

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of AUGUSTUS H. SLAUGHTER and U.S. POSTAL SERVICE,
POST OFFICE, Philadelphia, PA

*Docket No. 99-2125; Submitted on the Record;
Issued October 11, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation effective July 1, 1997; and (2) whether appellant has established any continuing disability on or after July 1, 1997.

The Board has duly reviewed the case on appeal and finds that the Office failed to meet its burden of proof in terminating appellant's compensation.

Appellant, a motor vehicle operator, filed a claim on December 19, 1995 alleging that he injured his left leg, right neck, back and side in a motor vehicle accident. The Office accepted appellant's claim for strain and sprain of the cervical and lumbar spine and left shoulder strain.

By letter dated April 16, 1997, the Office proposed to terminate appellant's compensation benefits. In a decision dated July 1, 1997, the Office terminated appellant's medical and compensation benefits finding that the residuals of his December 19, 1995 employment injury had ceased. Appellant requested an oral hearing and, by decision dated June 12, 1998, the hearing representative affirmed the Office's July 1, 1997 decision

Appellant requested reconsideration on July 27, 1998. By decision dated October 1, 1998, the Office declined to reopen appellant's claim for review of the merits. Appellant, through his attorney, requested reconsideration on November 23, 1998. By decision dated March 19, 1999, the Office again declined to reopen appellant's claim for review of the merits.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order 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

¹ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

has ceased or that it is no longer related to the employment.² Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.³ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.⁴

In this case, the Office accepted appellant's claim for cervical and lumbar spinal strains and right shoulder strain. In a report dated January 31, 1996, Dr. Seymour Shlomchik, a Board-certified orthopedic surgeon, noted appellant's history of employment injury as well as a motor vehicle accident in May 1995 which resulted in a low back injury and treatment through November 1995. Dr. Shlomchik reviewed x-rays of appellant's left knee and lumbar spine which were within normal limits. He diagnosed acute cervical and lumbar strains by history with no objective findings. Dr. Shlomchik stated that appellant could return to full duty.

Appellant's attending physician, Dr. George Bonafino, an osteopath, supported appellant's claim for continued partial disability due to residuals of his cervical and lumbar strains.

The Office referred appellant for a second opinion evaluation with Dr. Giles Floyd, a Board-certified orthopedic surgeon. In a report dated June 13, 1996, Dr. Floyd noted appellant's history of injury and reviewed the medical records. He noted that no diagnostic studies were provided for his review. Dr. Floyd performed a physical examination and diagnosed mild residual cervical and lumbar strain syndromes without radiculopathy. He stated that appellant's subjective complaints were unsubstantiated by objective findings. Dr. Floyd stated that appellant had reached maximum medical improvement, that he required no further medical treatment and that he could return to full duty.

A magnetic resonance imaging (MRI) scan dated June 18, 1996 demonstrated L4-5 disc desiccation with left L5 nerve root involvement.

In a report dated July 25, 1996, Dr. Michael M. Cohen, a Board-certified neurologist, noted appellant's history of injury and examined appellant. Dr. Cohen diagnosed mild left cervical radiculopathy, cervical strain, left L5 lumbar radiculopathy and lumbar strain. On August 22, 1996 Dr. Cohen noted that electromyogram and nerve conduction studies revealed mild left C6-7 radiculopathy and left L5-S1 radiculopathy.

Dr. Bonafino completed a series of form reports supporting appellant's continued work-related residuals.

In a report dated February 10, 1997, Dr. Cohen noted that appellant's low back pain had worsened and radiated into both lower extremities. He recommended further diagnostic studies.

² *Id.*

³ *Furman G. Peake*, 41 ECAB 361, 364 (1990).

⁴ *Id.*

In a report dated March 26, 1997, Dr. Parviz Kambin, a Board-certified orthopedic surgeon, noted appellant's history of injury and examined appellant. He stated that appellant's lumbar spine condition was due to degenerative disc pathology. Dr. Kambin stated that appellant's cervical condition was related to a sprain from the myoligamentous structures superimposed on preexisting degenerative changes.

In a report dated April 30, 1997 and received by the Office on May 19, 1997, Dr. Bonafino reviewed Dr. Floyd's finding of no radiculopathy and noted that subsequent diagnostic testing revealed positive L5-S1 radiculopathy. Dr. Bonafino stated that appellant was partially disabled.

The Board finds that Dr. Floyd's report is not entitled to the weight of the medical evidence. Dr. Floyd's report was more than one year old at the time of the Office's decision terminating appellant's compensation. Furthermore, Dr. Floyd specifically noted that he did not review any diagnostic testing. Shortly after he completed his report, additional medical testing revealed that appellant had both cervical and lumbar radiculopathies. While the medical evidence does not establish that these conditions are causally related to appellant's accepted cervical and lumbar strains, the lack of objective findings in Dr. Floyd's examination detracts from the probative value of his conclusion in light of these findings. Dr. Floyd also failed to explain how he reached his diagnoses of mild residual cervical and lumbar strain syndromes if appellant had no residuals of his employment injuries. As Dr. Floyd's report is not sufficiently conclusive to outweigh the remainder of the medical evidence supporting appellant's continued disability, the Board finds that there is an unresolved conflict of medical opinion evidence.

Section 8123(a) of the Federal Employees' Compensation Act,⁵ provides: "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."

In this case, three physicians have provided medical opinion evidence that appellant still had residuals due to his accepted employment injuries and experienced periods of total and partial disability. The Office referral physician, Dr. Floyd, found that appellant had no medical residuals

⁵ 5 U.S.C. §§ 8101-8193, 8123(a).

and that he could return to full duty without restriction. As there is an unresolved conflict of medical opinion evidence, the Board finds that the Office failed to meet its burden of proof to terminate appellant's compensation and medical benefits.⁶

The March 19, 1999 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, DC
October 11, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member

⁶ The Board's jurisdiction is limited to final decisions of the Office issued within one year of the date of the appeal to the Board. 20 C.F.R. § 501.3(d)(2). In this case, the Board has jurisdiction over the Office's October 1, 1998 nonmerit decision and the March 19, 1999 decision. Although, the March 19, 1999 decision states on its face that it is a nonmerit decision, the Board notes that in the memorandum to the Director, the claims examiner performed a merit review of the medical evidence submitted in support of appellant's request for reconsideration and concluded that none of the evidence submitted nor previously considered was sufficient to require the modification of the Office's prior decision. As the Office conducted a review of the merits on March 19, 1999, the Board has jurisdiction to consider the merits of appellant's claim. However, in light of the disposition of the issue of termination it is not necessary for the Board to consider whether the Office abused its discretion by refusing to reopen appellant's claim for consideration of the merits on October 1, 1998.