

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MELVIN W. OHLSEN and DEPARTMENT OF THE TREASURY,
BUREAU OF ALCOHOL, TOBACCO & FIREARMS, Dallas, TX

*Docket No. 00-2463; Submitted on the Record;
Issued July 27, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's wage-loss compensation effective November 7, 1999.

On May 16, 1979 appellant, then a 53-year-old special agent, was involved in motor vehicle accident while in the performance of duty when a truck hit the side of a government vehicle in which appellant was a passenger. The Office accepted appellant's traumatic injury claim for a temporary aggravation of preexisting degenerative joint and disc disease with myelopathy, right shoulder strain and dorsal spine strain.¹ Appellant received compensation for intermittent periods of total disability and for continuing total disability effective January 1980 when appellant was unable to work.

Appellant's attending physician is Dr. John M. Hundley, a general practitioner, who has maintained over the years that appellant has continuing disability related to his employment injury. Dr. Hundley has found that appellant is totally disabled from returning to his regular job.

On April 1, 1991 appellant was employed by the Baptist Children's Home as a live-in childcare worker. His duties included general supervision and transportation of children who were residents of the home. His hours of employment were estimated at 30 hours per week.

On June 15, 1992 the Office issued a decision regarding appellant's loss of wage-earning capacity. It was determined that appellant earned wages of \$210.86 per week as a childcare worker effective February 15, 1991 and his compensation was adjusted accordingly.

In a series of reports dated May 15, 1990, June 4, 1992, May 17, 1994, May 25, 1995, May 21, 1996 and June 3, 1997, Dr. R.M. Kamath, a Board-certified orthopedic surgeon, indicated that appellant was under his care. He reported physical findings and diagnosed that

¹ Appellant has a prior work-related injury to his left leg, which is under case number 070167785. He received a schedule award for a 10 percent permanent impairment of the left lower extremity on March 18, 1981.

appellant had degenerative disc disease of the lumbar spine. He maintained that appellant was totally disabled from gainful employment due to his back limitations.

The Office referred appellant for a second opinion evaluation with Dr. Karl F. Sauer, a Board-certified orthopedic surgeon. In a report dated October 29, 1997, Dr. Sauer gave a history of work injury, reviewed an x-ray report from November 1979, and noted physical findings. He stated that appellant's range of motion in the trunk revealed flexion to 60 degrees and extension to 15 degrees. He stated that there was no objective evidence of the aggravation of preexisting degenerative joint disease detected. Range of motion in the shoulders was also listed as "good." According to Dr. Sauer, appellant's back problems were secondary to the natural progression of his preexisting disease process. He opined that appellant's degenerative joint disease had "returned to baseline pathology to be expected for this condition had the aggravation never occurred." Dr. Sauer concluded that appellant's continuing disability was due to his cardiac status and the natural progression of his nonwork-related degenerative joint disease.

In an OWCP-5 work evaluation report, Dr. Sauer advised that appellant should limit the following activities: kneeling, bending, twisting, reaching and lifting. He noted that the restricted activities could be carried out 10 minutes per hour, and that appellant should not lift greater than 20 pounds. He indicated that appellant was unable to work due to preexisting degenerative disc disease.

The Office issued a notice of proposed termination of compensation on February 26, 1998 advising appellant that the record evidence established that he had no continuing work-related disability due to his employment injury. Appellant was given 30 days to submit additional evidence or argument if he disagreed with the proposed action.

In a decision dated March 26, 1998, the Office terminated appellant's compensation benefits, finding that the weight of the medical opinion was represented by Dr. Sauer's report which established that he had no continuing disability or residuals due to the May 16, 1979 work injury.

Appellant requested a hearing, which was held on December 17, 1998.

In a February 24, 1999 decision, an Office hearing representative set aside the Office's March 26, 1998 decision, finding a conflict in the medical evidence.

On remand, the Office referred appellant to Dr. Houshang Seradge, a Board-certified orthopedist, for an impartial medical evaluation. Dr. Seradge examined appellant on April 8, 1999 at which time he took appellant's medical history and recorded physical findings. He then sent appellant for a functional capacity evaluation (FCE) on May 11, 1999. Dr. Seradge noted in a June 4, 1999 report that appellant's FCE demonstrated that he could perform light duty for eight hours per day. He responded to questions posed by the Office as follows:

"(1) There is no objective evidence that aggravation by the accident described of the degenerative joint disease is currently active or disabling.

"(2) [Appellant's] degenerative joint disease continues to progress in a manner of natural progression of osteoarthritic and degenerative arthritic changes.

“(3) There is no objective evidence that the aggravation of the [disc] disease with myelopathy is currently active and disabling.”

He further noted that the “[a]ggravation of degenerative joint disease due to the trauma that [appellant sustained] may have accelerated the natural process, although [it] has not made any significant difference in his overall function.” He opined that “aggravation of the [degenerative disc] disease is not, by itself (alone), preventing [appellant] from returning to his position as a special agent.” He specifically noted that appellant’s heart surgery and progression of the degenerative joint disease should be considered.

On September 13, 1999 the Office issued a second notice of proposed termination of compensation.

In a decision dated October 15, 1999, the Office terminated appellant’s compensation effective November 7, 1999.

Appellant requested a hearing, which was held on March 23, 2000.

In a decision dated June 1, 2000, an Office hearing representative affirmed the Office’s October 15, 1999 decision.

The Board finds that the Office did not meet its burden of proof to properly terminate appellant’s compensation effective November 7, 1999.

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

In the present case, the Office correctly found that there was a conflict in the medical evidence between Drs. Hundley, Kamath and Sauer as to whether or not appellant has continuing disability causally related to the May 16, 1979 work injury. As such the Office referred appellant to Dr. Seradge, an impartial medical examiner.

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.⁴ The Board does not consider Dr. Seradge’s opinion to be sufficiently reasoned to warrant special weight.

² *Harold S. McGough*, 36 ECAB 332 (1984).

³ *Jason C. Armstrong*, 40 ECAB 907 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979).

⁴ *Gary R. Sieber*, 46 ECAB 215 (1994); *Jack R. Smith*, 41 ECAB 691 (1990); *James P. Roberts*, 31 ECAB 1010 (1980).

Dr. Seradge evaluated appellant and determined that there was no objective evidence from which to conclude that “aggravation by the ‘work’ accident described of the degenerative joint disease [was] currently active or disabling.” Although he stated that there was no objective evidence that the “aggravation of the [degenerative disc] disease [was] currently active and disabling, he suggested that appellant’s degenerative back condition may have been accelerated by the work injury.

Furthermore, Dr. Seradge did not find that appellant was able to return to his regular job as a special agent. As used in the Federal Employees’ Compensation Act,⁵ the term disability means incapacity because of an injury in employment to earn the wages the employee was receiving at the time of the injury, *i.e.*, a physical resulting in loss of wage-earning capacity. The general test in determining loss of wage-earning capacity is whether the employment-caused impairment prevents the employee from engaging in the kind of work he was doing when he was injured.⁶ In other words, if an employee is unable to perform the required duties of the job in which he or she was employed when injured, the employee is disabled.⁷ Because Dr. Seradge did not provide a reasoned medical opinion establishing that appellant is no longer disabled from performing his last job as a result of his employment injury, the Board finds that the Office failed to carry its burden of proof in terminating appellant’s compensation benefits.

The decision of the Office of Workers’ Compensation Programs dated June 1, 2000 is hereby reversed.

Dated, Washington, DC
July 27, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

⁵ 5 U.S.C. §§ 8101-8193, 8102.

⁶ *Patricia A. Keller*, 45 ECAB 278 (1993).

⁷ *Id.*