In view of the fact that he does have herniated discs, I would not expect that he will ever return to preinjury level.”

Dr. Toland opined that appellant should not be doing heavy lifting and should be given sedentary work. Appellant’s problem, he stated, was low back and lower extremity referral.

The Office continued to pay compensation benefits. Approximately a year after Dr. Toland’s September 5, 1996 report, as part of a periodic rolls review, the Office referred the case back to him for an opinion on appellant’s current work restrictions based on the accepted conditions. However, the record indicates that Dr. Toland had retired. The Office referred appellant to Dr. Leonard Klinghoffer, a Board-certified orthopedic surgeon, for additional medical studies.

In a report dated December 18, 1997, Dr. Klinghoffer related appellant’s history and noted that appellant still had frequent low back pain radiating down the back of both lower extremities to the toes. On physical examination appellant demonstrated a limited range of active low back motion with complaints of pain and supine straight leg raising of only 30 degrees caused a complaint of low back pain. X-rays showed marked degenerative spurs on the left side of the opposing margins of the bodies of L2 and L3, milder spurs on both sides at the L3-4 level, minimal anterior spurring at the L2-3 and L4-5 levels, moderate-sized spurring anteriorly at the body of L5, minimal narrowing of the L2-3 and lumbosacral discs and some sclerosis of the lumbosacral apophyseal joints bilaterally. Dr. Klinghoffer reported that he reviewed studies brought by appellant, including MRI studies dated October 18, 1990, January 6, 1992 and November 29, 1993. Findings, he stated, were the same in all three: There was a normal signal in all of the intervertebral discs; there was a moderate bulging of the discs between L4-5 and S1; the L5 bulge was a broad-based midline bulge; the L4-5 bulge was also in the midline but was less apparent; there was no evidence of any nerve root irritation compromise at either level, and there was no sign of disc herniation. Dr. Klinghoffer noted that radiologist reports describing the MRI studies indicated that there was a bulging of the disc at L3-4 and small disc herniations at L4-5 and L5-S1 that showed no change between January 1992 and November 1993. Dr. Klinghoffer reported that a CT scan dated June 20, 1988 revealed circumferential bulging of the L4-5 disc, most prominent on the left. There was a similar, more uniform but slightly less prominent circumferential bulge of the L5-S1 disc, most prominent in the posterior midline.

Dr. Klinghoffer reviewed medical records, including reports from appellant’s attending physician, Dr. Chollak, and the report of the earlier second-opinion physician, Dr. Didizian. Dr. Klinghoffer had this to say about Dr. Toland’s September 5, 1996 report: “He felt that the patient had developed decompensated muscles and he felt that since the patient gave a history that was free of any problems with his back before 1988, the effects of the 1988 injuries had not yet completely cleared up.”

Dr. Klinghoffer reported that appellant’s physical examination did not reveal any abnormality either orthopedic or neurologic. He stated that appellant’s complaints of pain were

compatible with the degenerative arthritis visible in the low back x-rays and that some intermittent low back symptoms seemed reasonable in this 58-year-old man. He stated that appellant's CT scan and his three MRI studies all revealed some disc bulges at multiple levels, but he saw nothing that he would characterize as a disc herniation: "I do not believe that he has a disc herniation or ever had one." Dr. Klinghoffer stated that none of the records he reviewed discussed any abnormal neurologic findings at any time since the onset of appellant's symptoms in 1988. He opined as follows:

"On the basis of his history and the information in his records, I believe that he sprained his back in the course of his work in 1988, first when he slipped on some ice and again, when he was unloading linens from a cart. He may have suffered temporary recurrences from those injuries in the course of physical activities during the subsequent year or so, but nine years have elapsed, there are no objective findings, and I believe that he has recovered from the physical effects of whatever it was that happened to him in the course of his work in 1988."

Dr. Klinghoffer stated that appellant required no treatment related to the incidents in 1988 and had no related disability.

