

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TYRONE HUFF and SMITHSONIAN INSTITUTION,
ARTS & INDUSTRIES MUSEUM, Washington, DC

*Docket No. 98-2283; Submitted on the Record;
Issued September 15, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
VALERIE D. EVANS-HARRELL

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation benefits effective November 15, 1996; and (2) whether appellant met his burden of proof to establish that he sustained any employment-related disability after November 15, 1996, the date his compensation benefits were terminated.

The Board has duly reviewed the case record in the present appeal and finds that the Office did not meet its burden of proof in terminating appellant's compensation benefits effective November 15, 1996.

It is well established that 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 is no longer related to the employment.¹

On September 17, 1992 appellant, then a 41-year-old air conditioning mechanic, sustained a cervical sprain in the performance of duty. Appellant continued to be treated for his condition. By letter dated October 10, 1995, the Office advised appellant that it had placed him on the short-term compensation rolls effective July 16, 1995. By letter dated August 30, 1996, the Office advised appellant that it proposed to terminate his compensation benefits on the grounds that the weight of the medical evidence established that his disability related to his September 17, 1992 employment injury had ceased. By decision dated November 15, 1996, the Office terminated appellant's compensation benefits effective that date. By letter dated December 12, 1996, appellant requested an oral hearing before an Office hearing representative. On July 22, 1997 a hearing was held before an Office hearing representative at which time appellant testified. By decision dated October 3, 1997, finalized October 6, 1997, the Office

¹ See *Alfonso G. Montoya*, 44 ECAB 193, 198 (1992); *Gail D. Painton*, 41 ECAB 492, 498 (1990).

hearing representative affirmed the Office's November 15, 1996 Office decision. By letter dated January 5, 1998, appellant requested reconsideration. By decision dated April 7, 1998, the Office denied modification of its October 3, 1997 decision.²

In a narrative report dated January 4, 1993, Dr. Daniel J. Clauw, a Board-certified internist of professorial rank with a specialty in rheumatology, related that appellant had chronic back pain with spasms as well as mild arthritis of the cervical spine. He provided findings on examination and diagnosed fibromyalgia.

In notes dated March 11, 1994, Dr. David P. Sniezek, appellant's attending physiatrist, related that appellant complained of persistent upper and lower back pain. He stated that he had reviewed appellant's history and condition and concluded that he was totally disabled.

In a narrative report dated March 29, 1994, Dr. Sniezek provided a history of appellant's condition and stated that at the time of his first examination of appellant on October 26, 1992 his working diagnosis was a sprain/strain of the cervical spine complicated by myofascial pain syndrome. He noted that x-rays taken on September 21, 1992 revealed only mild degenerative changes at C5-6. Dr. Sniezek provided findings on examination and diagnosed chronic sprain/strain of the cervical spine with secondary traumatically-induced fibromyalgia and opined that appellant would be disabled for at least one year.

In a narrative report dated June 23, 1995, Dr. Major P. Gladden, a Board-certified orthopedic surgeon and Office referral physician, provided a history of appellant's condition and findings on examination and stated that there was no objective evidence of any ongoing problem and appellant was able to perform his normal activities.

By letter dated November 6, 1995, the Office referred appellant, together with a statement of accepted facts and copies of medical records, to Dr. Robert O. Gordon, a Board-certified orthopedic surgeon, for an examination and evaluation. It appears that the Office had intended that Dr. Gordon act in the capacity of an impartial medical specialist selected to resolve a conflict in medical opinion between Dr. Sniezek, appellant's physician, and Dr. Gladden, the Office referral physician, as to whether appellant had any remaining disability or medical condition causally related to his September 17, 1992 employment injury. This was evidenced by an internal Office memorandum, a subsequent statement of accepted facts and the August 30, 1996 Office decision. However, neither appellant nor Dr. Gordon was advised of the existence of a conflict or the fact that the Office wished Dr. Gordon to act as an impartial medical specialist rather than as a second opinion physician. The Board has held, in the case of *Henry J. Smith, Jr.*,³ that when the Office does not notify a claimant of a physician's status as an impartial medical specialist, that physician may not serve as the impartial medical specialist in that case. The Office's procedures, as noted in the *Smith* case, are intended to assure a claimant's knowledge that a physician is an impartial medical specialist, so that he or she may then choose

² The Board notes that appellant submitted additional evidence with his appeal to the Board. The Board has no jurisdiction to review this evidence for the first time on appeal; see 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35, 36 n. 2 (1952).

