

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of McDANIEL V. ELEAZER and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS HOSPITAL, Philadelphia, PA

*Docket No. 98-1270; Submitted on the Record;  
Issued July 12, 2000*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation effective November 12, 1995.

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation effective November 12, 1995, but that the medical evidence establishes that appellant did not have disability after December 19, 1996 due to his August 26, 1985 employment injury.

Under the Federal Employees' Compensation Act,<sup>1</sup> once the Office has accepted a claim it has the burden of justifying termination or modification of compensation benefits.<sup>2</sup> The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.<sup>3</sup> The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>4</sup>

On August 26, 1985 appellant, then a 27-year-old laborer, sustained an employment-related acute dorsolumbar strain and right knee contusion when he fell partially down stairs while carrying a metal case. Appellant stopped work on August 26, 1985 and received compensation for periods of disability. By decision dated October 30, 1995, the Office terminated appellant's compensation effective November 12, 1995 on the grounds that he had no employment-related disability after that date. The Office based its termination primarily on the

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

<sup>3</sup> *Id.*

<sup>4</sup> *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

June 6 and July 12, 1994 reports of Dr. Herbert Stein, a Board-certified orthopedic surgeon who served as an Office referral physician.<sup>5</sup>

In a decision dated and finalized August 29, 1996, an Office hearing representative affirmed the Office's October 30, 1995 decision on the grounds that the Office had properly relied on the opinion of Dr. Stein in terminating appellant's compensation effective November 12, 1995. The Office hearing representative further determined that a January 18, 1996 report of Dr. Michael M. Cohen, an attending Board-certified neurologist, created a conflict in the medical evidence regarding whether appellant had employment-related disability after November 12, 1995, which required that the case be referred to an impartial medical examiner to resolve the conflict.

On remand, the Office referred appellant to Dr. Paul L. Liebert, a Board-certified orthopedic surgeon, for an impartial medical examination. By decision dated February 12, 1997, the Office determined that the medical evidence, including the December 19, 1996 report of Dr. Liebert, did not show that appellant had disability after November 12, 1995 due to his August 26, 1985 employment injury. By decision dated and finalized December 16, 1997, an Office hearing representative denied modification of the Office's February 12, 1997 decision.

The Board finds that the Office did not initially meet its burden of proof to terminate appellant's compensation effective November 12, 1995 by relying on the June 6 and July 12, 1994 reports of Dr. Stein, an Office referral physician. The June 6 and July 12, 1994 reports do not contain adequate medical rationale in support of their conclusions on causal relationship.<sup>6</sup> In these reports, Dr. Stein diagnosed acute lumbosacral strain by history, noted marked restriction of lumbar motion and indicated that he could not explain the degree of appellant's significant symptoms. Dr. Stein suggested that overreaction played a role in appellant's condition but he did not adequately explain the process through which appellant's employment-related condition would have resolved. In addition, it is unclear whether he performed a complete review of the medical records, including the findings of diagnostic testing.<sup>7</sup>

The Board further finds that the thorough, well-rationalized December 19, 1996 opinion of Dr. Liebert, the impartial medical specialist selected to resolve the subsequent conflict in the

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<sup>5</sup> The Office also made reference to a March 11, 1986 report of Dr. Frank A. Mattei, a Board-certified orthopedic surgeon who served as an Office referral physician, as lending support to its termination. The Office also referred appellant to Dr. Perry Berman, a Board-certified psychiatrist, who determined in an October 19, 1994 report that appellant did not have an employment-related emotional condition.

<sup>6</sup> See *Leon Harris Ford*, 31 ECAB 514, 518 (1980) (finding that a medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship which is unsupported by medical rationale).

<sup>7</sup> Moreover, it should be noted that Dr. Stein's evaluation was performed more than a year prior to the time appellant's compensation was terminated effective November 12, 1995. The Office also partially relied on a March 11, 1986 report, in which Dr. Mattei posited that appellant no longer had employment-related disability. However, Dr. Mattei did not provide adequate medical rationale in support of his conclusions on causal relationship and his report was produced a substantial period prior to the time appellant's compensation was terminated.

medical opinion, establishes that appellant did not have disability after December 19, 1996 due to his August 26, 1985 employment injury.

