

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROY T. DAY, SR. and DEPARTMENT OF HOUSING URBAN
DEVELOPMENT, OFFICE OF MANAGEMENT & FIELD COORDINATION,
Richmond, VA

*Docket No. 98-934; Submitted on the Record;
Issued February 9, 2000*

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion in refusing to accept appellant's March 3, 1997 cervical surgery as causally related to his May 1, 1996 employment injury; and (2) whether the Office properly terminated appellant's compensation on the grounds that he no longer had any residuals or disability due to either his December 10, 1985 or May 1, 1996 employment injury.

On October 17, 1996 appellant, then a 51-year-old supervisory equal opportunity specialist, filed a traumatic injury claim (Form CA-1), assigned number A25-0494445, alleging that on May 1, 1996 he experienced neck and back pain with numbness and tingling in his upper and lower arms and hands after prolonged sitting during a training session at the University of Maryland, College Park campus. Appellant stopped work on May 1, 1996 and returned to work on September 9, 1996.¹

By letter dated December 24, 1996, the Office accepted appellant's claim for a resolved cervical sprain.

The Office received the January 31, 1997 medical treatment note of Dr. J. Michael Simpson, an orthopedic surgeon and appellant's treating physician, regarding his objective test results. He stated that the study clearly showed a pseudoarthrosis at the C4-5 segment which was the most recent operative level that he had completed on appellant. Dr. Simpson noted

¹ Prior to the instant claim, appellant filed a traumatic injury claim assigned number A25-281011 on December 12, 1985 alleging that he sustained skull, neck, shoulder, lower back and tail bone injuries on December 10, 1985 when he fell out of his chair. The Office accepted appellant's claim for a contusion to the skull, cervical spine and low back, and a herniated disc at L4-5. On May 7, 1996 appellant filed a claim (Form CA-2a) alleging that he sustained a recurrence of his December 10, 1985 employment injury on May 1, 1996. In a September 16, 1996 letter, the Office advised appellant that he claimed a new injury on May 1, 1996 rather than a recurrence of his December 10, 1985 employment injury.

appellant's desire to consider surgical intervention given his persistent symptoms and explained that he told appellant that it was rare to operate on pseudoarthrosis in the cervical spine. He also stated that the pseudoarthrosis could be the potential cause of appellant's symptoms, but that there was no way to definitely prove this true. Dr. Simpson further stated that it was reasonable to perform the surgery given appellant's difficulties in performing his job duties.

By letter dated February 12, 1997, the Office referred appellant, together with the medical records and a statement of accepted facts, to Dr. William K. Fleming, a Board-certified orthopedic surgeon, to determine whether appellant sustained a severe cervical condition as a result of the prior work injury or aggravated by the May 1, 1996 employment injury.

Meanwhile, appellant underwent a foraminotomy of the left C6-7 nerve root and posterior cervical fusion at C4 to C7 on March 3, 1997 which was performed by Dr. Simpson.

Dr. Fleming submitted an April 29, 1997 medical report indicating appellant's complaints and medical treatment. He also indicated his findings on physical and objective examination. Dr. Fleming diagnosed status post cervical fusion of C4-5, C5-6 and C6-7. Dr. Fleming stated that the work-related conditions included disc herniation at C4-5 and exacerbation of the above with exacerbation of the osteophyte bony ridging at C3-4, C4-5 secondary to the May 1, 1996 cervical sprain. He further stated that these conditions were probably present, especially the bony ridging, prior to the May 1, 1996 employment injury. He then stated that given appellant's history, he most likely sustained a herniated disc while lifting, and carrying books and supplies during the mandatory course. Dr. Fleming stated that a nonwork-related condition was probably related to the numbness in appellant's left three fingers. He stated that this should be further investigated because it appeared to be carpal tunnel syndrome or more of a distal neuropathy rather than a proximal neuropathy. Regarding the Office's questions about appellant's permanent impairment or residuals due to the May 1, 1996 employment injury, Dr. Fleming stated that appellant would suffer decreased range of motion of the cervical spine and may have occasional neck pain depending on his activity level. Dr. Fleming then explained why appellant would have continued pain. Concerning the Office's questions about the revision of appellant's claim to include a severe cervical condition, he stated that he could not make such a determination because he was not given appellant's history prior to a July 1996 cervical fusion. Dr. Fleming stated that appellant had a preexisting condition, but that he was not sure of its origin. He then stated that, if it was work related, the sprain, which was ultimately discovered as a herniated disc, was also work related. Additionally, Dr. Fleming stated that if the previous fusion was not related then the sprain which was later found to be a cervical herniated disc was work related.

