U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JIMMIE H. DUCKETT and DEPARTMENT OF THE NAVY, NAVAL SHIPYARD, Long Beach, CA

Docket No. 99-1858; Submitted on the Record;
Issued April 6, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective January 7, 1996.

On August 19, 1983 appellant, then a 44-year-old pipefitter, filed a claim for an injury to his shoulders, head and back on August 18, 1983 when he fell backwards onto a pallet. He returned to limited duty on June 4, 1984, but stopped work on June 14, 1984. The Office paid compensation until appellant returned to limited duty as a clerk for four hours a day on January 13, 1992, after which the Office began payment of compensation for loss of wage-earning capacity.

Appellant filed a claim for a recurrence of disability on March 18, 1994. By decisions dated July 6, 1994 and May 23, 1995, the Office found the evidence insufficient to establish that appellant could not perform the duties he held when he stopped work on March 3, 1994.

On September 11, 1995 the Office referred appellant, a statement of accepted facts and prior medical reports to Dr. James T. London, a Board-certified orthopedic surgeon, for a second opinion on appellant's disability and its relationship to his employment injury. After receiving Dr. London's report, the Office issued a notice of proposed termination of compensation on December 4, 1995.

In response, appellant submitted a report dated December 18, 1995 from Dr. Paul E. Wakim, an osteopath, and a December 27, 1995 report from Dr. Rufus W. Gore, a Board-certified orthopedic surgeon. By decision dated January 5, 1996, the Office terminated appellant's compensation effective January 7, 1996 on the grounds that the disability and residuals of his accepted employment injury had ceased.

Appellant requested a hearing, which was held on October 23, 1996. By decision dated December 17, 1996, an Office hearing representative found that the weight of the medical evidence established that appellant's disability and condition related to his August 18, 1983 employment injury ended by January 5, 1996.

Appellant requested reconsideration and submitted additional medical evidence, including a November 11, 1996 report from Dr. Jack Kriegsman, a Board-certified orthopedic surgeon. By decision dated August 21, 1997, the Office reiterated its previous finding. By letter dated November 8, 1997, appellant again requested reconsideration, which was denied on December 29, 1997 as insufficient to warrant review of its prior decisions.

Appellant requested reconsideration twice more and submitted a report dated March 24, 1998 from Dr. Bart DeCoro, a Board-certified physiatrist and an August 13, 1998 report from Dr. Charles D. Kenyon, a Board-certified rheumatologist. On November 19, 1998 the Office referred appellant to Dr. Mark Borigini, a Board-certified rheumatologist, for a second opinion evaluation. The Office denied appellant's requests on June 15, 1998 and February 11, 1999 on the grounds that the additional evidence was insufficient to warrant modification of its prior decisions.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. 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.[1]

The Board finds that the Office properly terminated appellant's compensation effective January 7, 1996.

In his October 17, 1995 report, Dr. London set forth an accurate history of appellant's injury and treatment, and reviewed the prior medical evidence. After describing appellant's findings on physical examination and x-rays, Dr. London concluded:

> "[Appellant], in my opinion, sustained a contusion as a result of the August 18, 1983 incident. In my opinion, that contusion would reasonably have resolved in five to six weeks with conservative medical treatment. In my opinion, there are no permanent residuals as a result of the August 18, 1983 incident.
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> "[Appellant] has a preexisting, long-standing medical condition known as ankylosing spondylitis. He has spontaneous fusion of his spine from the upper thoracic area to the sacrum. He has no motion whatsoever in his thoracolumbar spine. The only way in which the August 18, 1983 incident could have aggravated or worsened this preexisting condition would have been by causing a fracture in his stiffened spine. There is no evidence in his medical records or x-rays to indicate that he sustained any fracture of his spine. His spine is completely solid. A fall on the back would have only injured the soft tissues in the thoracic and lumbar area in the absence of a fracture. Since his spine is completely fused and there is bone around each one of the discs in the spine, it would have been impossible for him to have sustained any disc injury.
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> "It is therefore my opinion that his condition should have resolved in five to six weeks. Ongoing medical treatment and periods of disability once six weeks had

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

passed from the August 18, 1983 incident, in my opinion, was necessitated by his ankylosing spondylitis and not by the August 18, 1983 incident. No work restrictions are indicated as a result of the August 18, 1983 incident. No medical treatment was necessitated after six weeks had passed from the August 18, 1983 incident."

In a report dated December 27, 1995, Dr. Gore set forth appellant's history and reviewed prior medical reports. After describing appellant's findings on physical examination and x-rays, he concluded:

"That the patient sustained an industrial injury in 1983 certainly is not in question. This would have reasonably produced minimal soft tissue injury such as contusions, bruises, strains, sprains or the like.

