

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FOREST J. TIDABOCK, JR. and DEPARTMENT OF THE NAVY,
PHILADELPHIA NAVAL SHIPYARD, Philadelphia, PA

*Docket No. 99-1586; Submitted on the Record;
Issued January 21, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation benefits as of October 12, 1997 on the basis that appellant's employment-related disability had ceased.

On March 27, 1990 appellant, then a 47-year-old supervisory planner and estimator, tripped on a plumbing clean-out plate and fell against a wall and onto the floor. Appellant described the nature of his injury as "severe back pain [and] pain down [the] left leg." He stopped working on March 28, 1990. The Office accepted appellant's claim for cervical and lumbar strain and aggravation of degenerative joint disease of the lower back, and appellant was placed on the periodic compensation roll. He did not return to work following his March 27, 1990 employment injury.

Dr. Dhiraj K. Panda, a Board-certified neurosurgeon and appellant's treating physician, had previously operated on appellant's back in 1986 and again in December 1989 for nonwork-related injuries. He performed two lumbar laminectomies to repair herniated discs at L2-L3 and L5-S1. Appellant returned to work following his most recent back surgery just two weeks prior to his employment injury on March 27, 1990. Dr. Panda examined appellant two days after the March 27, 1990 incident and diagnosed cervical and lumbar strain and sprain. He also recommended that appellant undergo physical therapy. In the months following his employment injury, appellant continued to complain of lower back and left leg pain. Dr. Panda recommended continued physical therapy and epidural steroid injections. He also recommended that appellant participate in a pain management program, which appellant did for a period of three weeks before discontinuing treatment in February 1991.

In his most recent report dated May 24, 1991, Dr. Panda noted that appellant continued to complain of low back and left leg pain and that appellant walked with a cane, limping on the left side. Dr. Panda also noted that appellant identified his constant pain as the source of his

depression. He expressed the opinion that appellant did not have any “organic basis for his symptoms” and that his symptoms were “more functional in nature.”

Subsequently, the Office referred appellant to several specialists to ascertain whether he had any psychological or continuing physical disabilities attributable to his March 27, 1990 employment injury.

In a report dated December 11, 1991, Dr. Gladys S. Fenichel, a Board-certified psychiatrist and Office referral physician, concluded that appellant met the diagnostic criteria for a major depression and a somatoform pain disorder. She explained that, while appellant had a history of two back operations prior to his employment injury, it appeared that his condition was aggravated by the fall of March 27, 1990. Dr. Fenichel also indicated that appellant would not be able to perform his prior job duties with the physical limitations he displayed.

The Office later referred appellant for a second psychiatric evaluation with Dr. Jon Bjornson, a Board-certified psychiatrist. In a report dated March 31, 1994, Dr. Bjornson diagnosed major depression, which was improving, probable somatoform pain disorder and probable psychogenic impotence. He explained that appellant indeed had a psychological disorder, the onset of which he suspected occurred prior to appellant’s second back surgery in December 1989. Dr. Bjornson specifically indicated that appellant did not have a psychological problem that was either caused or aggravated by his March 27, 1990 employment injury. He further explained that appellant’s somatoform pain disorder was interwoven with his depression. Dr. Bjornson concluded that appellant was capable of performing sedentary work and that such employment would likely benefit appellant psychologically.

In May 1996 the Office referred appellant for a third psychiatric evaluation with Dr. Perry A. Berman, a Board-certified psychiatrist, who, in a June 17, 1996 report, diagnosed pain disorder, which he noted was associated with psychological factors and not medically based. He indicated that appellant’s “current occupation is being disabled.” Dr. Berman further indicated that he was unable to identify any psychological factors connected with appellant’s March 27, 1990 employment injury that would cause, support or reinforce the pain appellant reported. Additionally, he noted that there was very little appellant could not do as a result of the injuries he sustained at work. Dr. Berman explained that there was insufficient evidence to warrant a continuing diagnosis of major type depression. While he noted that appellant had some mild depressive symptomatology, he stated that it was not at a level that would interfere with appellant’s resumption of work.

In addition to undergoing a battery of psychological evaluations, appellant was also referred for examination by Dr. Robert M. Cohen, a neurosurgeon, who examined appellant on May 19, 1992, however, he declined to offer an opinion at that time due to the lack of a more recent magnetic resonance imaging (MRI) scan of appellant’s lumbosacral spine. An MRI was subsequently performed on August 12, 1992 which the Office forwarded for Dr. Cohen’s review. In a report dated March 25, 1993, Dr. Cohen noted that the MRI revealed degenerative disc disease from L2-3 through L5-S1, as well as evidence of excess scar tissue at the site of appellant’s prior surgeries. He explained that appellant’s left S1 nerve root was being devastated by intrathecal and epidural scar tissue as well as compression in the neuroforamen at the level of the facet joint. Dr. Cohen also noted the presence of enhancing scar tissue involving the L5

nerve root. Additionally, the doctor commented that a November 13, 1991 EMG/NCV study revealed chronic bilateral L5-S1 radiculopathy and chronic polyneuropathy. Dr. Cohen explained that this combination was probably the cause of appellant's severe L5 and S1 motor deficits that were demonstrated on his prior physical examination. With respect to appellant's ability to work, he indicated that he would be limited to the most sedentary-type position and most of appellant's work would have to be carried out in the seated position.