³ 43 ECAB 524 (1992), *reaff'd on recon.*, 43 ECAB 892 (1992).

to exercise the procedural right to participate in the selection of the impartial medical specialist. In this case, as appellant was not advised that Dr. Gordon was selected to serve as an impartial medical specialist, Dr. Gordon must be deemed a second opinion physician. Therefore, his opinion is not entitled to the special weight which is generally accorded to the opinion of an impartial medical specialist.⁴

In a narrative report dated November 27, 1995, Dr. Gordon provided a history of appellant's condition and findings on examination and diagnosed a history of cervical strain. He stated:

“It appears that [appellant] was felt to have sustained some soft tissue strain in the accident that occurred on September 17, 1992 and there is nothing in my examination of [appellant] or my review of the medical records that have thus far been provided that indicate that anything other than a soft tissue strain occurred. His x-rays and his MRI [magnetic resonance imaging] scan indicate nothing more serious than a muscular strain. Nevertheless, over three years later, [appellant] still has significant subjective complaints and says he is not working, even at light duty; however, there are no objective findings on examination and there is no objective evidence of any residual or permanent impairment as a result of the September 17, 1992 accident. The healthcare practitioners that have continued to treat him for all these years stated that he has what they call either chronic myofascial pain syndrome or fibromyalgia, however, I believe they are really describing his subjective complaints, rather than any objective abnormalities. I do not believe that any symptoms that he has at this time are related to any anatomical injury that occurred on September 17, 1992 and I do not believe that he has any restriction on his physical capacity as a result of the September 17, 1992 accident....”

In noting that appellant had no employment-related residual or permanent impairment, Dr. Gordon explained that “I would not ordinarily expect even someone who does heavy work to be restricted from work activity for more than six weeks after such an injury.”

In form reports dated December 13, 1995 and January 19, March 1 and July 1, 1996, Dr. Sniezek related that appellant had focal areas of muscle tightness and pain. He diagnosed fibromyalgia and indicated that the condition was causally related to his September 17, 1992 employment injury. Dr. Sniezek indicated that appellant remained totally disabled.

In a letter dated July 10, 1996, Dr. Sniezek stated that appellant remained under his care for chronic neck and lower back pain and stiffness due to his 1992 employment injury.

In a report dated September 16, 1996, Dr. Sniezek discussed appellant's symptoms and stated his opinion that the fibromyalgia condition was causally related to appellant's September 17, 1992 employment injury. He stated that when he first examined appellant he found that he had focal areas of muscle tightness and pain in the shawl muscles of the upper

⁴ See *Roger Dingess*, 47 ECAB 123, 126 (1995).

back. Dr. Sniezek stated that appellant was diagnosed as having myofascial pain syndrome and fibromyalgia and continued to experience symptoms despite treatment and stated that he had advised appellant to stop working.

In a report dated October 30, 1996, Dr. Sniezek provided a history of appellant's condition and findings on examination and diagnosed a chronic sprain/strain of the cervical spine with secondary traumatically-induced fibromyalgia. He indicated that appellant remained disabled due to these conditions.

In a report dated November 11, 1996, Dr. Clauw related that appellant had experienced intermittent musculoskeletal pain dating back to his military service in Vietnam and an exacerbation after some minor trauma in the late 1980's and that he developed more severe discomfort following his employment injury in September 1992. He stated:

“The symptoms that he is currently experiencing, which are all seen in fibromyalgia, include: muscle pain and spasms, weakness, stiffness, numbness and tingling, headaches, irritable bowel symptoms, TMJ [temporomandibular joint] syndrome, fatigue and difficulty with concentration. [Appellant] has been tried on a number of different medications, some of which have been successful in reducing symptoms, yet these problems all continue to date.

“I feel that because of his history and physical examination he suffers from fibromyalgia syndrome and that this condition is likely to be permanent.”

The Board finds that there exists an unresolved conflict in the medical opinion evidence between appellant's physicians, Drs. Sniezek and Clauw, and the Office referral physicians, Drs. Gordon and Gladden, as to whether appellant continued to have any residual disability or medical condition causally related to his September 17, 1992 employment injury.⁵ Therefore, the Office failed to meet its burden of proof in terminating appellant's compensation benefits.

⁵ As noted above, Dr. Gordon is a second opinion physician in this case, not an impartial medical specialist, and his opinion is not entitled to special weight.

The decisions of the Office of Workers' Compensation Programs dated April 7, 1998 and October 3, 1997 and finalized on October 6, 1997 are reversed.⁶

Dated, Washington, DC
September 15, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Valerie D. Evans-Harrell
Alternate Member

⁶ Given the Board's disposition of the first issue in the present case, it is not necessary for the Board to address the second issue of whether appellant met his burden to establish that he sustained an employment-related disability after November 15, 1996.