"I would have to concur with Dr. London in that one would have reasonably received substantial improvement within five to six weeks. It has been my experience that some patients continue to be symptomatic for perhaps up to 8 to 12 weeks. To consider that this patient has, some 12 years status post injury, continued to be symptomatic, is not medically reasonable and we must give strong consideration to the natural progression of other possible etiologies of this patient's complaints and findings.

"The patient has been followed by multiple physicians in the past. His medical conditions have been well addressed by a Dr. Thompson, who has treated his diabetes, hypertension and his prostate problem. It is to be noted, however, that Dr. Thompson's medical diagnosis fails to include the rheumatological disorder known as ankylosing spondylitis. This is a well-established, well-documented disease process, which classically begins in the fourth and fifth decade of life and is characterized by the presence of discomfort, typically in the lumbar spine and especially over the sacroiliac joints. These patients then have discomfort that proceeds in a caudal to cephalad direction. This is the case we see with [appellant]. He initially complained of lumbar pain, but over the years, there are documented episodes of thoracic discomfort.

"It is unfortunate that Dr. Thompson, as well as Dr. Haft, did not fully appreciate the radiographic abnormalities and, indeed, failed to include the diagnosis of ankylosing spondylitis given the classic 'bamboo spine.' Additionally, there were no blood tests, which can help to further solidify this diagnosis. Typically these patients have a genetic marker in their blood known as an HLAB-27. Though this can be negative in some circumstances, the presence of this genetic marker can be helpful. Indeed, the patient's clinical presentation, that of his extensive syndesmophyte formation with ankylosis and sacroiliac joint fusion and total spine fusion from the lumbar to the thoracic spine, should be given the most consideration. Also, on my examination, there is expansion of the thoracic cage which is classic in this disease process.

"In conclusion, it is reasonable that the patient sustained a contusion or lumbar strain in the 1983 injury. Certainly, 12 years post injury, this would not be persistent.

> "In my medical opinion, I would have to concur with the other physicians who have reached the conclusion that this patient's ongoing symptomatology is due to the relentless, natural progression of a preexistent nonindustrial condition. That disease, ankylosing spondylitis, is not to be considered an arthritic process. It is certainly an inflammatory process but is not aggravated by other musculoskeletal mechanical injuries such as contusions, bruises, strains, sprains or the like.
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> "Again, this is a disease process that is not affected by outside factors. There only exception and I have to concur with Dr. London, was if there were a spinal fracture. However, this did not occur with this patient as a result of his 1983 industrial injury.
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> "This patient is permanent and stationary with the restrictions he was issued in 1984, which restricted him from heavy lifting and other activities. I do not believe that there has been any additional injury or progression of his industrial component in this problem. Indeed, at this time, some 12 years later, his condition would have to be attributed to the ankylosing spondylitis."

At the time of the Office's January 5, 1996 decision terminating appellant's compensation, the reports of Drs. London and Gore constituted the weight of the medical evidence and were sufficient to meet the Office's burden of proof in terminating appellant's compensation. These reports were based on an accurate history, reviewed prior medical reports, and provided medical rationale explaining why these Board-certified orthopedic surgeons believed that appellant's continuing condition was due to the natural progression of his preexisting ankylosing spondylitis rather than to his August 18, 1983 employment injury.

The reports of Dr. Wakim are entitled to less probative value than those of Drs. London and Gore. In his September 7, 1995 report, Dr. Wakim acknowledged that he did not have any medical records available to review. He concluded that appellant's ankylosing spondylitis was aggravated by his 1983 employment injury, but did not provide any rationale for this conclusion. Medical reports not containing rationale on causal relation are entitled to little probative value.[2] Dr. Wakim's December 18, 1995 report sets forth primarily a legal argument rather than a medical opinion:

> "The definition of aggravation in the workers' compensation field and labor code indicates an increase in the symptoms and/or findings than previously, due to an incident either industrial or nonindustrial. [Appellant] sustained such an incident on August 18, 1983 that aggravated his preexisting condition and brought this to light. Such contribution has been held as a causative factor of aggravation by the courts over my 23 years of practice and common knowledge."

Not only are legal standards outside the realm of expertise of a physician,[3] but also the Board has consistently stated that the fact that work activities produced pain or discomfort revelatory of an underlying condition does not raise an inference of causal relation.[4]

[2] *Ceferino L. Gonzales*, 32 ECAB 1591 (1981).

