

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PETE P. CARREON and DEPARTMENT OF THE AIR FORCE,
BROOKS AIR FORCE BASE, San Antonio, TX

*Docket No. 98-1028; Submitted on the Record;
Issued April 14, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation benefits as of July 31, 1997 on the basis that appellant's accepted conditions had resolved; and (2) whether the Office abused its discretion by refusing to reopen appellant's case for a merit review of his claim under 20 C.F.R. § 10.138.

On October 26, 1994 appellant, then a 58-year-old laborer, was injured in the performance of duty when a motor vehicle struck a piece of lawn maintenance equipment he was operating at the time. Appellant described the equipment as a gasoline-powered weed-eater. He explained that the impact of the vehicle forced the weed-eater's motor into his right hip causing him to experience "great pain." Appellant ceased work on the day of his injury. The Office initially accepted the claim for right hip contusion and later accepted the additional conditions of lumbar strain and right shoulder contusion as resulting from the October 26, 1994 employment incident. Additionally, the Office placed appellant on the periodic compensation rolls.

In a report dated September 25, 1996, appellant's attending physician, Dr. Daniel C. Valdez, a Board-certified orthopedic surgeon, noted that appellant continued to have difficulty with his cervical and lumbar spine as a result of a number of injured discs. He further noted that appellant had failed all attempts of conservative/nonoperative treatment and that, from an orthopedic standpoint, appellant was not a surgical candidate. Dr. Valdez concluded that appellant could not work and would not be able to work in the future and, therefore, he should be considered 100 percent disabled on a permanent basis.

In December 1996, the Office referred appellant for examination by Dr. Govindasam Durairaj, a Board-certified orthopedic surgeon. In a report dated January 25, 1997, Dr. Durairaj reviewed appellant's history of injury and noted that he complained of pain in his neck, right shoulder and lower back. He conducted a physical examination and reviewed appellant's prior treatment records, including various objective studies and magnetic resonance

imaging of appellant's right shoulder and cervical and lumbar spine. Dr. Durairaj's clinical impression was right shoulder impingement syndrome and multiple degenerative changes in the cervical and lumbar spine, with disc herniations at C4-5, C5-6, C6-7 and L5-S1. Additionally, Dr. Durairaj commented that appellant did not currently suffer from lumbar strain and that his symptoms were much more exaggerated when compared to the objective findings during examination. Regarding the issue of causal relationship, he explained that appellant had preexisting degenerative conditions that were aggravated by his employment injury. Dr. Durairaj further indicated that the herniations of the disc in the neck were probably related to the accident. Finally, with respect to the question of appellant's ability to resume any type of work, he stated that appellant probably would never be able to resume his former duties as a laborer. However, Dr. Durairaj indicated that appellant probably could perform light duty from 4 to 6 hours, with a lifting restriction of no more than 20 pounds. After noting additional restrictions with respect to bending, carrying, climbing, sitting, walking and standing, he concluded that appellant could "[b]asically ... be placed on a desk job only."

Because of the differing opinions regarding appellant's ability to work, the Office referred appellant for an impartial medical examination with Dr. Gene R. Smith, a Board-certified orthopedic surgeon. In a report dated March 5, 1997, Dr. Smith indicated that appellant had degenerative joint disease generalized in his spine, mainly in the cervical and lumbar areas and also in the right acromioclavicular joint. He explained that these were all symptomatic, but not attributable to appellant's employment injury. The only conditions attributable to appellant's employment were right shoulder strain and right hip strain, which Dr. Smith indicated appellant had completely recovered from and, therefore, required no further treatment.

In a notice of proposed termination of compensation dated June 30, 1997, the Office advised appellant that it proposed to terminate his compensation benefits because the weight of the medical evidence, as represented by Dr. Smith's March 5, 1997 opinion, supported that all injuries related to the October 26, 1994 work incident had resolved. Additionally, the Office advised appellant that if he disagreed with the proposed action he should submit additional medical evidence or argument within 30 days.

Appellant, through his congressional representative, challenged the Office's proposed decision to terminate compensation. Additionally, the Office received a July 21, 1997 report from Dr. Valdez and a similarly dated report from Dr. Fernando T. Avila, a Board-certified anesthesiologist specializing in pain management, who indicated that he had treated appellant on several occasions beginning in March 1995 and that he had reviewed the recent reports of Drs. Durairaj and Smith. He noted his agreement that appellant had some degenerative conditions of the neck, back and right shoulder. Dr. Avila explained that appellant has had increasing pain since the accident and has been unable to return to his regular occupation. He expressed the opinion that appellant's current complaints are directly related to the October 26, 1994 accident in that he sustained an aggravation of his preexisting conditions. Dr. Avila concluded that appellant was unable to return to work at the present time and in the foreseeable future.

