

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of RICHARD LOEN and DEPARTMENT OF THE NAVY,  
MILITARY SEALIFT COMMAND, Oakland, CA

*Docket No. 97-2850; Submitted on the Record;  
Issued March 15, 2000*

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,  
BRADLEY T. KNOTT

The issue is whether appellant's disability causally related to his September 12, 1981 employment injury ended by May 10, 1996.

The Office of Workers' Compensation Programs accepted that appellant's September 12, 1981 employment injury, sustained by running up and down ladders and across decks, resulted in a herniated disc at L5-S1 and degenerative joint disease from L3 to the sacrum. The Office authorized and paid for surgery to appellant's spine performed on November 11, 1981 (removal of free disc fragment at L5-S1 and of bulging disc at L4-5), January 31, 1985 (discectomy at L4-5), and January 16, 1986 (removal of recurrent disc at L4-5 and fusion from L3-S1). Appellant received continuation of pay from October 14, 1981, when he first stopped work following the injury, until November 27, 1981 and compensation for total disability until he was declared fit for duty on March 8, 1982. The Office accepted that appellant sustained a recurrence of disability from December 29, 1983 to April 9, 1984 and also accepted a recurrence of disability beginning October 16, 1984, after which appellant did not return to work at the employing establishment. From January 21 to June 24, 1992 appellant worked as a drug and rehabilitation counselor. The Office paid appellant compensation for a loss of wage-earning capacity during this period and resumed compensation for temporary total disability on June 24, 1992.

On October 30, 1995 the Office referred appellant, the prior medical reports and a statement of accepted facts to Dr. Mark Reis, a Board-certified orthopedic surgeon, and Dr. Barbara Jessen, a Board-certified neurologist, for a second opinion evaluation of appellant's condition and disability. In a report dated November 29, 1995, Drs. Reis and Jessen diagnosed

“Chronic low back pain with somewhat nonanatomic, right lower extremity complaints and evidence of symptom magnification on examination today” and “Status post lumbar surgery times three, with ‘failed back syndrome.’” The report of Drs. Reis and Jessen stated:

“There is a very poor history of the exact mechanism of [appellant’s] initial injury of September 12, 1981. The only note furnished in this regard is from the initial examining physician, Dr. Carlyle, dated November 3, 1981. Apparently, even at that time, [appellant] did not remember the exact mechanism of his injury. Whether or not the myelogram reported on November 9, 1981 had anything to do with [appellant’s] complaints at that time is also somewhat difficult to determine. These myelogram findings might have been consistent with simple degenerative changes and not at all directly related to the symptoms which [appellant] complained of at that time. However, as he has undergone microdiscectomy and lumbar surgery times three, the question of whether his initial injury, whatever it might have been, required the surgeries he eventually underwent seems to be a moot point at the present time. In fact, these surgeries have been allowed as related to his work-related condition.

“It seems most likely today that [appellant’s] chronic complaints of low back discomfort with some evidence of nonorganic signs on physical examination are related to his original injury of September 12, 1981 and subsequent surgery, on a more-probable-than-not basis. Therefore, on a more-probable-than-not basis, it seems most appropriate to render that [appellant] currently has a residual ‘work-related condition.’”

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“Whether real or perceived, it is apparent that this work-related condition is disabling for [appellant]....”

The work tolerance limitations form completed by Dr. Reis on November 29, 1995 stated that appellant could not stand or sit longer than one hour, lift more than 25 pounds, walk longer than 10 to 15 minutes, or perform any bending or twisting. He indicated that these limitations were related to appellant’s employment injury.

In a letter dated December 11, 1995, the Office advised Drs. Reis and Jessen as follows:

“Our regulations do not allow us to accept vague diagnoses such as chronic low back pain or failed back syndrome. If you believe that he has a current work-related back condition, then please clearly define what the condition is and explain how the work activities and/or surgeries caused this condition. These diagnoses must be based on significant objective and clinical findings. We cannot accept a continuing back condition based solely on subjective complaints.

“I have enclosed another copy of our Form OWCP-5c. Please complete this form based on the objective and substantiated clinical findings.”

In a report dated December 13, 1995, Dr. Reis stated:

“We are sorry for any confusion, which may have arisen from the diagnosis listed at the time of [appellant’s] [examination] of November 29, 1995. It is understandable that there might be some confusion regarding what must necessarily be a rather vague diagnosis regarding [appellant’s] current subjective complaints. First of all, the diagnosis of ‘failed back syndrome,’ although a rather colloquial term, is well documented in the orthopedic literature as a term which fairly well describes [appellant’s] presentation. In short, this term is frequently applied to an individual who has been operated on and who has had low back surgery one or more times for perhaps questionable indications and who has not substantially improved with surgical intervention. The term further relates to the fact that symptoms may even be worse overall after surgical intervention because of encouragement of the individual’s own subjective perception of ongoing disability.

“After review of the conclusions and summary provided in the November 29, 1995 [examination] report, it seems clear that neither the neurologist nor myself was under the impression that any substantial injury occurred in September 1981 to [appellant’s] back, much less an injury which would have required surgical intervention.