[3] *Helen Casillas*, 46 ECAB 1044 (1995).

[4] *Harry D. Nelson*, 33 ECAB 1122 (1982).

The reports appellant submitted subsequent to the Office's termination of his compensation do not outweigh the reports of Drs. Gore and London or create a conflict of medical opinion.[5] In a report dated March 6, 1996, Dr. George Thompson, Jr., a Board-certified internist, stated that appellant had "a well-documented history of persistent low back pain related to traumatic injuries sustained at work in August, 1983," but did not provide any rationale to explain how the low back pain in 1996 was still related to the 1983 employment injury.

In a report dated November 11, 1996, Dr. Kriegsman, a Board-certified orthopedic surgeon, opined that "the healing episode would have been significantly protracted because of the underlying problem," and that "a temporary disability as a result of this injury could have been as long as two years and very possibly somewhat longer than that." This opinion does not support the position that appellant's disability related to his August 18, 1983 employment injury did not end by January 7, 1996, the date the Office terminated his compensation. Nor does Dr. Kriegsman's "educated guess that absent his industrial injury of 1983, the patient probably could have performed the work he was doing for an additional 5 to 10 years without being incapacitated, as he is at the present time." In a report dated March 24, 1998, Dr. DeCoro disagreed with Drs. London and Gore that the effects of appellant's employment injury resolved within no more than 12 weeks, but did not express an opinion that appellant had continuing disability causally related to his August 18, 1983 injury.

In a report dated August 13, 1998, Dr. Kenyon, a Board-certified rheumatologist, concluded that appellant did not have ankylosing spondylitis but that his diagnosis actually was diffuse idiopathic skeletal hyperostosis (DISH). After explaining how he arrived at this diagnosis, Dr. Kenyon stated:

> "It is my professional opinion that it would not be unusual for a preexistent disease such as [DISH] to be asymptomatic prior to an injury and for an individual following an injury to have a marked exacerbation of symptoms. I suspect he sustained a major ligamentous injury or perhaps one or more microfractures involving the heterotopic ligamentous calcifications, which occur in DISH. I feel that an acute and potentially chronic exacerbation of a preexistent disease very likely occurred at the time of this man's injury, although sometimes these injuries may heal over time, in other instances they may not."

This opinion by Dr. Kenyon is speculative, especially given his statement later in this report: "In so far as how to apportion any potential long-term disability between his preexistent disease [DISH] and the work-related aggravation of same, I have no opinion." In addition, Dr. Kenyon appears to have relied on an inaccurate history of "a severe injury to his back on August 18, 1983." This is inconsistent with the medical reports prepared shortly after the injury, such as the August 19, 1983 report from Dr. Thompson diagnosing a low back strain and indicating appellant could return to light work on September 1, 1983 and a November 16, 1983 Dr. Thompson report stating that appellant had minimal physical findings and no neurologic

[5] Beginning with an Office hearing representative's December 17, 1996 decision, the Office's decisions have referred to Dr. Gore as an impartial medical specialist resolving a conflict of medical opinion. The evidence reveals, however, that appellant was referred to Dr. Gore by his representative rather than by the Office. Dr. Gore's opinion therefore is not entitled to the special weight afforded an impartial medical specialist resolving a conflict of medical opinion.

deficits. Dr. Kenyon's report lends little support to the position that appellant had disability after January 7, 1996 causally related to his August 18, 1983 employment injury.

After it received Dr. Kenyon's report, however, the Office referred appellant to another Board-certified rheumatologist, Dr. Borigini, for a second opinion. In a report dated December 16, 1998, Dr. Borigini, after noting that Dr. Kenyon raised the possibility that a microfracture was responsible for appellant's pain, stated, "I feel that his symptoms are so diffuse, with trouble with the cervical spine, thoracic spine and lumbosacral spine, and it is not entirely clear to me that he would have injured all of those areas simultaneously with no improvement over 15 years with pain from such an injury." He concluded, "I do not think that that the course of this condition, if it were DISH, or even if were ankylosing spondylitis, would be altered because of his fall." Although Dr. Borigini concluded that appellant had a chronic pain syndrome that was caused by his employment injury, in a supplemental report dated January 14, 1999 Dr. Borigini stated that he "did not feel the incident in 1983 would have caused an anatomic injury that could explain his diffuse pain complaints." His report lends little support to a position that appellant had disability after January 7, 1996 causally related to his August 18, 1983 employment injury.

The decisions of the Office of Workers' Compensation Programs dated February 11, 1999 and June 15, 1998 are affirmed.

Dated, Washington, DC
April 6, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member