

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EMANUEL J. PITURRO and U.S. POSTAL SERVICE,
POST OFFICE, Bronx, NY

*Docket No. 99-345; Submitted on the Record;
Issued November 29, 2000*

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated compensation benefits on the basis that appellant had no continuing disability due to his accepted employment injury; and (2) whether the Office abused its discretion in denying further merit review.

On January 20, 1988 appellant, then a 44-year-old letter carrier, filed a traumatic injury claim for an injury sustained to his lower back on January 19, 1988. He stopped working on January 20, 1988 and has not returned to work since that date. The Office accepted the claim for muscle spasm of the low back and lumbosacral sprain and placed appellant on the automatic rolls for temporary total disability by letter dated November 2, 1988.

In a report dated January 11, 1994, Dr. Hal S. Gutstein, appellant's attending Board-certified neurologist, opined that appellant remained totally disabled due to his accepted January 19, 1988 employment injury. In support of his opinion, Dr. Gutstein noted that appellant continued "to report pain which occurs on a regular and frequent and near constant basis and again worse with any lifting over approximately 10 pounds." He attributed appellant's symptoms to his employment injury and that appellant "continues to show signs and symptoms of lumbosacral insufficiency involving the L4-5 bulging and degenerative disc and left S1 nerve root injury as noted previously on his scans and EMG [electromyogram] studies."

In a report dated March 2, 1993, Dr. Martin C. Manin, an Office referral Board-certified orthopedic surgeon, based upon a physical examination, review of the medical evidence and employment injury history, concluded that there were no objective findings to support any continuing disability due to appellant's accepted back sprain and that appellant had "a significant degree of exaggeration." Dr. Manin also opined that appellant would be able to perform his usual duties without any restrictions and no further medical or chiropractic treatment was required. In support of his opinion, he noted no sensory, motor or reflex deficit in the lower extremities and a May 2, 1989 magnetic resonance imaging (MRI) test showed no disc

herniation or evidence of bone destruction although there was a degenerated and bulging disc at L4-5. Dr. Manin noted that when appellant thought he was not being observed that he bent and moved easily and had no problems getting on and off the examination table.

On July 5, 1994 the Office referred appellant, together with a statement of accepted facts, medical records and list of questions, to Dr. Martin Jay Barschi, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. Gutstein, appellant's treating physician, and Dr. Manin, a second opinion physician, regarding the issue of causal relationship and continuing disability.

In a July 29, 1994 report, Dr. Barschi, based upon a physical examination, review of the medical record and statement of accepted facts, opined that appellant's work injury aggravated a preexisting degenerative lower back condition and that "were it not for the patient's obesity he would have been expected to recover from this accident in one to two weeks." He indicated that there was no objective evidence to support that appellant had any continuing orthopedic disability of his back and that any disability appellant may have is due to his obesity and its complications, which was unrelated to his employment injury.¹

The Office referred appellant for an updated second opinion as to continuing disability. In a report dated March 7, 1997, Dr. Richard Stern, a second opinion Board-certified orthopedic surgeon, based upon a physical examination and employment injury and medical history, opined that appellant's subjective complaints were not supported by objective findings and that the accepted conditions had resolved. Dr. Stern concluded that any disability appellant may currently have is due to his obesity which is unrelated to his accepted employment injury. Lastly, he recommended that appellant should have medical treatment for his obesity, but that he required no further medical treatment for his lumbosacral spinal employment injury.

On March 24, 1997 the Office issued a notice of proposed termination of compensation. The Office noted that appellant had been referred for a second opinion as the medical evidence was more than one year old. In support of its proposal to terminate benefits, the Office noted that it based its decision upon the March 7, 1997 report of Dr. Stern, the second opinion physician, who concluded that appellant could return to work and had no continuing disability or residuals due to his accepted employment injury.

By letter dated April 21, 1997, appellant's counsel disagreed with the Office's proposal to terminate benefits and presented legal arguments against the proposal to terminate compensation benefits.

In a report dated April 23, 1997, Dr. Gutstein opined that appellant remained totally disabled to his January 19, 1988 employment injury which caused a permanent impairment of the lumbar spine which affected all functions of the lumbar spine. He stated that appellant was

¹ This case had previously been on appeal before the Board prior to the opinion by the impartial medical expert. Docket No. 94-2548 (issued August 21, 1996). In the prior appeal, the Board found that the Office, in its decision dated May 18, 1994, properly suspended appellant's compensation benefits from October 12, 1989 until March 1, 1993 for failure to submit to a medical examination. The facts and circumstances of the case are set forth in the Board's prior decision and are incorporated herein by reference.

disabled from performing the activities of a letter carrier, but was capable of working with restrictions. Lastly, Dr. Gutstein stated that he disagreed with Dr. Stern regarding appellant's obesity being the cause of his current disability.

