U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH PATRICK BENNETT and DEPARTMENT OF THE NAVY, NAVAL SHIPYARD, Philadelphia, PA

Docket No. 99-1347; Submitted on the Record;
Issued March 5, 2001

DECISION and ORDER

Before DAVID S. GERSON, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective on March 1, 1997 on the grounds that he had no further employment-related disability.[1]

On July 28, 1986 appellant filed a claim for traumatic injury contending that he sustained an injury to his head while in the performance of duty. He did not return to work after July 28, 1986 and was terminated on August 3, 1993.

On September 24, 1986 the Office accepted appellant's claim for a head contusion and cervical strain sustained on July 28, 1986.[2]

In a medical report dated June 2, 1987, Dr. Somnath Nair, appellant's treating neurologist and Board-certified in neurological surgery, noted that he had examined appellant that day and found possible chronic pain syndrome. He recommended that appellant consider a psychiatric evaluation.

In a medical report dated June 29, 1989, the Office medical adviser reviewed appellant's medical records and recommended referral to a Board-certified psychiatrist to determine "whether the prolonged and present psychiatric and/or neurotic condition of [appellant] still can be considered causally [related] to the work incident [which] occurred on July 28, 1986…."

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[1] The record contains documents that are not associated with this appeal.

[2] In a decision dated October 17, 1990, the Office reduced appellant's compensation benefits on the grounds that he was qualified to work as an electronics assembler. However, in a decision dated February 5, 1991, the Branch of Hearings and Review remanded the case to the Office on the grounds that the evidence of record did not support that appellant could work as an electronics assembler. Specifically, the Office found that the position required lifting objects of 20 pounds while appellant's treating physician limited his lifting to 10 pounds. That claim is not before the Board.

In a medical report dated December 6, 1990 and received by the Office on February 12, 1991, Dr. James F. Bonner, appellant's treating physician and Board-certified in physical medicine and rehabilitation, noted that appellant was symptomatic with pain and referred him to a psychiatrist.

In a report dated November 7, 1990 and received by the Office on March 28, 1991, Dr. Leonard M. Paul, a licensed psychologist, stated that appellant's "handicaps and disabilities, related to injuries in the 1986 accident at work, preclude his ability to return to … customary employment." Dr. Paul noted that appellant had chronic pain syndrome.

In a letter decision dated July 7, 1991, the Office advised appellant that further treatment with Dr. Bonner was terminated. The Office the provided a list of three doctors from which appellant could chose for authorized treatment.

In a letter dated July 24, 1991, the Office advised appellant that Dr. Bonner was not authorized to provide further medical services because the doctor had failed to respond to the Office's request for additional medical information.

In a work restriction evaluation form dated May 21, 1991 and received by the Office on August 7, 1991, Dr. Bonner stated that appellant could return to work 8 hours a day, with restrictions including a lifting restriction of not more than 10 pounds. He noted that appellant had reached maximum medical improvement.

By letter dated August 3, 1991, appellant requested an oral hearing regarding the Office's decision to deny further medical treatment from Dr. Bonner, who also asked for a copy of his appeal rights, which the Office, in a September 20, 1991 letter, provided.

In a letter dated September 24, 1991, appellant appealed to the Board the Office's decision terminating its authorization for medical benefits from Dr. Bonner.

By letter dated October 1, 1991, the Office requested that Dr. Bonner evaluate appellant regarding his readiness for reemployment.

In a medical report dated October 17, 1991, Dr. Bonner stated that "psychological and psychiatric testing is necessary for [appellant] since his level of frustration and anxiety which he continues to experience concerning his disability have been sufficiently exacerbated in the last several months…."

In a letter dated the same date, the Office referred appellant to Dr. Roy Lerman, Board-certified in physical medicine and rehabilitation, "to clarify the cause and extent of your injury-related impairment…."

In a medical report dated November 6, 1991, Dr. Lerman noted a familiarity with appellant's history of injury and provided findings. He found "little objective evidence to support [appellant's] subjective complaints of pain." Dr. Lerman added that appellant "has symptoms consistent with some thoracic myofascial pain and possibly some chondrochondritis….(sic) Treatment which has proven to be effective in chronic myofascial pain syndrome includes aerobic exercise and antidepressant medication."

The Office, in November 1991, subsequently expanded appellant's claim to include chronic pain syndrome.

In a medical report dated April 16, 1992, Dr. Paul stated that appellant had completed the Minnesota Multiphasic Personality Inventory – 2 (MMPI-2) on December 26, 1991. He found that appellant was depressed, had difficulty managing daily responsibilities and as a result of his physical problems, felt vulnerable, and "helpless and overwhelmed with increased levels of pain and stress."

In a decision dated November 9, 1992, the Board remanded the case to the Office on the grounds that the Office failed to include findings of fact in its July 7, 1991 decision and failed to provide appellant a copy of his appeal rights until its September 20, 1991 letter.[3]

In a memorandum to the file dated April 5, 1993, a senior claims examiner noted that because the Office had accepted appellant's claim for chronic pain syndrome, he was entitled to the type of medical care provided by Dr. Bonner who was Board-certified in physical medicine and rehabilitation. Dr. Bonner determined that appellant could work a full-time, light-duty position, but also had "referred him for psychiatric treatment." In a letter dated the same day, the Office authorized medical care from Dr. Bonner.

