

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM H. BROWN and DEPARTMENT OF THE NAVY,
MILITARY SEALIFT COMMAND, Bayonne, NJ

*Docket No. 99-1584; Submitted on the Record;
Issued November 19, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, 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 effective March 30, 1996.

The Board has duly reviewed the case on appeal and finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits.

On April 1, 1997 appellant, then a 41-year-old engineer-utility man, filed a claim alleging that on March 31, 1997 he tripped and fell over a steam hose while walking on the quarterdeck in the performance of duty. On June 24, 1997 the Office accepted appellant's claim for contusion of both elbows, lumbosacral sprain and contusion of the right shoulder and subsequently began paying appropriate compensation benefits. Appellant stopped work on April 1, 1997 and has not returned. The Office proposed to terminate appellant's compensation benefits on October 19, 1998. By decision dated December 3, 1998, the Office terminated appellant's compensation benefits effective that date, finding that appellant had no continuing disability as a result of his March 31, 1997 employment injury. Appellant requested an oral hearing, but subsequently withdrew his request and instead requested reconsideration and submitted additional evidence in support of his request. In a decision dated March 24, 1999, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant review of its prior decision.

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 terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.² The test of "disability" under the Federal Employees' Compensation Act is

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

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

whether an employment-related impairment prevents the employee from earning the wages the employee was receiving at the time of injury.³

In its decision dated December 3, 1998, the Office terminated appellant's compensation on the strength of the September 10, 1998 report of Dr. Nate V. Bondi, a Board-certified orthopedic surgeon selected to resolve a conflict concerning the extent of disability, if any, causally related to appellant's March 21, 1997 employment injury.⁴ The Board finds, however, that Dr. Bondi's report fails to justify the Office's action in terminating appellant's compensation benefits.

When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁵

In his September 10, 1998 report, after examining appellant and reviewing the medical evidence of record, Dr. Bondi states:

“Based on [appellant's] history and clinical findings as of September 10, 1998, with the provided medical records, there is a direct causal relationship between the injury to his shoulders and the contusion to his elbows. However, I believe the accident may have been an aggravation of a preexisting lumbosacral pathology which was prevalent, by history of a previous accident in 1990. Furthermore, the diagnosis of a degenerative disc in a patient weighing 290 pounds is not an uncommon finding.

“Considering the review of all his medical records and statements of fact concerning the lumbosacral spine, I firmly believe that the claimant was being treated all along for a lumbosacral strain or sprain. However, once an MRI scan

351 (1975).

³ 20 C.F.R. § 10.5(a)(17).

⁴ The Office found that a conflict existed between appellant's treating physician, Dr. Robert Haar, a Board-certified orthopedic surgeon, and Dr. Andrew Dowd, the Office second opinion physician. Dr. Haar submitted a series of reports in which he opined that appellant remained totally disabled for work, primarily due to his back condition. While the Office accepted that appellant had a lumbosacral sprain, a January 30, 1998 magnetic resonance imaging (MRI) scan revealed degenerative disc disease with a broad-based central herniation at L5-S1. Dr. Dowd opined in his initial report dated April 18, 1998 and addendum dated June 22, 1998, that appellant remained partially disabled due to his injury-related conditions, but could perform light duty, with restrictions, six hours a day. Dr. Dowd further opined that the disc herniation shown on the January 30, 1998 MRI scan, according to the history of this claimant, appears to be causally related to the injury of March 31, 1997. Dr. Dowd concluded that he felt that it was likely that over time, appellant would be able to work in a full-duty position and recommended that he be reevaluated in three months.

⁵ *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

was performed, they were treating the MRI scan and no longer [appellant's] objective findings.

“Based on the information gathered today with consideration that the date of injury is now 18 months since the time of his accident, [appellant] has made a timely and complete recovery from his injury to his right shoulder and elbows. Furthermore, it is my opinion that [appellant] sustained an aggravation of a preexisting degenerative disc problem which had been longstanding in nature. Thus, I feel [appellant] is capable of working on a restricted basis according to the federal guidelines.”

Dr. Bondi concluded that, there are no objective findings to indicate current need for orthopedic management or physical therapy,” “there are no permanent sequelae referable to his accident of March 21, 1997” and “the prognosis remains good for a full functional recovery from the injuries of March 31, 1997.”

The Office relied upon Dr. Bondi's September 10, 1998 report in reaching its decision to terminate appellant's compensation benefits. However, this report does not clearly establish that appellant recovered from the accepted lumbosacral sprain injury. The report of Dr. Bondi does not establish that appellant has no residual disability due to his accepted employment injury as he noted that appellant sustained an aggravation of a preexisting degenerative disc condition which would prevent him from working except with restrictions. Dr. Bondi did not state, however, whether the aggravation was temporary in nature and, if so, when it ceased. There is no medical evidence in the record that establishes that appellant no longer has residuals. The Office failed to meet its burden of proof to terminate appellant's compensation benefits.

The decisions of the Office of Workers' Compensation Programs dated March 24, 1999 and December 3, 1998 are hereby reversed.

Dated, Washington, D.C.
November 19, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member