On June 9, 1997 an Office medical adviser reviewed the case record to determine whether appellant's March 3, 1997 surgery was warranted due to the effects of the May 1, 1996 employment injury. The Office medical adviser stated that the medical record supported the need for the March 3, 1997 cervical surgery, but that appellant's previous surgery on August 2, 1994 was not work related. The Office medical adviser also stated that appellant's spondylosis at C4-5 did not develop on May 1, 1996, but must be regarded as a preexisting condition. The Office medical adviser found that the disc herniation at the same level was probably related to

the degeneration and spondylosis. The Office medical adviser concluded that the March 3, 1997 surgery was not work related.

On June 19, 1997 a second Office medical adviser reviewed the case record. The Office medical adviser responded no to the Office's question whether the medical record supported the need for the March 3, 1997 surgery due to the effects of the May 1, 1996 employment injury. The Office medical adviser explained that the surgery performed was due to a preexisting condition caused by deterioration resulting from the 1994 surgery.

In response to a bill submitted by appellant for his March 3, 1997 cervical surgery, the Office advised him by letter dated June 20, 1997 that it would not pay for the surgery based on the Office medical adviser's opinion that it was not warranted by the May 1, 1996 employment injury. The Office advised appellant to submit comments within 30 days. Appellant submitted a June 26, 1997 letter indicating his continued neck pain, surgeries and his health insurance company's refusal to pay his medical bills. In a response letter dated July 2, 1997, the Office advised appellant that there was a conflict in the medical evidence as to the causal relationship of the surgery and that he would be referred to an impartial medical examiner for examination.

By letter dated September 10, 1997, the Office referred appellant, together with the medical records, a statement of accepted facts, to Dr. Howard G. Stern, a Board-certified orthopedic surgeon with a specialty practice in spinal surgery, for an impartial medical examination. By letter of the same date, the Office advised Dr. Stern of the referral.

Dr. Stern submitted an October 13, 1997 medical report reviewing the history of appellant's December 10, 1985 and May 1, 1996 employment injuries, medical treatment, and family and social background. Dr. Stern diagnosed cervical spondylosis and lumbar spondylosis. He opined that appellant did not suffer residuals from his May 1, 1996 employment injury. He explained that no energy was imparted to the cervical spine as a result of prolonged sitting and that prolonged sitting did not constitute cervical trauma. Dr. Stern further explained that appellant did not sustain significant trauma to the cervical spine on May 1, 1996, but that the symptoms he suffered on that date were the result of his preexisting cervical spondylosis. Dr. Stern concluded that appellant's cervical condition and treatment subsequent to May 1, 1996 constituted an exacerbation of the preexisting cervical spondylosis. Regarding the Office's question whether appellant suffered residuals from any other employment-related or nonemployment-related injury, Dr. Stern stated that appellant suffered residuals from cervical spondylosis, which was a degenerative condition. He could not state with medical certainty that appellant's cervical spondylosis and treatment between December 1985 and the present time were related to any work-related injury, specifically, the May 1, 1996 injury. Concerning the Office's question whether appellant's March 3, 1997 surgery was due to the May 1, 1996 employment injury, Dr. Stern stated that it was not related to the effects of the May 1, 1996 work injury. He explained that appellant did not sustain any trauma to the neck on May 1, 1996, but that he was merely sitting for a prolonged period. He further explained that prolonged sitting for several hours cannot cause cervical spondylosis or disc herniation. He concluded that appellant's March 3, 1997 surgery was not warranted for the effects of any other injury, work related or otherwise, but was constituted treatment of a chronic degenerative condition, the cervical spondylosis. In an accompanying work restriction evaluation, Dr. Stern indicated that

appellant could work full duty for eight hours per day within the guidelines of his job description for his current clerical job.