In a work restriction evaluation form dated November 1, 1993, Dr. Bonner stated that appellant had knee pain, was sensitive to cold and had a total temporary disability. He further noted that appellant had reached maximum medical improvement.

In a statement of accepted facts dated December 3, 1993, the Office stated that, on August 8, 1986, it had accepted appellant's claim for contusion of the head and in November 1991, it had expanded appellant's claim to include cervical strain and chronic pain syndrome. The Office noted that appellant's disability began on July 28, 1986 and "continues to this date."[4]

In a letter dated March 17, 1994, the Office referred appellant to Dr. Randall N. Smith, a Board-certified orthopedic surgeon, to resolve the conflict in medical opinion concerning whether appellant had residuals of his work injury.[5]

In a work restriction evaluation form dated March 24, 1994, Dr. Bonner stated that appellant was totally disabled.

In a medical report dated April 12, 1994, Dr. Smith stated that he had examined appellant on that date, demonstrated a familiarity with his history of injury and reported findings. He noted appellant's contemporary complaints of pain along the slope of the neck on the left and

[3] Docket No. 92-85 (issued November 9, 1992).

[4] The Board notes that the Office accepted cervical strain on September 24, 1986.

[5] The Board notes that the Office's referral letter to Dr. Smith also dated March 17, 1994 did not refer to a conflict in medical opinion.

tentative movements secondary to complaints of pain. Upon examination, Dr. Smith reported some mild crepitus with cervical rotation, but no spasms or deficits were noted. He also reported a normal neurological examination. Dr. Smith concluded that appellant sustained a soft tissue injury to the neck and upper back, but could not explain appellant's subjective complaints. He added: "I believe that his complaints are and can be attributed to the work injury although there is no real objective evidence there to explain why he has not improved."

In a memorandum to the file entitled conflict case, dated May 19, 1994, the Office noted that Dr. Smith was an impartial medical examiner chosen to resolve a conflict in medical opinion.

On July 14, 1994 the Office requested that Dr. Smith provide an opinion as to whether appellant could perform the duties of an electronics assembler.

In a memorandum dated February 8, 1996, the Office noted that Dr. Smith did not respond to its July 14, 1994 request.

On April 1, 1996 the Office referred appellant, a statement of accepted facts and his case record to Dr. Eric Solomon, a Board-certified physiatrist, and Dr. Robert DeSilverio, a Board-certified psychiatrist, for a second opinion evaluation.

In a medical report dated April 16, 1996, Dr. Bonner stated that he had examined appellant on that date and noted his continuous subjective complaints of pain in the thoracic, lumbar and chest area.

In a report dated April 18, 1996, Dr. Solomon noted a familiarity with appellant's history of injury and reported findings. Upon examination, appellant's cervical motion was within functional limits, his upper extremity range of motion and shoulder girdle motion were full and there was no scapular winging or asymmetry. Dr. Solomon further noted normal reflexes and sensory tests, a negative Spurling's Test, and negative cubital and carpal tunnel bilaterally. Appellant's arms were warm, his pulses were intact, he had good capillary refill and an Adson's maneuver was negative. Dr. Solomon noted that appellant complained of localized tenderness at Erb's Point and complained of pain with cervical motion as well as girdle motion, abduction and protraction/retraction, but that he could not identify specific areas of tenderness, trigger points or areas of spasm. He further noted that his review of radiographic and electrodiagnostic testing and the results of a physical examination failed to reveal physical limitations or defects.

Dr. Solomon stated that he could find no physical abnormality to explain appellant's complaints and that his soft tissue injury would have resolved over a matter of weeks.

In a medical report dated May 20, 1996, Dr. DeSilverio noted a familiarity with appellant's history of injury and reported findings. He found that appellant "manifests no evidence of any psychiatric disorder that can be reasonably attributed to his accident on July 28, 1986 or alleged sequelae of it." Dr. DeSilverio added that appellant had psychogenic pain disorder in which psychological factors "have an important role in the onset severity, exacerbation and maintenance of pain. It should be emphasized, however, that the accident or alleged sequelae did not cause the psychological factors involved." He then noted appellant's work history prior to his July 28, 1986 work-related injury, including an incident earlier on the

day of the injury wherein he was written up for unsatisfactory performance and another event a year earlier for being away from his job, and opined that these incidents may have had a psychological basis and that any current psychological condition "could be explained on the basis of the natural history of a developing psychological disorder." Dr. DeSilverio added that "[T]he accident may have given form to an incipient disorder but was not causative."

On September 19, 1996 the Office issued a notice of proposed termination of compensation for wage loss as the evidence established that appellant was no longer disabled due to his employment injury. The Office noted that Dr. Solomon opined that appellant had no disability due to a physical, neurological or orthopedic impairment and that Dr. DeSilverio opined that appellant manifested no evidence of a psychiatric disorder that could be attributed to the July 28, 1986 accident or alleged sequelae.