By decision dated August 19, 1997, the Office finalized the proposal to terminate appellant's wage loss and medical compensation effective September 13, 1997 on the basis that he no longer had any residuals due to his accepted employment injury.

In a November 7, 1997 report, Dr. Gutstein diagnosed lumbar sprain and radiculopathy due to a degenerative and bulging disc at L4-5 with S1 nerve injury which were due to his January 19, 1988 employment injury. A physical examination revealed restriction in appellant's range of motion in flexion, extension and rotation and a positive straight leg raising at 35 degrees. Dr. Gutstein opined that appellant "remained symptomatic despite treatment and has gained quite a bit of weight as a consequence of his inactivity." Next, he opined that appellant was totally disabled and in support of this conclusion noted:

"His signs and symptoms have been consistent throughout. The combination of subjective complaints, object of clinical findings and diagnostic tests all indicate that he has a permanently disabling condition of the lumbar spine which is causally connected to the January 19, 1988 accident."

In an undated letter received by the Office on November 17, 1997, appellant requested a review of the written record.

By decision dated February 4, 1998, the Office hearing representative found that the Office had met its burden of proof to terminate benefits. However, the hearing representative found that subsequent to the termination of benefits, Dr. Gutstein's November 7, 1997 report created a conflict in the medical opinion evidence such that a referral to an independent medical examination to resolve the conflict between Drs. Stern and Gutstein.

By letter dated March 3, 1998, the Office referred appellant, together with a statement of accepted facts, medical records and list of questions, to Dr. Nauihal S. Singh, a Board-certified neurologist, to resolve the conflict in the medical opinion evidence between Drs. Stern and Gutstein.

In a March 23, 1998 report, Dr. Singh noted that appellant was examined sitting up because he refused to lie down. He noted that appellant raised his legs 40 degrees and that he raised appellant's legs 90 degrees and that the remaining test were normal. In conclusion, Dr. Singh noted:

"This patient who initially had a lumbosacral spine sprain now has a chronic pain syndrome which needs to be managed in a Pain Clinic. At this time, although the patient has been observed to have normal functions of the back and he may have considerable amount of exaggeration of his symptoms, I feel that he should have a follow-up with a Pain Clinic, where his psychiatric evaluation can be combined with his pain management."

In a May 1, 1998 response letter, Dr. Singh noted that appellant had been seen by him on March 23, 1998 and that appellant “refused to lie down” so that the examination was performed with appellant sitting up and requesting the physician to remove his shoes. Dr. Singh stated that appellant “was almost uncooperative and had exaggeration of his symptoms related to his lumbosacral spine sprain” and that appellant suffered from chronic pain syndrome.

By letter dated May 7, 1998, the Office requested clarification as to whether appellant’s lumbosacral sprain/strain had resolved in view of the normal findings.

In an addendum dated May 11, 1998, Dr. Singh noted:

“[Appellant] was observed to have normal functions of the back and all test that was conducted was found to be normal but his lumbosacral sprain/strain condition has not resolved. Patient needs to take care of his fears and exaggeration of symptoms with a pain clinic.”

By letter dated May 14, 1998, the Office instructed appellant to report for another examination with Dr. Singh to resolve the convex in the medical opinion evidence as it was found that he had obstructed the medical examination by refusing to cooperate with the examination by refusing to lie down as requested by the physician.

In a report dated May 29, 1998, Dr. Singh noted that when he first examined appellant on March 23, 1998 he was uncooperative and not well dressed, but that “today he was properly dressed and shaved. A physical examination revealed that appellant “could bend sitting down to remove his shoes,” that his straight leg raising test was normal, he could bend 80 to 90 degrees, and neck movements were normal and full. Dr. Singh noted appellant had initially been diagnosed with a lumbosacral sprain and that he currently “complains of vague pain in the back.” He concluded that appellant was not disabled due to his accepted employment injury as appellant had no positive neurological findings, normal functions of the back, could walk normally without a can, had no limping and was seen to bend normally. Lastly, Dr. Singh noted that appellant had an “exaggeration of his symptoms at this time and, in my opinion, he does not need any further neurological treatments.”

