U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH E. BURGER and DEPARTMENT OF THE NAVY, AVIATION SUPPLY OFFICE, Philadelphia, PA

Docket No. 99-2096; Submitted on the Record;
Issued January 19, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation on October 19, 1995.

The Office accepted that appellant's August 19, 1991 employment injury resulted in a cervical and lumbosacral sprain and in a herniated disc at L4-5, for which a percutaneous nucleotomy was performed on October 9, 1992. Appellant received continuation of pay following his injury, followed by payment of compensation for disability during periods he worked part time and periods he did not work.

After his surgery on October 9, 1992 appellant returned to work on March 8, 1993 working four hours per day as a shipment clerk. The Office, which had paid compensation for temporary total disability during his absence from work after the surgery, reduced his compensation to that for partial disability.

On July 19, 1994 the Office referred appellant, prior medical records and a statement of accepted facts to Dr. Leonard Klinghoffer, a Board-certified orthopedic surgeon, for a second opinion on his disability and its relationship to his employment injury. In a report dated August 31, 1994, Dr. Klinghoffer after describing appellant's history, complaints and findings on physical examination and reviewing the prior medical reports, concluded: "I believe that some intermittent awareness of his low back seems reasonable on the basis of the fact that he had a percutaneous dis[c]ectomy but I cannot explain any of his other complaints and I feel reasonably convinced that his continuing symptoms now are due to nonphysical factors.… I do not believe that this man requires any active treatment in the orthopedic realm and I do not believe that he has any physical disability at this time."

The Office determined that the report of Dr. Klinghoffer created a conflict of medical opinion with the reports of appellant's attending physicians, including Dr. George Rodriguez, a Board-certified physiatrist, who in a November 17, 1994 report recommended further treatment

and set forth work tolerance limitations. To resolve this conflict of medical opinion, the Office referred appellant, the case record and a statement of accepted facts to Dr. John T. Williams, a Board-certified orthopedic surgeon. In a report dated June 23, 1995, Dr. Williams described appellant's history, complaints and findings on physical examination. He stated, "Today, on physical examination, there are no positive objective findings to correlate to this patient's complaints and in the absence of same, it [i]s my opinion that this patient is fully recovered and is able to resume his normal preaccident activities and duties without any restrictions." Dr. Williams reviewed appellant's prior diagnostic studies, noting that an April 29, 1992 computed tomography (CT) scan on April 29, 1992 showed degenerative changes that he stated "are on the basis of wear and tear and it [ha]s been there a while, meaning that this, obviously, preexisted the patient's accident and was aggravated by the accident." Dr. Williams concluded:

> "[M]y opinion is that this patient had preexisting degenerative disc and degenerative joint changes in his lumbar spine, which was evidence by the various studies which were done in close proximity to this patient's accident, *i.e.*, CT scan, dated [October 30, 1991], from the Diagnostic Testing Center. Impression -- there is a small, central herniation of L4-5 disc associated with some ligamentum flavum hypertrophy, which is causing some mild stenosis. Now that is there, it's been there, was there before the accident. The accident, in my opinion, aggravated it, but the aggravation would be a temporary and transitory nature and I think this is substantiated and correlated by the patient having had a procedure at this area and he still has the same complaints."

By decision dated October 19, 1995, the Office terminated appellant's compensation on the basis that the weight of the medical evidence demonstrated that the effects of appellant's August 19, 1991 employment injury had ceased. Appellant requested a hearing, which was held before an Office hearing representative on January 11, 1999. By decision dated March 5, 1999, an Office hearing representative found that the opinion of Dr. Williams constituted the weight of the medical evidence and established that appellant had recovered from his August 19, 1991 employment injury. The Office hearing representative also found that the reports subsequent to Dr. Williams' report were not sufficient to overcome the weight of that report and that the report of Dr. Perry A. Berman, a Board-certified psychiatrist, to whom the Office referred appellant, showed that appellant did not have a psychiatric condition related to his August 19, 1991 employment injury.

The Board finds that the Office properly terminated appellant's compensation on October 19, 1995.

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] In situations where there are opposing medical reports of virtually equal weight

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

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 on a proper factual background, must be given special weight.[2]

In the present case, there was a conflict of medical opinion on the question of whether appellant continued to have residuals of his employment injury. Dr. Klinghoffer, the Office's referral physician, concluded that he did not and Dr. Rodriguez, one of appellant's attending physicians, implied that he did. To resolve this conflict of medical opinion, the Office pursuant to section 8123(a) of the Federal Employees' Compensation Act,[3] referred appellant, the case record and a statement of accepted facts to Dr. Williams, a Board-certified orthopedic surgeon. Dr. Williams' June 23, 1995 report was based on an accurate history and concluded that appellant had "fully recovered" from the effects of his August 19, 1991 employment injury. Dr. Williams provided rationale for this opinion, stating that appellant had no positive objective findings on examination to correlate with his complaints. He also provided rationale for his opinion that appellant's continuing problems were on the basis of his preexisting degenerative process in his lumbar spine, explaining that CT scans done shortly after the injury showed degenerative changes that must have preexisted the injury and that appellant had surgery to correct the disc herniation at L4-5 but still had the same complaints. Dr. Williams' report constitutes the weight of the medical evidence and is sufficient to establish that appellant had no residuals of his August 19, 1991 employment injury after October 19, 1995. The reports of diagnostic testing done after Dr. Klinghoffer's report are of little probative value to support ongoing employment-related disability, as they do not address this determinative issue.

After Dr. Klinghoffer's evaluation suggested that appellant's symptoms may be psychiatric rather than physical, the Office referred appellant to Dr. Berman, a Board-certified psychiatrist. He diagnosed chronic somatoform pain disorder and concluded that "nothing of a psychiatric nature has caused his problems, nor did anything connected with work worsen of exacerbate any psychiatric condition other than his claims of pain." Dr. Berman attributed appellant's complaints to secondary gain: "When he has sufficient pain he does not have to work." Although he acknowledged that the etiology of appellant's claim of pain was difficult to assess and that Dr. Berman could not determine to what extent appellant's back pain was caused by his employment injury, the fact that the etiology of a condition is obscure does not shift the burden of proof to the Office to disprove an employment relationship.[4] The Office did not accept that appellant had a psychiatric condition causally related to his employment injury and appellant

[2] *James P. Roberts*, 31 ECAB 1010 (1980).

[3] 5 U.S.C. § 8123(a) states 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."

[4] *Judith A. Peot*, 46 ECAB 1036 (1995).

retained the burden of proof regarding such a condition.[5] While the case record contains evidence of psychiatric and psychological treatment, it does not contain a rationalized medical opinion that appellant has a psychological or psychiatric condition causally related to his August 19, 1991 employment injury. The Office properly found that appellant does not have psychiatric condition related to his employment injury.

The decision of the Office of Workers' Compensation Programs dated March 5, 1999 is hereby affirmed.

Dated, Washington, DC
January 19, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

[5] Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that his condition was caused or adversely affected by her employment. As part of this burden he must present rationalized medical opinion evidence, based on a complete factual and medical background, showing causal relation. The mere fact that a disease manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two. Neither the fact that the disease became apparent during a period of employment, nor the belief of appellant that the disease was caused or aggravated by employment conditions, is sufficient to establish causal relation. *Bruce E. Martin*, 35 ECAB 1090 (1984).