U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GEORGE LEWIS and DEPARTMENT OF THE ARMY, DEFENSE SUPPLY SERVICE, Fort Belvoir, VA

Docket No. 00-2064; Submitted on the Record;
Issued June 13, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits.

On October 2, 1997 appellant, a 53-year-old warehouse foreman, injured his lower back while lifting a box. He was placed on light duty on October 8, 1997 and returned to full duty on April 21, 1998. Appellant filed a Form CA-1 claim for benefits based on traumatic injury on the date of injury, which the Office accepted for lumbar strain on May 23, 1998.

Appellant filed a claim for recurrence of disability on November 23, 1998. He was off work until March 22, 1999, when he was returned to light-duty work. The Office accepted his recurrence claim, for lumbar disc syndrome, on April 14, 1999.

By letters dated April 22 and 23, 1999, the Office scheduled a second opinion examination for appellant with Dr. John B. Cohen, a Board-certified orthopedic surgeon, to determine whether appellant had any continuing disability due to the October 2, 1997 employment injury.

In a report dated May 10, 1999, Dr. Cohen, after reviewing the medical records, the statement of accepted facts and stating findings on examination, stated:

> "At this time, I believe [appellant] would benefit from a short course of work hardening to minimize his complaints. Then I would return him to full duty. If [appellant] continues to complain of subjective symptoms, I would limit him to approximately 40 [to] 50 pounds of lifting at any time. He has significant nonanatomic findings, with complaints of low back pain with plantar flexion of the foot when sitting and low back pain with hip flexion and with internal and external rotation of the hip."

Appellant was also examined on May 20, 1999 by Dr. Louis E. Levitt, a Board-certified orthopedic surgeon, who stated:

> "[Appellant's] examination in my office today is really quite benign. There is no evidence of active pathology and what is most outstanding during his evaluation is the presence of illness behaviors which clearly indicate to this examiner that [appellant] is exaggerating his symptomatology. He has all of the nonanatomic clinical features to his evaluation which suggest a functional and not organic basis for his clinical complaints. [Appellant] has been over-treated and over-protected in the absence of any measured pathology to justify the limitations placed on his work responsibilities…. [He] has recovered adequately such that I would return him to the work force and I would not limit his work or avocational activities in any manner. [Appellant's] original injury was a simple muscular strain and he has recovered fully from that…. [He] will have no permanent injury that resulted from his [October 1997] work trauma; consequently there is no basis for long-term disability."

Appellant was examined on June 11, 1999 by Dr. Hampton Jackson, a Board-certified orthopedic surgeon, who advised that appellant still had back symptoms aggravated by increased work activity, such as additional pushing, pulling, standing, lifting or walking. Because of the nature of appellant's condition, Dr. Jackson stated, appellant had been continued on light duty. He opined that returning appellant to regular duties would aggravate appellant's symptoms and cause him to take time off from work unnecessarily.

The Office issued a proposed notice of termination on July 21, 1999, stating that based on the opinions of Drs. Cohen and Levitt, which represented the weight of the medical evidence, appellant no longer had any residual disability stemming from the October 2, 1997 employment injury and was capable of returning to full duty. The Office gave appellant 30 days to submit additional medical evidence or legal argument.

Appellant submitted reports from Dr. Jackson dated July 9 and August 6, 1999. In his July 9, 1999 report, Dr. Jackson stated appellant remained on light duty because his usual job required too much pushing, pulling, bending, lifting, walking, standing, etc. He noted significant evidence of facet joint injuries in the lower lumbar spine with accompanying spasm and restriction of motion in the lower back.

Dr. Jackson essentially reiterated his earlier findings and conclusions in his August 6, 1999 report, and added:

> "[Appellant] is barely making it on light duties. He cannot do the lifting he did before his injury of [October 2, 1997]. [Appellant] even has problems with prolonged sitting, prolonged standing and repeated bending. Examination still shows evidence of a significantly decompensated lower back. There is atrophy and spasm as well as restriction of motion of the lower back."

By decision dated September 9, 1999, the Office terminated appellant's compensation effective October 9, 1999.

By letter dated February 1, 2000, appellant's attorney requested reconsideration.

By decision dated February 11, 1997, the Office affirmed its previous decision, finding that appellant did not submit sufficient evidence to warrant modification.

The Board finds that the Office failed to meet its burden to terminate appellant's compensation benefits.

In the present case, there was disagreement between Drs. Cohen and Levitt, the second opinion physicians and Dr. Jackson, appellant's treating physician, regarding whether appellant was capable of returning to full-duty work without restrictions. Drs. Cohen and Levitt opined that appellant could work an eight-hour day without restrictions and had no permanent disability resulting from the October 2, 1997 employment injury. Dr. Jackson, however, stated repeatedly in his periodic progress reports that appellant had significant objective symptoms and decompensation in his lower back, was only capable of performing at most light-duty work and that heightened physical activity would aggravate his symptoms and cause him to be disabled from all work. This created a conflict in the medical evidence. In its September 9, 1999 termination decision, however, the Office erred in ignoring the conflict and finding that the second opinion reports of Drs. Cohen and Levitt represented the weight of the medical evidence in terminating compensation. When such conflicts in medical opinion arise, 5 U.S.C. § 8123(a) requires the Office to appoint a third or "referee" physician, also known as an "impartial medical examiner."[1] It was therefore incumbent upon the Office to refer the case to a properly selected impartial medical examiner, using the Office procedures, to resolve the existing conflict. Accordingly, as the Office did not refer the case back for a properly selected impartial medical examiner, there remains an unresolved conflict in medical opinion.[2]

[1] Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part, "(i)f there is a 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." *See Dallas E. Mopps*, 44 ECAB 454 (1993).

[2] *See Shirley L. Steib*, 46 ECAB 309 (1994); *Vernon E. Gaskins*, 39 ECAB 746 (1988).

The decision of the Office of Workers'Compensation Programs dated September 9, 1999 is reversed.

Dated, Washington, DC
June 13, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member