The Office properly determined, after its October 30, 1995 termination decision, that a conflict in the medical opinion developed between the opinion of Dr. Cohen,<sup>8</sup> appellant's attending physician and the opinion of Dr. Stein, the Office referral physician, regarding whether appellant had employment-related disability after November 12, 1995. In order to resolve the conflict, the Office properly referred appellant, pursuant to section 8123(a) of the Act, to Dr. Liebert for an impartial medical examination and an opinion on the matter.<sup>9</sup> In situations where 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.<sup>10</sup>

In his December 19, 1996 report, Dr. Liebert reported the findings of his comprehensive examination and evaluation. He stated:

“It is my opinion that [appellant] sustained strictly soft tissue injuries to his lower back and right knee as a result of the incident as reported on August 26, 1985. On review of all the medical documents available and specifically the reports of the physicians treating this claimant, I found no reference to his right knee being symptomatic until very recently in the course of his treatment. On review of the MRI [magnetic resonance imaging] report, the documented osteochondritis dessicans is, on description, more than likely nontraumatic in character and associated with degenerative changes. It is my opinion that this condition is in no way related causally to the incident on August 26, 1985, with the way the claimant described his bumping of the right knee on the railing.”

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“On review of these studies, which include a computerized tomography scan of the lumbosacral spine as well as an MRI, I found no evidence of any impinging structures which would explain any type of radiculopathy symptoms in this claimant. In fact, the MRI was normal, with no evidence of herniated disc material.

“The reports of reports of abnormal EMG [electromyogram] and nerve conduction studies ... were based, as I have stated, mostly on the EMG portion of

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<sup>8</sup> In a January 18, 1996 report, Dr. Cohen determined that appellant continued to have disability due to a continuing employment-related lumbar strain with radicular symptoms. He indicated that the type of appellant's injury and the findings upon examination and diagnostic tests all supported his opinion.

<sup>9</sup> Section 8123(a) of the Act provides in pertinent part: “If there is 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 U.S.C. § 8123(a).

<sup>10</sup> *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

the examination, with the nerve conduction velocities being essentially within normal limits. The nerve conduction velocities are the more reproducible and constant parts of this examination. I found no signs of radiculopathy or impingement whatsoever.”

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“In summary, [appellant] has recovered fully from his soft tissue injuries to both his right knee (contusion) and his lumbosacral spine (lumbosacral spine sprain and strain) as a result of the injury of August 26, 1995 and I find no orthopedic reasons why this claimant cannot return to his preinjury level of employment without restriction, on the basis of that injury.”

The Board has carefully reviewed the opinion of Dr. Liebert and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the extent of appellant’s employment-related disability. Dr. Liebert’s opinion is based on a proper factual and medical history in that he had the benefit of an accurate and up-to-date statement of accepted facts, provided a thorough factual and medical history and accurately summarized the relevant medical evidence. Moreover, he provided a proper analysis of the factual and medical history and the findings on examination, including the results of diagnostic testing and reached conclusions regarding appellant’s condition which comported with this analysis.<sup>11</sup> Dr. Liebert provided medical rationale for his opinion by explaining that the findings upon examination and diagnostic testing, as well as the nature of the injury itself, did not show that appellant had any continuing residuals of his employment-related condition.<sup>12</sup>

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<sup>11</sup> See *Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

<sup>12</sup> The record contains reports of other attending physicians detailing appellant’s condition in 1995 and 1996, including several reports of Dr. Ghassem Kalani, a physician Board-certified in physical medicine and rehabilitation. However, these reports are of limited probative value due to their lack of medical rationale in support of their opinions on causal relationship. Appellant has alleged that he has continuing disability due to a herniation at L4-5 and an emotional condition, but these conditions have not been accepted as employment related.

The decision of the Office of Workers' Compensation Programs dated and finalized December 16, 1997 is affirmed as modified to reflect that appellant is entitled to compensation for the period November 12, 1995 to December 19, 1996.

Dated, Washington, D.C.  
July 12, 2000

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member