In a report dated January 26, 1998, Dr. Chollak stated that he last evaluated appellant on January 16, 1998 and that appellant continued to have symptoms in both his back and legs. "He can only walk short distances without getting numbness down his legs, right being worse than left." Dr. Chollak noted that appellant also suffered from central herniated discs at the C3-4 and C4-5 levels and foraminal stenosis. "At this stage," he stated, "with his chronic sciatica, we really do n[o]t feel [appellant] will improve much further. We feel that [appellant] is permanently disabled from his full-time regular work as a result of injuries sustained in 1988 and that compensation benefits should not be terminated." In his treatment note of January 16, 1998, Dr. Chollak stated: "At this stage we really do n[o]t expect any improvement. He has chronic sciatica."

In a decision dated June 4, 1998, the Office terminated appellant's compensation benefits on the grounds that the weight of the medical evidence, as represented by the second opinion of Dr. Klinghoffer, together with the lack of probative medical evidence from the attending physician, Dr. Chollak, indicated that appellant was completely recovered from his work injury.

The Board finds that the Office has not met its burden of proof to justify the termination of appellant's compensation benefits.

It is well established that, once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.¹ After it has determined that an employee has disability causally related to his or her federal employment, the Office may not

¹ *Harold S. McGough*, 36 ECAB 332 (1984).

terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.²

The Office terminated appellant's compensation benefits on the basis of the December 18, 1997 report of Dr. Klinghoffer. The Board finds, however, that his opinion is of diminished probative value and does not represent the weight of the medical opinion evidence. Dr. Klinghoffer reported that appellant only sprained his back in 1988. He did not accept that appellant sustained a herniated nucleus pulposus at L5-S1, stating: "I do not believe that he has a disc herniation or ever had one." This is contrary to the statement of accepted facts³ and the September 5, 1996 opinion of the impartial medical specialist, Dr. Toland, who reported: "In view of the fact that he does have herniated discs, I would not expect that he will ever return to preinjury level." As for the back sprain, Dr. Klinghoffer concluded that appellant had recovered from the physical effects "of whatever it was that happened to him" because nine years had elapsed and there were no objective findings. Dr. Toland reported that an EMG showed bilateral S1 and left L5 neuropathy and that a CAT scan showed L5-S1 herniated discs "with the lower one being central and to the right." Further, the impartial medical specialist observed that the laboratory evaluations, MRI scan, CAT scan and EMG did indicate that there was some resolving neuropathy of the nerves of the lower extremities and that there was also evidence of mild bulging and herniated discs. Dr. Klinghoffer's opinion is also inconsistent with the opinion of the attending physician, Dr. Chollak, who continued to diagnose chronic sciatica and permanent disability as a result of injuries sustained in 1988. The issue of objective findings aside, Dr. Klinghoffer's observation that nine years had elapsed is immaterial without convincing medical rationale explaining how this lapse of time leads to a reasonable medical conclusion that residuals of the accepted injuries have resolved.

As a second-opinion physician, Dr. Klinghoffer is entitled to his professional opinion and need not agree with the impartial medical specialist or with the Office's acceptance of a herniated nucleus pulposus at L4-5. However, the opinion of the impartial medical specialist is entitled to special weight under the law,⁴ and until such time as contrary medical evidence outweighs this opinion, or until such time as there is sufficiently probative medical opinion evidence to justify a rescission of the Office's acceptance of a herniated nucleus pulposus at L4-5,⁵ Dr. Klinghoffer's opinion may not represent the weight of the medical evidence on this accepted condition.

² *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

³ See *Charles F. Picuillo*, 38 ECAB 646 (1987) (finding that the opinion of an impartial medical specialist was not premised on the statement of accepted facts and thus was of diminished probative value).

⁴ E.g., *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

⁵ The Office must inform claimants correctly and accurately of the grounds on which a rejection rests so as to afford them an opportunity to meet, if they can, any defect appearing therein. *John M. Pittman*, 7 ECAB 514 (1955). The Office may not, therefore, find that residuals of an accepted employment injury have ceased by a particular date when the evidence upon which the Office's decision rests tends to support that, in fact, the injury never occurred.

Because Dr. Klinghoffer's opinion is of diminished probative value, the Office has not met its burden of proof to justify the termination of appellant's compensation benefits.⁶

The June 4, 1998 decision of the Office of Workers' Compensation Programs is reversed.

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

George E. Rivers
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁶ The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c). The Board therefore has no jurisdiction to review Dr. Chollak's July 1, 1998 report or any evidence submitted to the record after the Office's June 4, 1998 decision.