U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES J. DERNER and DEPARTMENT OF THE NAVY, NAVAL AIR STATION, Alameda, CA

Docket No. 99-1265; Submitted on the Record;
Issued February 1, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective March 28, 1999 on the grounds that he had no disability after that date due to his November 25, 1980 employment injury.

The Board finds that the Office properly terminated appellant's compensation effective March 28, 1999 on the grounds that he had no disability after that date due to his November 25, 1980 employment injury.

Under the Federal Employees' Compensation Act,[1] once the Office has accepted a claim it has the burden of justifying termination or modification of compensation benefits.[2] The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[3] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[4]

On November 25, 1980 appellant, then a 29-year-old aircraft towman, fell on his back at work and sustained an acute strain of the muscles and ligaments of his thoracolumbar spine with nerve root irritation and a permanent aggravation of degenerative disc disease at L4-5. Appellant stopped work on November 25, 1980, returned to work on August 10, 1981 and stopped work again on March 7, 1982; he received compensation for periods of disability. By decision dated March 24, 1999, the Office terminated appellant's compensation effective March 28, 1999 on the

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[1] 5 U.S.C. §§ 8101-8193.

[2] *Charles E. Minniss,* 40 ECAB 708, 716 (1989); *Vivien L. Minor,* 37 ECAB 541, 546 (1986).

[3] *Id.*

[4] *See Del K. Rykert,* 40 ECAB 284, 295-96 (1988).

grounds that he had no disability after that date due to his November 25, 1980 employment injury. The Office based its termination on the opinion of Dr. Randall W. Armstrong, a Board-certified orthopedic surgeon who served as an impartial medical examiner.

The Office determined that there was a conflict in the medical opinion between Dr. David S. Seminer, appellant's attending Board-certified neurosurgeon, and Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon acting as an Office referral physician, on the issue of whether appellant continued to have disability due to his November 25, 1980 employment injury.[5] In order to resolve the conflict, the Office properly referred appellant, pursuant to section 8123(a) of the Act, to Dr. Armstrong for an impartial medical examination and an opinion on the matter.[6]

In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[7] The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Armstrong, the impartial medical specialist selected to resolve the conflict in the medical opinion. The July 17, 1997 report of Dr. Armstrong establishes that appellant no longer had disability due to his November 25, 1980.

In his report, Dr. Armstrong indicated that diagnostic testing from the 1980s showed degenerative disc disease of appellant's low back, but did not show any significant disc protrusion in that region. He noted that an attending physician indicated in 1986 that appellant had full range of lumbar motion with negative straight leg raising and no objective evidence of motor weakness. Dr. Armstrong noted that it was not until 1992 that diagnostic testing showed a significant protrusion at L4-5. He diagnosed degenerative disc disease at L4-5 with an L4-5 disc protrusion and indicated that there is little evidence that the November 25, 1980 incident caused the L4-5 disc protrusion. Dr. Armstrong indicated that appellant likely sustained musculoligamentous strains and annular disc tears which, given the nature of such conditions, would have resolved by August 1981. He noted that appellant was able to perform heavy work for a private employer beginning in 1982 and indicated that on multiple occasions, including the present examination, he exhibited inconsistent responses on lumbar range of motion testing. Dr. Armstrong concluded that appellant did not have any objective evidence of disability related to his November 25, 1980 employment injury. He noted that appellant's continuing problems

[5] In a report dated February 11, 1997, Dr. Seminer indicated that appellant continued to be totally disabled from his usual work due to his November 25, 1980 employment injury. In a report dated November 26, 1996, Dr. Swartz noted that appellant continued to have residuals of his November 25, 1980 employment injury but that he was able to perform his usual job as an aircraft towman with a lifting restriction of 50 pounds. He indicated that appellant ceased being totally disabled in August 1982.

[6] Section 8123(a) of the Act provides in pertinent part: "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." 5 U.S.C. § 8123(a).

[7] *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

were due to nonwork-related degenerative disc disease and recommended a 50-pound lifting restriction on that basis.

The Board has carefully reviewed the opinion of Dr. Armstrong and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Armstrong's opinion is based on a proper factual and medical history in that he had the benefit of an accurate and up-to-date statement of accepted facts, provided a thorough factual and medical history and accurately summarized the relevant medical evidence. Moreover, Dr. Armstrong provided a proper analysis of the factual and medical history and the findings on examination, including the results of diagnostic testing and reached conclusions regarding appellant's condition, which comported with this analysis.[8] Dr. Armstrong provided medical rationale for his opinion by explaining that appellant did not exhibit any objective evidence of employment-related disability and by noting that appellant's accepted condition was such that it would have since resolved itself. He also highlighted the fact that appellant had been able to perform heavy work and exhibited inconsistent responses on examination. Dr. Armstrong further explained that appellant's continuing problems were due to his nonwork-related degenerative disc disease.

Appellant submitted an October 10, 1997 report in which Dr. Desmond Erasmus, an attending Board-certified neurosurgeon, indicated that appellant had been totally disabled since August 1981 due to his November 25, 1980 employment injury. This report, however, is of limited probative value on the relevant issue of the present case in that Dr. Erasmus did not provide adequate medical rationale in support of his conclusion on causal relationship.[9] Appellant also submitted an August 21, 1997 report of Dr. Seminer, an October 31, 1997 report of Dr. Richard N. Canaan, an attending Board-certified orthopedic surgeon and an October 1, 1998 report of Dr. Pasquale X. Montesano, another attending Board-certified orthopedic surgeon. However, these reports do not contain a clear opinion that appellant continued to have employment-related disability.[10]

[8] *See Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

[9] *See Leon Harris Ford*, 31 ECAB 514, 518 (1980) (finding that a medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship which is unsupported by medical rationale).

[10] *See Charles H. Tomaszewski*, 39 ECAB 461, 467-68 (1988) (finding that medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

The decision of the Office of Workers' Compensation Programs dated March 24, 1999 is affirmed.

Dated, Washington, DC
February 1, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member