The Office later referred appellant for a second neurological evaluation with Dr. A. Charles Winkelman, a Board-certified neurologist, whose October 11, 1993 report questioned the diagnosis of chronic polyneuropathy reported by Dr. Cohen. Additionally, while Dr. Winkelman noted a history of discogenic and spondylitic disease in appellant's lower back, he did not believe that appellant's total paralysis in the distal motor groups of his left leg was organic. He commented that there was a significant psychological/emotional component to appellant's present clinical picture. Dr. Winkelman concluded that appellant was capable of performing sedentary-type work.

In May 1996 the Office referred appellant for an impartial medical examination with Dr. Easwari Balasubramanian, a Board-certified orthopedic surgeon, who, in a July 12, 1996 report, opined that appellant did in fact sustain a work-related injury to the lower back in the form of a sprain as a result of a fall, but currently there were no residuals from that injury. He further indicated that appellant's reported pain was nonorganic in nature. Dr. Balasubramanian explained that appellant's present problems were due to chronic pain syndrome and neurological deficits secondary to his previous surgical procedures, which caused epidural scar formation. He concluded by noting that, although appellant was disabled at the present time from normal activities, his present condition was not the result of the 1990 work-related injury.

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 the reports of Drs. Balasubramanian and Berman, supported that the effects of the March 27, 1990 work injury had ceased. Additionally, the Office advised appellant that if he disagreed with the proposed action he should submit additional medical evidence or argument within 30 days. By letter dated August 16, 1997, appellant advised the Office that he had recently seen his doctor and that he would forward a copy of the doctor's report immediately upon receipt.

By decision dated October 9, 1997, the Office terminated appellant's compensation benefits effective October 12, 1997 on the grounds that the medical evidence of record established that appellant's employment-related disability had ceased. The Office noted that appellant had not submitted any recent medical evidence on his behalf, and that the reports of Drs. Balasubramanian and Berman represented the weight of the medical evidence.

On October 9, 1998 appellant's counsel requested reconsideration and submitted a September 16, 1998 report from Dr. Ronald J. Potash, a Board-certified surgeon, who indicated that appellant complained of low back pain and stiffness as well as left leg lateral pain on the side of his calf, heel and little toe. He also noted complaints of numbness in the left foot and left leg instability, which increased with activity. Dr. Potash noted appellant's history of injury on March 27, 1990 as well as appellant's two prior back surgeries in 1986 and 1989. Based on his

physical examination and a review of appellant's medical records, Dr. Potash diagnosed "[a]cute lumbosacral strain and sprain with myositis and exacerbation of prior muscle injury." He additionally noted a diagnosis of "[s]tatus post partial laminectomies L5-S1 and L2-3 with discectomies." Dr. Potash found that appellant had reached maximum medical improvement on September 1, 1998 and that he had a 23 percent impairment of his left lower extremity due to sensory and motor strength deficits. He concluded that appellant's work-related injury of March 27, 1990 was the "competent producing factor for [appellant's] subjective and objective findings." Under cover letter dated October 14, 1998, appellant's counsel also submitted a claim for a schedule award based on Dr. Potash's findings.

In a merit decision dated January 5, 1999, the Office denied modification of the October 9, 1997 decision terminating benefits. The Office found that Dr. Potash did not provide sufficient medical rationale to explain continuing work-related disability or injury-related permanent impairment. Specifically, the Office noted the absence of any discussion regarding the effects of appellant's nonwork-related back surgeries. The Office concluded that the prior findings of the impartial medical examiner continued to represent the weight of the medical evidence.

The Board finds that the Office met its burden of proof in terminating appellant's compensation benefits as of October 12, 1997.

Once the Office accepts 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 and properly referred appellant for an impartial medical evaluation.³ As previously noted, Dr. Balasubramanian opined that, while appellant sustained a work-related injury to the lower back in the form of a sprain, currently there were no residuals from that injury. With respect to appellant's complaints of continuing leg and back pain, he further indicated that appellant's reported pain was nonorganic in nature. The Board finds that the Office properly relied on Dr. Balasubramanian report as a basis for terminating appellant's benefits effective October 12, 1997.⁴ Additionally, the question of whether appellant developed a psychological

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

condition as a consequence of his March 27, 1990 employment injury was adequately addressed by Dr. Berman's June 17, 1996 report, in which he indicated that he was unable to identify any psychological factors connected with appellant's March 27, 1990 employment injury. Additionally, while earlier medical evidence indicated that appellant suffered from depression, Dr. Berman explained that there was insufficient evidence to warrant a continuing diagnosis of major depression. He concluded that appellant's mild depressive symptomatology was not at a level that would interfere with his resumption of work. Consequently, the Office properly determined that the weight of the evidence established that appellant's employment-related disability had ceased.

The subsequent medical evidence submitted on reconsideration does not undermine the Office's earlier decision to terminate benefits. Although Dr. Potash determined that appellant had a 23 percent permanent impairment of the left lower extremity and identified appellant's work-related injury of March 27, 1990 as the "competent producing factor for [appellant's] subjective and objective findings," he failed to provide any explanation for his opinion regarding causation. Because Dr. Potash did not include a reasoned explanation regarding the relationship between appellant's current condition and his accepted employment injury of March 27, 1990, his report does not rise to the level of rationalized medical opinion evidence.⁵ Accordingly, the Office properly denied modification of the October 9, 1997 decision terminating benefits. Inasmuch as the record establishes that appellant does not have any continuing disability causally related to his March 27, 1990 employment injury, appellant is not entitled to a schedule award under the Act.⁶

⁵ *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (the Board found that a medical opinion not fortified by medical rationale is of little probative value).

⁶ 20 C.F.R. § 10.302.

The decision of the Office of Workers' Compensation Programs dated January 5, 1999 is hereby affirmed.

Dated, Washington, D.C.
January 21, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member