

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MICHAEL HOGUE and DEPARTMENT OF THE TREASURY,  
INTERNAL REVENUE SERVICE, St. Louis, MO

*Docket No. 00-1865; Submitted on the Record;  
Issued July 26, 2001*

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DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation for disability effective January 1, 2000.

On October 5, 1998 appellant, a 49-year-old investigator, injured himself while removing sandbags and a spare tire out of the trunk of a government vehicle. He stopped work on November 4, 1998 and did not return. The Office accepted his claim for the condition of right shoulder impingement and paid benefits.<sup>1</sup>

In a report dated March 2, 1999, Dr. Anthony Margherita, appellant's attending physician, related appellant's history of injury. He noted that clinical evaluation was somewhat limited given appellant's morbid obesity but that appellant had proceeded through a number of diagnostic procedures. Dr. Margherita reported that appellant currently manifested a primary symptom complex referable to a right rotator cuff tear. He added:

"Unfortunately, [appellant's] course has been somewhat complicated by the fact that he primarily uses his upper limbs for balance and control given the fact that he presently has a total hip replacement. I feel that this has significantly contributed to his continued disability and that his large size has similarly had a negative impact on his progress to date.

"From a symptomatic perspective [appellant] has improved somewhat through the course of our treatments and interventions and with the use of medications. I anticipated that with a shoulder injection and a reasonable therapy/range of motion program, that [appellant] should be capable of returning at some level to his prior work activities within the next four weeks. After he is reevaluated

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<sup>1</sup> In another claim the Office accepted the conditions of avascular necrosis of the left femoral head and left total hip replacement.

following the injection I will be able to offer specific work restrictions and modification of his work activities. By his own report, [appellant] is on the road a great deal and is required to utilize his right shoulder a great deal during the course of his work as an investigator.”

In a supplemental report dated June 3, 1999, Dr. Margherita advised that he had received the report of appellant’s functional capacity evaluation and follow-up visit and stated:

“It is my opinion at the present time that [appellant] suffers from a multiplicity of medical problems relating to his shoulder, hip, severe deconditioning and morbid obesity. Upon review of his functional capacity evaluation which was performed on February 19, [1999] but which I received shortly following my letter to you, it is apparent that he is incapable of resuming any employment now and for the foreseeable future. I would request that you consider placing [appellant] into disability retirement status based on his multiple medical problems, obesity, his hip and his persistent shoulder problems.”

Because Dr. Margherita failed to clarify the extent to which the employment-related right shoulder impingement disabled appellant from his federal employment, the Office sought a second opinion. The Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. Don B.W. Miskew, a Board-certified orthopedic surgeon. In a report dated September 20, 1999, Dr. Miskew related appellant’s history of injury, medical course, complaints and findings on examination. X-rays, he reported, showed no arthritis and he saw no evidence of any bony spur or acromial abnormality that would suggest an impingement problem. There were no signs of arthritis in the shoulder. Responding to specific questions posed by the Office, Dr. Miskew reported that, because appellant had no previous history of right shoulder problem, his shoulder problems were indeed initiated by the accident of October 5, 1998. He also reported that, secondary to his shoulder only, appellant could work at his regular position as an investigator, *i.e.*, appellant could drive a car, carry a very light briefcase and do his investigation work. Dr. Miskew permanently restricted appellant to lifting no more than 20 pounds with the right arm and performing no work above mid chest level.

On October 6, 1999 Dr. Miskew indicated that appellant was capable of carrying his briefcase, a laptop computer and the luggage containing his personal belongings on an occasional basis, as would be needed during his travels as an investigator.

On October 15, 1999 the Office issued a notice of proposed termination on the grounds that the weight of the medical evidence established that appellant was not disabled from his date-of-injury job as a result of the October 5, 1998 employment injury.

On October 22, 1999 Dr. David L. Voshall, with whom appellant had recently established himself as a patient, disagreed with the statement that “the weight of medical evidence records [sic] establishes you are not disabled.” Dr. Voshall explained that appellant was in fact disabled as a result of multiple medical problems, including prescription drugs that interfere with his ability to operate a motor vehicle, a hip injury that requires him to use a walker and a shoulder injury that makes it difficult for him to carry anything. He reported that appellant also had a difficult time getting in and out of vehicles because of multiple disabilities and appellant now

had a new pericardial effusion that might increase his symptomatology. Dr. Voshall concluded that appellant could not stand, sit, carry or work for a sufficient period of time to allow gainful employment: "I believe the patient will require significant and prolonged periods of risk and it seems to me that the patient should continue disabled."

In a decision dated December 7, 1999, the Office terminated appellant's compensation for disability effective January 1, 2000.

An Office hearing representative reviewed the written record and on March 23, 2000 issued a decision affirming the termination of appellant's compensation for disability.

The Board finds that the Office did not meet its burden of proof to terminate compensation.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.<sup>2</sup> 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>3</sup>

In this case, there is a conflict of medical opinion between appellant's physicians, Dr. Margherita and Dr. Voshall, and the Office referral physician, Dr. Miskew. Dr. Margherita reported that appellant was incapable of resuming any employment now or for the foreseeable future. He attributed this disability to a multiplicity of medical problems relating to his shoulder, hip, severe deconditioning and morbid obesity. Dr. Voshall offered basically the same opinion. Dr. Miskew disagreed. He reported that, secondary to appellant's shoulder only, appellant could work with some restrictions at his regular position as an investigator, including driving a car, carrying a light briefcase and doing his investigation work. He opined that appellant was capable of carrying his briefcase, a laptop computer and the luggage containing his personal belongings on an occasional basis, as would be needed during his travels as an investigator.

Section 8123(a) of the Federal Employees' Compensation Act provides in 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."<sup>4</sup>

To resolve the conflict in opinion between appellant's physicians and the Office referral physician, the Office shall refer appellant, together with the medical record and a statement of accepted facts, to an appropriate impartial specialist for an opinion on whether appellant continues to be disabled from his date-of-injury job as a result of the October 5, 1998 employment injury. Appellant has another claim, which the Office accepted for avascular

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<sup>2</sup> *Harold S. McGough*, 36 ECAB 332 (1984).

<sup>3</sup> *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

<sup>4</sup> 5 U.S.C. § 8123(a).

necrosis of the left femoral head and left total hip replacement. An issue has arisen in this case whether appellant's left hip condition affects his capacity to resume his date-of-injury job, the Office should consolidate these claims and ask the impartial medical specialist to address this question. The Office shall also ask the impartial medical specialist whether appellant is disabled as a result of the drugs prescribed for his work-related injuries, which Dr. Voshall indicates interfere with his ability to operate a motor vehicle. After such further development of the evidence as may be necessary, the Office shall issue an appropriate decision on appellant's entitlement to compensation under the Act.

The March 23, 2000 and December 7, 1999 decisions of the Office of Workers' Compensation Programs are reversed and the case remanded for further action consistent with this opinion.

Dated, Washington, DC  
July 26, 2001

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member