In a letter dated June 4, 1998, Dr. Singh indicated that appellant had no limitations in performing an eight-hour day and that he had misread and incorrectly filled out a previous form.

By decision dated June 5, 1998, the Office found that appellant no longer had any continuing disability due to his accepted employment injury. In reaching the decision to terminate further compensation and medical benefits, the Office relied upon the report of the impartial medical examiner, Dr. Singh.

In a letter dated July 24, 1998, appellant’s counsel requested reconsideration and submitted a May 8, 1998 report by Dr. Gutstein in support of his request.

In his report dated May 8, 1998, Dr. Gutstein reported a 50 percent limitation of motion of appellant’s lumbar spine with sciatic notch tenderness. As to range of motion, he noted that appellant had “positive straight leg raising 30 degrees to the left,” 30 degrees of range of motion

in the lumbar spine, extension was 15 degrees, rotation was 15 degrees and appellant's gait remained antalgic. In conclusion, Dr. Gutstein opined that appellant had a permanently disabling lumbar spine condition which was caused by the January 19, 1988 employment injury and that appellant was disabled from performing his usual employment as a letter carrier. He, however, indicated that appellant was capable of working with restrictions on repetitive movement, lifting, standing and sitting. Lastly, Dr. Gutstein opined that appellant's employment injury "was a significant contributing factor in the patients (sic) obesity as well as his present psychological adjustment reaction."

On August 4, 1998 the Office denied appellant's request for merit review on the basis that the evidence submitted was cumulative.

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits.

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination or modification of compensation benefits.² The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.³ The Office's burden includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁴

After termination or modification of compensation 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.⁵

In this case, the Office properly based its decision to terminate appellant's compensation benefits on the March 7, 1997 report of Dr. Stern, who advised that appellant had no objective findings on physical examination to support that his accepted conditions had not resolved. Dr. Stern further opined that appellant had no continuing disability related to his accepted employment injury and that any disability appellant may have was due to his obesity, which was unrelated to his January 19, 1988 employment injury. Therefore, as the Office properly based its termination decision on Dr. Stern's well-rationalized opinion, which was also the most recent medical opinion, that there were no objective findings of residuals from his accepted employment, the Board affirms the February 4, 1998 decision by the hearing representative affirming the August 19, 1997 decision terminating benefits effective September 13, 1997.

² *Raymond W. Behrens*, 50 ECAB ____ (Docket No. 97-1289, issued January 14, 1999).

³ *Carl D. Johnson*, 46 ECAB 804, 809 (1995).

⁴ *Raymond W. Behrens*, *supra* note 2.

⁵ *Talmadge Miller*, 47 ECAB 673, 679 (1996); *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

Subsequent to the termination of benefits, the Office, acting in response to appellant's request for review of the medical record, found that there was a conflict in the medical evidence between Dr. Stern's opinion and that of Dr. Gutstein, and it therefore referred appellant, a statement of accepted facts and his medical records to Dr. Singh, an impartial medical examiner. In his March 23, 1998 medical report, Dr. Singh, after noting appellant's refusal to cooperate by refusing to lie down or remove his own shoes, concluded that appellant had normal functions of the back and recommended a referral to a pain management clinic. In response to request for clarification from the Office, Dr. Singh in his May 1, 1998 letter noted that appellant "was almost uncooperative and had exaggeration of his symptoms related to his lumbosacral spine sprain" and in his May 11, 1998 letter noted that appellant had normal functions of his back and the tests were normal, but that the lumbosacral spine/sprain condition had not resolved and appellant needed help with his fears and symptom exaggeration. Appellant was sent for another examination with Dr. Singh as the Office found appellant had obstructed his first examination by refusing to cooperate with the physician when he requested him to lie down for an examination. In his May 29, 1998 report, Dr. Singh noted that appellant was cooperative and concluded that appellant had no disability due to his accepted employment injury based upon the objective evidence and normal testing. He further stated that any further neurological treatment was unwarranted. Based on Dr. Singh's May 29, 1998 report, the Office denied modification of its previous decision terminating compensation.

