

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of RONALD G. OWENS and DEPARTMENT OF THE ARMY,  
U.S. ARMY MATERIAL COMMAND, Texarkana, TX

*Docket No. 00-984; Submitted on the Record;  
Issued August 2, 2001*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective January 11, 1999.

The Office accepted appellant's claim for a lumbar strain, a herniated disc at L5-S1 with a discectomy performed in April 1989 resulting from an April 9, 1987 employment injury under claim No. 16-00129935. The Office also accepted his claim for rotator cuff syndrome of the right shoulder, dislocation of the right acromioclavicular joint and resection of the right distal clavicle on July 16, 1985 resulting from a June 27, 1995 employment injury under claim No. 16-0098449. The Office combined the shoulder claim with the back claim. He has not worked since October 30, 1984.

In a progress note dated September 16, 1998, appellant's treating physician, Dr. Jeffrey T. DeHaan, a Board-certified orthopedic surgeon, stated that appellant came in for a follow-up of a magnetic resonance imaging (MRI) scan which did not show any neurological impingement or nerve problems. He stated that the MRI scan showed degenerative changes at the discs both at the level of the fusion and above it. Dr. DeHaan recommended obtaining tomograms to determine if there was nonunion in the area of the fusion.

In an October 1, 1998 progress note, Dr. DeHaan stated that the fusion looked solid in the tomograms. In a progress note dated November 17, 1998, he stated that appellant was having "a little bit more" difficulty in the left sacroiliac region and he stated he would like to see what a tertiary center would have to say on the question of whether appellant should have surgery.

In a report dated November 13, 1998, a referral physician, Dr. Edwin C. Simonton, a Board-certified orthopedic surgeon, considered appellant's history of injury, performed a physical examination, reviewed x-rays of the shoulder and lumbar spine, tomograms performed on February 15, 1996 and October 1, 1998 and the September 16, 1998 MRI scan. He stated that appellant had recovered from multiple surgical procedures on his right acromioclavicular joint and lumbar spine. Dr. Simonton stated that, "[b]ecause of the calcific body and the multiple

surgical procedures performed,” he recommended that appellant not attempt work of an overhead nature. He stated that appellant had recovered from the accepted lumbar strain and there were no objective findings of a herniated disc at L5-S1. Dr. Simonton stated that appellant could not return to work operating heavy machinery because of the restriction of motion in the right shoulder and because of the likelihood of aggravating his back. He stated that appellant should not perform overhead work and his bending and lifting should be restricted. Dr. Simonton also stated that appellant should drive an automobile in moderation. He stated that, if appellant could stop and move about, and change positions, his problem would be minimized. In an undated work capacity evaluation, Dr. Simonton opined that appellant could work eight hours a day but that he should initially start working from four to six hours a day and gradually work up to an eight-hour day.

On December 7, 1998 the Office issued a notice of proposed termination of compensation, in which it found that Dr. Simonton’s opinion constituted the weight of the evidence and established that appellant had no continuing work-related disability due to the April 9, 1987 employment injury.

By decision dated January 11, 1999, the Office terminated appellant’s compensation benefits effective January 11, 1999.

In an undated letter, appellant requested reconsideration of the Office’s decision and submitted additional evidence including reports and a progress note from Dr. Charles R. Gordon, a neurological surgeon, dated December 14 and 23, 1998 and Dr. DeHaan’s progress notes dated from September 16 through November 17, 1998. In a report dated December 14, 1998, Dr. Gordon considered appellant’s history of injury, performed a physical examination and reviewed the tomograms which he stated suggested nonunion posterolaterally at L5-S1 with disc deterioration at L5-S1. He stated that he would like to see the most recent MRI scan, and if the discs above L5-S1 looked good and there was no nerve pressure, he thought appellant would be a good candidate for an anterior lumbar interbody fusion at L5-S1 based on his nonunion alone. Dr. Gordon stated that, if the discs above L5-S1 were worrisome, they might need to consider preoperative discography and if appellant had pressure on the nerve, they might need to consider anterior interbody fusion with posterior nerve exploration.

In another report dated December 14, 1998, Dr. Gordon stated that appellant was completely medically disabled on the basis of his left leg pain and weakness and his problems. He recommended considering surgical intervention.

In a progress note dated December 23, 1998, Dr. Gordon stated that he reviewed the MRI scan and agreed with Dr. DeHaan that appellant would be a good candidate for “an ALIF L5-S1 based on the MRI [scan] alone.”

By decision dated March 11, 1999, the Office denied appellant’s request for modification.

The Board finds that the Office failed to meet its burden of proof to terminate benefits.

Once the Office has accepted 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.<sup>1</sup> The Office's burden of proof includes the necessity of furnishing rationalized medical evidence based on a proper factual and medical background.<sup>2</sup>

In this case, a conflict of medical opinion exists between the referral physician, Dr. Simonton, and appellant's treating physician, Dr. Gordon, as to whether appellant continues to have a work-related disability.<sup>3</sup> Dr. Simonton found that appellant had recovered from the accepted injury of lumbar strain and had residual findings of a herniated disc at L5-S1. Dr. Gordon, however, stated that the tomograms showed nonunion posterolaterally at L5-S1 with disc deterioration at L5-S1 and opined that appellant was totally disabled on the basis of his left leg pain and weakness. As a conflict exists between Dr. Simonton and Dr. Gordon as to whether appellant continued to be disabled due to his April 9, 1987 back injury, the Office failed to meet its burden of proof to terminate benefits.

The decisions of the Office of Workers' Compensation Programs dated March 11 and January 11, 1999 are hereby reversed.

Dated, Washington, DC  
August 2, 2001

David S. Gerson  
Member

Willie T.C. Thomas  
Member

Michael E. Groom  
Alternate Member

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<sup>1</sup> *Wallace B. Page*, 46 ECAB 227, 229-30 (1994); *Jason C. Armstrong*, 40 ECAB 907, 916 (1989).

<sup>2</sup> *Larry Warner*, 46 ECAB 1027, 1032 (1992); *see Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>3</sup> *See* 5 U.S.C. § 8123(a).