

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLES BLANCHARD and DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION, Rochester, NY

*Docket No. 98-1732; Submitted on the Record;
Issued May 19, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation effective December 7, 1996; and (2) if so, whether appellant has established entitlement to compensation after December 7, 1996.

In the present case, appellant an air traffic controller, filed a claim alleging that he sustained a fibrositis condition causally related to his federal employment.¹ The Office accepted the claim for fibromyalgia. The record indicates that appellant stopped working in January 1994 and retired from federal employment in October 1994.

In a letter dated October 24, 1996, the Office advised appellant that it proposed to terminate his compensation on the grounds that the medical evidence established that he no longer had fibromyalgia. By decision dated November 29, 1996, the Office terminated appellant's compensation effective December 7, 1996.

In a decision dated September 29, 1997, an Office hearing representative affirmed the termination decision. The hearing representative further indicated, however, that after the termination decision appellant had submitted sufficient evidence to create a conflict in the medical evidence as to whether he continued to have an employment-related condition after December 7, 1996. The case was remanded for referral to an impartial medical specialist.

In a decision dated February 12, 1998, the Office determined that appellant was not entitled to compensation after December 7, 1996.

The Board has reviewed the record and finds that the Office met its burden of proof to terminate compensation.

¹ The claim form indicates that appellant alleged that his employment caused stress, which aggravated his physical condition.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.²

In this case, the accepted condition was fibromyalgia. In a report dated September 17, 1996, Dr. Nak Shim, an orthopedic surgeon serving as a second opinion referral physician, provided a history and results on examination. Dr. Shim stated that there were no objective findings to concur with the symptoms reported. He further stated, "Except for his subjective complaint and in the absence of any objective findings, it is my opinion that, considering all the other activities he is engaged in which require a certain amount of physical activities, I do not see any definitive objective findings to support that he is unable to perform any job as an air controller." Dr. Shim also noted that appellant had been taking medication that would not allow him to work as an air traffic controller. In a report dated November 27, 1996, Dr. Shim reiterated his opinion that there were no objective evidence that appellant was suffering from fibromyalgia.

The Board finds that Dr. Shim provided probative medical evidence that appellant did not continue to have residuals of the accepted condition of fibromyalgia. He reported that he could not find any objective evidence of a continuing condition. On the other hand, the only relevant evidence from appellant's attending physicians that was before the Office at the time of the November 29, 1996 decision, is a brief report from Dr. Lori Tobler, an internist. Dr. Tobler noted in a November 12, 1996 report that she had been treating appellant since 1993 for fibromyalgia exacerbated by stress in he federal employment and "his symptoms have improved, although they persist and he continues to need to take medication to control his symptoms." Dr. Tobler does not discuss objective findings, or otherwise provide medical reasoning to support a continuing employment-related condition. A disability assessment based on subjective pain and fatigue complaints, rather than a diagnosis based on objective criteria, is of diminished probative value.³ The Board accordingly finds that the weight of the evidence rested with Dr. Shim and the Office met its burden to terminate compensation.

The Board further finds that the case requires further development of the evidence with respect to whether appellant has established entitlement to compensation after December 7, 1996.

After termination or modification of benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that he had an employment-related disability, which continued after termination of compensation benefits.⁴

² *Patricia A. Keller*, 45 ECAB 278 (1993).

³ *See Mary Lou Barragy*, 46 ECAB 781, 789 (1995); *Maria E. Padilla*, 33 ECAB 866, 871 (1982).

⁴ *Talmadge Miller*, 47 ECAB 673, 679 (1996); *see also George Servetas*, 43 ECAB 424 (1992).

In this case, the Office found a conflict in the medical evidence between Dr. Shim, the second opinion physician, and appellant's physicians, Dr. Peter Deane, an internist and Dr. Frederick Kaempffe, with respect to whether appellant continued to have an employment-related condition after December 7, 1996. The record contains a January 2, 1997 report from Dr. Deane and a January 27, 1997 from Dr. Kaempffe, supporting a continuing fibromyalgia condition. The case was referred to Dr. Jalal Sadrieh, a Board-certified orthopedic surgeon, for resolution of the conflict. In a report dated December 8, 1997, Dr. Sadrieh provided a history and results on examination. In a report dated January 5, 1998, he stated in pertinent part, "I feel the aggravation and stress from his work as an air traffic controller has ceased to exist and, therefore, does not play a role at the present time." Dr. Sadrieh does not, however, provide a rationalized opinion with respect to appellant's fibromyalgia condition as of December 7, 1996. The issue in the case was whether appellant was entitled to compensation after that date, not just as of Dr. Sadrieh's examination in December 1997. Since the Office referred appellant to Dr. Sadrieh as an impartial medical specialist, it has an obligation to secure a reasoned medical opinion that resolves the conflict.⁵

Accordingly, the case will be remanded to the Office for a supplemental report from the impartial medical specialist containing a reasoned opinion as to whether appellant had an employment-related disability after December 7, 1996. After such further development as the Office deems necessary, it should issue an appropriate decision.

It is well established that the Board and the Office may not have concurrent jurisdiction over the same case and those Office decisions, which change the status of the decision on appeal are null and void.⁶ In this case, the record contains a decision of an Office hearing representative dated June 18, 1998, issued after the filing of the appeal in this case. The Board finds that this decision is null and void.

⁵ See *Thomas Graves*, 38 ECAB 409 (1987).

⁶ *Douglas E. Billings*, 41 ECAB 880, 895 (1990).

The decision of the Office of Workers' Compensation Programs dated February 12, 1998 is affirmed with respect to the termination of benefits effective December 7, 1996, and set aside and remanded for further action with respect to whether appellant has established entitlement to compensation after December 7, 1996.

Dated, Washington, D.C.
May 19, 2000

Michael J. Walsh
Chairman

George E. Rivers
Member

Michael E. Groom
Alternate Member