“In brief, there is very little in [the] way of objective evidence on which to furnish a diagnosis, which would bear up to medical scrutiny. Mr. Loen’s presentation was characterized by a marked paucity of objective orthopedic or neurologic findings and a significant amount of nonanatomic findings and symptom amplification. This does not indicate that Mr. Loen does not actually experience the pain which he describes only that there is no hard objective medical evidence or anatomic basis on which to explain his multiple subjective complaints.

“His current condition, with its marked nonorganic presentation and review of the record, does not appear to suggest any current back condition, which is work related in any medically significant way. It appears that Mr. Loen’s current condition reflects a ‘perception’ of disability rather than any medically quantifiable disability. The only objective findings available with regard to [appellant’s] low back condition reflect what would be expected as postsurgical radiographic findings. Therefore, if you cannot accept a continuing back condition based solely on subjective complaints, perhaps his current ongoing subjective back complaints are best considered not related in any medically significant way to his injury of September 12, 1981.

“Another OWCP-5c form has been completed and is enclosed. It has been completed with the understanding that, while [appellant] might hurt, none of the activities outlined should cause medical harm.”

The work tolerance limitations form, completed by Dr. Reis on December 13, 1995 indicated that appellant had no limitations “other than generic recommendations regarding

sensible body mechanics,” listed under other medical factors to be considered, “possible psychologic factors affecting perception of functional level,” and stated that maximum medical improvement from the work injury would be reached after a pain management program.

On April 3, 1996 the Office issued appellant a notice of proposed termination of compensation on the basis that the disability resulting from his employment injury had ceased. By decision dated May 10, 1996, the Office terminated appellant’s compensation effective that date on the basis that the weight of the medical evidence established that he was not disabled or in need of continuing medical treatment due to residuals of his September 12, 1981 employment injury.

By letter dated July 2, 1996, appellant requested reconsideration and submitted additional medical evidence. By decision dated September 23, 1996, the Office denied modification of its May 10, 1996 decision.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. After it has been 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.<sup>1</sup>

The Board finds that the Office met its burden of proof to terminate appellant’s compensation effective May 10, 1996.

To justify terminating appellant’s compensation, the Office relied on the reports of Dr. Reis, a Board-certified orthopedic surgeon, who performed a second opinion evaluation. In his initial report, he noted that appellant’s complaints of low back discomfort were related to his employment injury and the surgeries he underwent for that injury. Dr. Reis also set forth work tolerance limitations that would preclude appellant’s performance of the duties of the position of able seaman he held when injured and indicated these limitations were due to appellant’s employment injury. After being questioned by the Office as to his diagnoses, he submitted a second report, in which he concluded that appellant had no work tolerance limitations due to his employment injury. In this report, however, Dr. Reis defended his diagnosis of failed back syndrome, stating that it was “well documented in the orthopedic literature as a term which fairly well describes [appellant’s] presentation” of no substantial improvement with surgical intervention.

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<sup>1</sup> *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

The second report from Dr. Reis is sufficient to meet the Office's burden of proof to terminate appellant's compensation.<sup>2</sup> In this report, Dr. Reis stated that it was his impression that appellant did not sustain any substantial injury in September 1981 and that there was "very little in [the] way of objective evidence on which to furnish a diagnosis, which would bear up to medical scrutiny." Dr. Reis noted that appellant's examination was "characterized by a marked paucity of objective or neurologic findings and a significant amount of nonanatomic findings and symptoms amplification." Dr. Reis concluded that appellant's back condition at the time he examined him was not "work related in any medically significant way" and reflected a "'perception' of disability rather than any medically quantifiable disability." Dr. Reis also completed a work tolerance limitations form indicating appellant had no limitations "other than generic recommendations regarding sensible body mechanics." Dr. Reis' December 13, 1995 report was sufficient to establish that appellant's disability causally related to his September 12, 1981 employment injury ended by May 10, 1996.

With his July 2, 1996 request for reconsideration, appellant submitted a report that created a conflict of medical opinion with that of Dr. Reis. In this May 29, 1996 report, Dr. G. Michael Wiese, a Board-certified neurosurgeon who performed surgery on appellant's spine, concluded that appellant had lumbar disc disease, a condition accepted by the Office, with objective neurologic residuals and that he continued to be disabled for the work he performed when injured. However, as this report was submitted after the Office properly terminated appellant's compensation, the Office is not required to reinstate compensation pending resolution of the conflict of medical opinion between Drs. Reis and Wiese.<sup>3</sup>

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<sup>2</sup> The Office's April 3, 1996 proposal to terminate compensation also indicates that appellant's attending physician did not disagree with the opinion of Dr. Reis. Although Dr. G. Bruce Smith did state that he had no basis to disagree with Dr. Reis' report, it is not clear which report was sent to Dr. Smith. In addition, appellant pointed out that Dr. Smith had not been a treating physician for over a year and one-half before this opinion was solicited.

<sup>3</sup> *Joseph M. Campbell*, 34 ECAB 1389 (1983).

The decision of the Office of Workers' Compensation Programs dated September 23, 1996 is affirmed insofar as it found that the Office properly terminated appellant's compensation effective May 10, 1996. Insofar as the Office's September 23, 1996 decision found that the submission of Dr. Wiese's report did not warrant modification of the Office's prior decision, it is set aside and the case remanded to the Office for resolution of a conflict of medical opinion to be followed by an appropriate decision.

Dated, Washington, D.C.  
March 15, 2000

David S. Gerson  
Member

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member