

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID W. PICKETT and TENNESSEE VALLEY AUTHORITY,
WIDOWS CREEK FOSSIL PLANT, Chattanooga, TN

*Docket No. 99-2220; Oral Argument Held October 17, 2000;
Issued November 28, 2000*

Appearances: *Edward A. Slavin, Jr., Esq.*, for appellant; *Miriam D. Ozur, Esq.*,
for the Director, Office of Workers' Compensation Programs.

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 benefits.

On February 11, 1988 appellant, an assistant unit operator, sustained an injury while in the performance of his duties. The Office accepted his claim for left shoulder strain and for somatoform pain disorder, general anxiety disorder and depression in remission. Appellant received compensation for temporary total disability.

On May 21, 1991 appellant's attending psychologist, Dr. Sally T. Avery, pronounced him psychologically capable and ready to return to employment. On September 25, 1995 she gave a principal diagnosis of dysthymia and explained that she never viewed appellant as suffering from somatoform pain disorder. Dr. Avery also explained that she had never seen appellant as disabled with regard to his psychological condition: "I continue to feel that [appellant] can be employed and is only limited with respect to heavy manual labor by his injury."

In an undated report received by the Office on September 16, 1998, Dr. Kenneth B. Carpenter, a Board-certified psychiatrist and Office referral physician, gave a principal diagnosis of narcissistic personality disorder. He stated that appellant's past psychiatric diagnosis was not severe enough to interfere with job functioning. He saw no need for limitations but noted that appellant's preexisting personality disorder might be problematic "in terms of him getting hired."

In a report dated October 22, 1998, Dr. Lester F. Littell, III, a Board-certified orthopedic surgeon and Office referral physician, stated as follows: "After carefully reviewing all of the medical records provided and the various repetitive assessments and treatment recommendations

by a variety of physicians, in several specialties, I am unable to identify a specific objective orthopedic abnormality on a clinical or imaging basis to account for this gentleman's prolonged perceived pain and disability." Dr. Littell reported that there was no objective clinical or imaging evidence of any tissue injury or disease and that there was no medical evidence that appellant was disabled from performing any type of physical activity.

On January 25, 1999 the Office issued a notice of proposed termination of compensation benefits. The Office found that the weight of the medical evidence rested with the reports of Drs. Carpenter and Littell and established that appellant had no continuing medical conditions or disability as a result of his February 11, 1988 employment injury.

Also on January 25, 1999 Dr. James E. Lynch, appellant's attending neurologist, reported the following: "The patient is continuing to have problems with his left shoulder. I cannot bring his left elbow past 90 degrees, and he tends to dislocate anteriorly on dorsal percussion of the shoulder mass."

In a decision dated February 26, 1999, the Office terminated appellant's compensation benefits effective February 27, 1999 on the grounds that the weight of the medical evidence of record established that appellant's injury-related disability and medical condition ceased by that date.

The Board finds that the Office has met its burden of proof to establish that appellant has no disability causally related to his accepted psychological conditions.

It is well established that, once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.¹ After it has 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.²

Appellant's own psychologist, Dr. Avery, made clear that she never considered appellant to be disabled with regard to his psychological condition. The Office referral physician, Dr. Carpenter, also reported that appellant's past psychiatric diagnosis was not severe enough to interfere with job functioning. Although appellant has raised questions concerning the probative value of Dr. Carpenter's opinion, the clear weight of the medical opinion evidence establishes that appellant has no disability for work as a result of his accepted psychological conditions. For this reason the Office has met its burden of proof to justify the termination of compensation for wage loss as a result of the accepted psychological conditions.

The Board also finds, however, that the Office has not met its burden of proof to establish that appellant no longer suffers physical residuals of his February 11, 1988 employment injury.

¹ *Harold S. McGough*, 36 ECAB 332 (1984).

² *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

Dr. Littell, the orthopedic referral physician, found nothing physically wrong with appellant's right shoulder. He was unable to identify a specific objective orthopedic abnormality on a clinical or imaging basis to account for appellant's prolonged perceived pain and disability. Five months later Dr. Lynch, the attending neurologist, reported that appellant was continuing to have problems with his left shoulder. Specifically, Dr. Lynch could not bring appellant's left elbow past 90 degrees, and he reported that appellant tended to dislocate anteriorly on dorsal percussion of the shoulder mass. As these findings are inconsistent with the clinical picture reported by Dr. Littell, the Board finds that a conflict in medical opinion exists between appellant's attending physician and the Office referral physician.³ So long as the conflict remains unresolved, the Office has not met its burden of proof to establish by the weight of the medical evidence that physical residuals of the February 11, 1988 employment injury have ceased.

The February 26, 1999 decision of the Office of Workers' Compensation Programs is reversed.⁴

Dated, Washington, DC
November 28, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

³ Section 8123(a) of the Federal Employees' Compensation Act provides in 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).

⁴ The issue raised by the Office's nonmerit decision of April 30, 1999 is moot. Also, as an administrative body the Board declines to review constitutional claims and therefore will not consider the constitutional arguments raised by appellant on appeal. See *Woodruff v. U.S. Department of Labor*, 954 F.2d 634, 639 (11th Cir. 1992) (federal courts retain jurisdiction over constitutional claims).