In response to Dr. Smith's findings, Dr. Valdez indicated in a July 21, 1997 report that the injuries to appellant's cervical spine, shoulder and lower lumbar are all related to the

October 26, 1994 employment injury “in that none of these were present prior to that accident and all these problems are present subsequent to the accident.” He further indicated that appellant continues to have severe problems which preclude his ability to work.

By decision dated July 31, 1997, the Office terminated appellant’s compensation benefits effective that same day on the grounds that the weight of the medical evidence established that the accepted conditions had resolved. In an accompanying memorandum, the Office noted that Dr. Smith’s March 5, 1997 report, represented the weight of the medical evidence and that the July 21, 1997 reports of Drs. Valdez and Avila contained inadequate rationale and, therefore, were of diminished probative value. Accordingly, the Office concluded that appellant was no longer entitled to compensation and medical benefits as the evidence established that he had no continuing condition as a result of his October 26, 1994 work-related injury.

On September 6, 1997 appellant requested reconsideration through his congressional representative. Accompanying the request was an August 11, 1997 letter, from appellant, in which he stated: “I was injured on duty. And this injury is for the rest of my life.” Appellant, however, did not submit any additional evidence along with his request for reconsideration. The Office by decision dated December 8, 1997, denied appellant’s request for reconsideration without reaching the merits of his claim. Appellant subsequently filed an appeal with the Board on January 27, 1998.

The Board finds that the Office failed to meet its burden of proof in terminating appellant’s compensation benefits as of July 31, 1997.

Once the Office has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.¹ Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.²

In the instant case, the Office determined that a conflict of medical opinion existed based on the reports of Drs. Valdez and Durairaj, and, therefore, the Office properly referred appellant to an impartial medical examiner.³ In cases where the Office has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁴ The Board finds that the impartial medical examiner’s report dated

¹ *Curtis Hall*, 45 ECAB 316 (1994); *John E. Lemker*, 45 ECAB 258 (1993); *Robert C. Fay*, 39 ECAB 163 (1987).

² *Jason C. Armstrong*, 40 ECAB 907 (1989).

³ The Federal Employees’ Compensation Act provides that if there is disagreement between the physician making the examination for the Office and the employee’s physician, the Office shall appoint a third physician who shall make an examination. 5 U.S.C. § 8123(a); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

⁴ *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

March 5, 1997, is not sufficiently rationalized. Whereas Drs. Durairaj and Avila explained that appellant had preexisting conditions that were aggravated by his October 26, 1994 employment injury Dr. Smith did not specifically address whether the employment injury aggravated appellant's preexisting conditions. The impartial medical examiner noted the following with respect to appellant's preexisting conditions:

"I think this 60 year old male has degenerative joint disease generalized in his spine, mainly in the cervical and lumbar area where the stress risers are the greatest; also the right acromioclavicular joint. These are all symptomatic but not attributable to the accident in question."

Noticeably absent from Dr. Smith's report is any explanation or discussion as to why appellant's back and shoulder symptoms, which admittedly rendered him unable to perform his prior duties as a laborer, were not attributable to his accepted employment injury of October 26, 1994. While the doctor indicated that appellant had recovered completely from his employment-related injuries, he did not explain why the employment injuries had resolved or even discuss whether there had been a temporary or permanent aggravation of appellant's degenerative joint disease of the spine or his shoulder condition. The noted deficiencies in the impartial medical examiner's report are particularly troublesome in that appellant is apparently disabled due to his back and shoulder condition and the Office previously accepted that the incident of October 26, 1994 caused injuries to the same areas of appellant's body. Consequently, Dr. Smith's mere conclusion that appellant's current symptoms are not attributable to the "accident in question" is insufficient to establish that appellant had no continuing condition as a result of his October 26, 1994 work-related injury. Inasmuch as Dr. Smith failed to provide adequate rationale to support his opinion, the Office improperly relied upon this evidence as a basis for terminating appellant's compensation. Under the circumstances, the Office has failed to meet its burden, and accordingly, the decision to terminate compensation is reversed.

The decisions of the Office of Workers' Compensation Programs dated December 8 and July 31, 1997 are hereby, reversed.⁵

Dated, Washington, D.C.
April 14, 2000

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

⁵ Given the Board's disposition of the merit issue in the present case, it is not necessary for the Board to specifically address the nonmerit issue of whether the Office, by decision dated December 8, 1997, properly denied appellant's September 6, 1997 request for reconsideration.