The Board finds that Dr. Singh's opinion negating continuing disability due to his January 19, 1988 employment injury and that appellant no longer had any residuals from the employment injury is sufficiently probative, rationalized and based upon a proper factual background and that, therefore, Dr. Singh's May 29, 1998 report is accorded the special weight of an impartial medical examiner.⁶ The Board notes that Dr. Singh reviewed appellant's employment injury history and medical evidence, reported extensive findings on examination and opined that he found no basis on which to attribute any condition to appellant's lumbosacral sprain. He in both his March 23 and May 29, 1998 reports noted that there was no objective evidence to substantiate appellant's complaints and that appellant had symptom exaggeration. The Office properly found that the May 29, 1998 report was more probative than the March 23, 1998 report as appellant was found to be uncooperative at the time of the examination on March 23, 1998 and was cooperative in the subsequent examination. The May 29, 1998 report by Dr. Singh further stated as appellant's neurologic examination was normal, appellant had no limitations as to his full employment duties. Thus, the Office properly relied upon Dr. Singh's report to find that appellant had no continuing disability due to his accepted employment injury.

The Board finds that the Office did not Office abuse its discretion in denying merit review.

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a point of law; by advancing a point of law or fact not previously considered by the Office; or by submitting relevant and pertinent evidence not previously considered by the Office.⁷ Section 10.138(b)(2) provides that

⁶ Gary R. Seiber, 46 ECAB 215 (1994).

⁷ 20 C.F.R. § 10.138(b)(1). See generally 5 U.S.C. § 8128(a).

when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.⁸ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.⁹

In his May 8, 1998 report, Dr. Gutstein again, as in his November 7, 1997 report, diagnosed bulging and degenerative disc at L4-5 with S1 nerve injury. He again concluded that these conditions were causally related to the employment injury and caused appellant continuing disability. The Board finds that this report from Dr. Gutstein did not provide any new findings was duplicative of his November 7, 1997 report. The Board has held that evidence which repeats or duplicates evidence already in the record has no evidentiary value and constitutes no basis for reopening a case.¹⁰

Appellant's representative also submitted arguments in support of his request for reconsideration. His representative alleged that the Office did not properly terminate appellant's compensation benefits on September 13, 1997 based upon the report of Dr. Stern and that the Office hearing representative on February 4, 1998 improperly failed to reinstate appellant's compensation benefits to the date of termination of benefits.

While a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening for further review of the merits is not required where the legal contention does not have a reasonable color of validity.¹¹ In arguing that the Office did not meet its burden of proof to terminate compensation on August 19, 1997, appellant's representative argues that a conflict existed on September 13, 1997 between Drs. Gutstein and Stern; however, appellant's representative also argues that no conflict existed in the medical opinion evidence at the time appellant was referred to Dr. Singh. As previously explained in this decision, the medical reports submitted by Dr. Gutstein through September 13, 1997, the date the Office terminated benefits were of limited probative value. Only on November 7, 1997 did Dr. Gutstein prepare a report which was of sufficient probative value to create a conflict in the medical opinion evidence. Therefore, as of September 13, 1997, Dr. Stern's report constituted the weight of the medical opinion evidence. After the Office received Dr. Gutstein's November 7, 1997 report a conflict existed in the medical opinion evidence, which the Office resolved through referral to Dr. Singh, an impartial medical specialist. Appellant's representative's arguments on reconsideration regarding the weight of the medical evidence are not based on a proper factual background, are not internally consistent and lack reasonable color of validity.

Appellant's representative also alleged that on February 4, 1998 the Office improperly failed to reinstate appellant's benefits to September 13, 1997. This argument also lacks color of validity. The Office would be required to reinstate benefits if a termination of compensation is

⁸ 20 C.F.R. § 10.138(b)(2).

⁹ *Howard A. Williams*, 45 ECAB 853 (1994).

¹⁰ *Saundra B. Williams*, 46 ECAB 546 (1995).

¹¹ *Nora Favors*, 43 ECAB 403 (1992).

vacated. In this case, the Office met its burden of proof to terminate compensation benefits on September 13, 1997. The Office subsequently undertook further development of the medical evidence and found by decision dated June 5, 1998 that appellant had no continuing disability or residuals due to his accepted employment injury. The Office denied modification of the prior decision on August 4, 1998. At no time, however, was the termination of compensation benefits vacated. Appellant was not entitled to any further compensation benefits after the termination of compensation on September 13, 1997.

As appellant's request for reconsideration did not meet the requirements of 20 C.F.R. § 10.138, the Office did not abuse its discretion in denying merit review on August 4, 1998.

The decisions of the Office of Workers' Compensation Programs dated August 4, June 5, and February 4, 1998 are hereby affirmed.

Dated, Washington, DC
November 29, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member