By decision dated November 4, 1997, the Office found the evidence of record insufficient to establish that appellant's March 3, 1997 surgery was due to either his December 10, 1985 or May 1, 1996 employment injuries.

The Board finds that the Office did not abuse its discretion in refusing to accept appellant's March 3, 1997 cervical surgery as warranted by his May 1, 1996 employment injury.

Section 8103 of the Federal Employees' Compensation Act provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed or recommended by a qualified physician, which the Office considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation.² In interpreting this section of the Act, the Board has recognized that the Office has broad discretion in approving services provided under the Act. The only limitation on the Office's authority is that of reasonableness.³ 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 probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.⁴

Section 8123(a) of the Act provides that if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.⁵

In this case, Dr. Simpson, an orthopedic surgeon and appellant's treating physician, performed surgery on March 3, 1997 which he attributed to appellant's employment. An Office medical adviser opined that the surgery was not related to appellant's May 1, 1996 employment injury. Inasmuch as a conflict was created in the medical opinion evidence between Dr. Simpson and the Office medical adviser as to whether appellant's March 3, 1997 surgery was due to his May 1, 1996 employment injury, the Office properly referred appellant to Dr. Stern, a Board-certified orthopedic surgeon with a specialty practice in spinal surgery, for an impartial medical evaluation.

When there exists 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

² 5 U.S.C. § 8103.

³ *Daniel J. Perea*, 42 ECAB 214 (1990).

⁴ *Francis H. Smith*, 46 ECAB 392 (1995); *Daniel J. Perea*, *supra* note 3.

⁵ 5 U.S.C. § 8123(a); *see also Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁶

In his October 13, 1997 medical report, Dr. Stern opined that appellant's March 3, 1997 cervical surgery was not related to the effects of his May 1, 1996 work injury and supported his opinion with medical rationale. The Board finds that Dr. Stern's opinion is rationalized, and based on an accurate factual and medical background to support a finding that appellant's March 3, 1997 surgery was not due to the effects of his May 1, 1996 employment injury. Therefore, it must be accorded special weight on the issue of whether the Office abused its discretion in refusing to accept this surgery.

As noted above, the Office has discretionary authority regarding the authorization of medical treatment. Based on the medical evidence of record, the Board finds that the Office did not abuse its discretion in denying authorization for appellant's cervical spine surgery in this case.

The Board further finds that the Office properly terminated appellant's compensation on the grounds that he no longer had any residuals or disability due to either his December 10, 1985 or May 1, 1996 employment injury.

Once the Office has accepted a claim and pays compensation, it has the burden of proof of justifying termination or modification of compensation benefits.⁷ 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.⁸

In this case, the Office relied on the medical opinion of Dr. Stern in terminating appellant's compensation benefits. In his October 13, 1997 medical report, Dr. Stern opined that appellant did not suffer any residuals from his accepted employment injuries and provided medical rationale in support of his opinion.

Inasmuch as Dr. Stern's medical opinion constitutes the weight of the reliable, probative and substantial evidence, the Board finds that the Office properly terminated appellant's compensation benefits on the grounds that he no longer had any residuals or disability due to either his December 10, 1985 or May 1, 1996 employment injuries.

⁶ *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

⁷ *Curtis Hall*, 45 ECAB 316 (1994); *John E. Lemker*, 45 ECAB 258 (1993); *Robert C. Fay*, 39 ECAB 163 (1987).

⁸ *Jason C. Armstrong*, 40 ECAB 907 (1989).

The November 4, 1997 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.
February 9, 2000

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member