

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN T. STARKS and DEPARTMENT OF THE ARMY,
WATERVLIET ARSENAL, Watervliet, NY

*Docket No. 00-899; Submitted on the Record;
Issued April 9, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation effective December 9, 1999.

Appellant was injured on November 15, 1977, when he was shoveling salt from the back of a truck and injured his low back. The Office accepted the condition of acute lumbosacral strain as arising out of that employment incident. Appellant returned to work on November 16, 1977 and returned to full duty on November 22, 1977. He stopped work again on November 29, 1977 and has not returned to work since that time.

Appellant was first treated on November 16, 1977 by Dr. Baruch Davis, a specialist in medical research. He was also treated at the employee health unit between November 18 and December 19, 1977. The claimant was transported from the employee health unit to the emergency room at St. Mary's Hospital on November 18, 1977. Appellant was hospitalized at Hillcrest Hospital from January 8 to January 26, 1978. Claimant was treated by Dr. Steven Silver beginning on August 20, 1982.

Appellant began his treatment with Dr. Philip S. Volastro, a Board-certified rheumatologist, on August 2, 1983. In a work restriction evaluation form dated October 28, 1999, Dr. Volastro noted severe restrictions on appellant's ability to work. Specifically, Dr. Volastro stated that appellant could not walk, lift, bend, squat, climb or kneel, could not perform simple grasping or pushing and pulling or fine manipulation, work above his shoulder, and that he could only sit for one to two hours a day. He noted that appellant has major impaired respiratory capacity. In a medical report dated June 10, 1998, Dr. Volastro noted appellant's ongoing problems with cervical and lumbar disc disease, degenerative arthritis, right shoulder girdle difficulty, rotator cuff tendinitis and carpal tunnel syndrome of the right hand.

By letter dated December 3, 1998, appellant was referred to Dr. William Bronk, a Board-certified orthopedic surgeon, for a second opinion. In a medical report dated December 9,

1998, Dr. Bronk noted that, although appellant suffered from numerous conditions, including chronic low back pain which was partially related to the job injury of November 15, 1977 and partially related to the three prior lumbar surgeries,¹ the evidence of record and his examination did not support that any conditions other than the acute lumbosacral strain were the result of the job incident of November 15, 1977. He continued:

“The examinee’s current symptoms and complaints regarding his back, are partially related to the November 15, 1977 incident, in my opinion, but are also related to the extraneous conditions of spinal fusion with disc excision and cervical degenerative disc disease and shoulder symptoms, as well as arthritis of the knee.

“If the injury of November 15, 1977 was a low back strain superimposed upon preexisting lumbar surgery, I would have expected this condition to have resolved by this time; however, some of these cases do not. I cannot provide you any further insight other than that. There are a percentage of cases of low back strain, which do not resolve for unknown factors. Some of this may be attributed to the examinee’s age and his obesity.

“The examinee’s injury is certainly an aggravation of a nonwork-related condition that existed prior to the injury of record. I cannot state whether or not this condition has returned to its preinjury status. The examinee states that he feels this is worse since the job-related accident, but I have no way of knowing whether or not this is the case. Historically, one has to assume that, since [appellant] did not return to work after the accident of November 15, 1977, that the aggravation of the preexisting condition may have been permanent, however, this is based purely on history.

“The examinee cannot perform his regular work duties. He is a laborer and groundsman and this involves bending and lifting and he is not equipped to perform these duties.

“The examinee’s inability too perform his regular duties is due to the incident of record, as best I can tell, as well as because of other conditions.”

Finally, Dr. Bronk concluded that appellant could perform other work duties within his physical limitations. In a work restriction form dated December 9, 1998, Dr. Bronk opined that appellant could work eight hours a day, although he placed restrictions on appellant by limiting his walking, standing, pushing and pulling to two hours and prohibiting reaching, twisting, squatting, kneeling and climbing.

By letter dated June 9, 1999, the Office referred appellant to Dr. Thomas S. Eagan, a Board-certified orthopedic surgeon, for an independent medical examination. In a medical

¹ Dr. Bronk found that appellant’s complaints of neck stiffness, limitation of motion of the right shoulder and osteoarthritic changes in his right shoulder are unrelated to the injury of November 1997.

report dated June 29, 1999, Dr. Eagan opined that appellant suffered from sprain of his lumbar spine, failed back syndrome, obesity, tobacco abuse-persistent, chronic obstructive pulmonary disease, asthma, arteriosclerotic heart disease, hypercholesterolemia, cervical lumbar degenerative disc disease, carpal tunnel syndrome, hypertension and rotator cuff tendinitis. He determined that there were no objective findings that the accepted condition of acute lumbosacral strain was still active. Dr. Eagan noted that appellant's diagnostic studies were unrevealing, and that the physical examination which revealed decreased range of motion of the lumbar spine and reported tenderness was compatible with degenerative joint disease of the lumbar spine which preexisted the November 15, 1977 workplace injury. He opined that appellant has recovered from the acute lumbosacral strain, and in reviewing the medical records, he was of the opinion that the sequence of events of the work injury amounted to a temporary aggravation of his severe underlying degenerative disc disease. Dr. Eagan further opined:

“Objectively the claimant is unable to perform the physical requirements of a laborer because of the objective findings of limitation of motion of the lumbar spine and reported tenderness, as well as the objective findings of abdominal obesity and deconditioned state. The disability of his lumbar spine is because of his underlying condition of lumbar disc degeneration. He has recovered from the injury sustained while shoveling. It is not possible to say exactly when this occurred retrospectively, but I cannot attribute any of his symptoms now to the injury of November 15, 1977. An acute lumbar strain is self limited.”

By letter dated October 28, 1999, the Office informed appellant of intention to terminate compensation payments.

In a decision dated December 9, 1999, the Office terminated appellant's entitlement to compensation and medical benefits effective that date, for the reason that appellant no longer had any residual impairment traceable to the injury of November 15, 1977.

It is well established that once the Office has accepted 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. Thus, the burden of proof is on the Office rather than the employee with respect to the period subsequent to the date when compensation is terminated or modified.²

In the instant case, as there existed a conflict between appellant's treating physician, Dr. Volastro, and the physician giving the second opinion for the office, Dr. Bronk, the Office referred appellant to Dr. Eagan, a Board-certified orthopedic surgeon, for an impartial opinion. Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict,

² *Eddie Franklin*, 51 ECAB ____ (Docket No. 98-1240, issued December 14, 1999); *Craig M. Crenshaw, Jr.*, 40 ECAB 919, 922 (1989); *Edwin L. Lester*, 34 ECAB 1807 (1983).

the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.³

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Eagan, the impartial medical specialist selected to resolve the conflict in the medical opinion. After examining appellant and reviewing his medical records, Dr. Eagan opined that there were no objective findings that the accepted condition of acute lumbosacral strain was still active. Although he agreed with the other doctors of record that appellant remains disabled, he stated that this was due to his lumbar disc degeneration, which existed prior to 1977. He stated that, although it was not possible to say exactly when appellant recovered from the injury of November 15, 1977, he concluded that none of his remaining symptoms were due to that accepted work injury, as an acute lumbar strain was self-limited. As Dr. Eagan's opinion is based upon an accurate factual background and his opinion that appellant had recovered from the work-related injury was supported by substantial evidence, it was entitled to special weight, and the Office met its burden in terminating appellant's compensation benefits.

The decision of the Office of Workers' Compensation Programs dated December 9, 1999 is affirmed.

Dated, Washington, DC
April 9, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member

³ *Charles E. Burke*, 47 ECAB 185, 191 (1995).