On October 14, 1996 Dr. Paul stated that as a result of appellant's causally related depression and disruptions of chronic, intractable pain, his perception of pain became intensified.

In a report dated October 15, 1996, Dr. Bonner stated that appellant had continued subjective complaints but that he concurred with Dr. Solomon's conclusions that appellant's "problems are not on a physical basis," but were psychological in nature.

In a decision dated January 28, 1997, the Office terminated appellant's benefits, effective March 1, 1997, on the grounds that he no longer suffered residuals from his July 28, 1986 work injury. The Office found that the weight of the medical evidence rested with the medical reports of Drs. Solomon and DeSilverio.

By letter dated February 26, 1997, appellant requested an oral hearing.

A hearing was held on November 20, 1997, and the hearing representative, in a decision issued on January 29, 1998 and finalized on February 2, 1998, affirmed the Office's January 28, 1997 decision. The hearing representative stated that appellant's medical reports submitted in support of his claim "are of seriously diminished probative value in that the physicians do not address the issue of causal relationship, nor do they provide their medical reasons for finding that the claimant does, in fact, have any residuals due to his employment injury that occurred more than 10 years ago."

In a letter dated December 3, 1998, appellant requested reconsideration.

In support he submitted a report dated April 24, 1998 from Dr. Joseph Puleo, a licensed clinical psychologist, and a report dated November 18, 1998 from Dr. Bonner.

Dr. Puleo stated that he initially treated appellant in November 1990 and diagnosed him "with reactive depression, secondary to the rather obvious difficulty [frustration] he was experiencing in dealing with his chronic pain syndrome." He added that appellant continues "to be adversely affected by a chronic pain syndrome and a secondary depressive disorder, directly related to his experience of pain."

Dr. Bonner stated that appellant's functional capacity evaluation established that appellant had severe spinal dysfunction and that, based on a nonphysiologic indicator, appellant

demonstrated a valid performance. He also noted appellant's electromyography test of the thoracic and cervical area, which demonstrated thoracic radiculopathy at T3-4.

In a merit decision dated February 10, 1999, the Office denied modification of the January 28, 1997 decision. In an attached memorandum, the Office noted that Dr. Bonner's report was materially similar to prior reports and thus was cumulative and insufficient to alter the weight of the medical opinion. The Office also noted that Dr. Puleo's report failed to explain the discrepancy between the doctor's opinion that appellant is highly motivated to return to work and appellant's contention that he is unable to work.

The Board finds that the Office met its burden of proof to terminate medical benefits for the condition of head contusion and cervical strain but did not meet its burden to terminate appellant's compensation benefits for the accepted condition of chronic pain syndrome.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[6] 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.[7] Further, the right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for wage loss.[8] To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition that require further medical treatment.[9]

In this case, the Office accepted appellant's claim for head contusion and cervical strain and approved medical care from Dr. Bonner, but later withdrew its authorization on July 17, 1991. Appellant appealed and the Board, in November 1992, remanded that case on the basis that the Office failed to issue its termination properly. However, the Office subsequently expanded the medical conditions associated with appellant's claim to include chronic pain syndrome. The Office then referred appellant to Drs. Solomon and DeSilverio for second opinions regarding whether appellant had residuals of his injuries.

Dr. Solomon conducted an orthopedic examination and evaluation to determine whether appellant had residuals of these accepted conditions of head contusion and cervical strain. In his comprehensive report dated April 18, 1996, Dr. Solomon summarized his findings as follows:

> "Radiographic as well as electrodiagnostic testing has not demonstrated any physical problem and on physical examination in the past and presently there have been no physical limitations or deficits found, no evidence of neurological or

[6] *Harold S. McGough*, 36 ECAB 332 (1984).

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

[8] *Marlene G. Owens*, 39 ECAB 1320 (1988).

[9] *See Calvin S. Mays*, 39 ECAB 993 (1988); *Patricia Brazzell*, 38 ECAB 299 (1986); *Amy R. Rogers*, 32 ECAB 1429 (1981).

> orthopedic impairment. I note during this evaluation, the patient is very emotionally distressed and seems somewhat distressed that various physicians are evaluating him and that they do not seem to want to believe his symptoms and complaints. I do reiterate the fact that I can find no physical abnormality at this time to explain his complaints and certainly, if there were any abnormalities occurring, especially soft tissue injury, resolution would have occurred over a matter of weeks and not have continued until this 10-year period post-accident.
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> "The current complaints do stem from his work accident on July 28, 1986, but as I have stated, his problems are not on a physical basis and any deficits certainly can be explored as needed by psychologic evaluation and testing. Any physical effects from the initial event would certainly have long since resolved.
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> "At this point, the patient can certainly return to his premorbid vocational level on a physical basis."

Dr. Solomon's report was based on a proper factual background and provided well-rationalized support for his opinion that the accepted physical conditions of head contusion and cervical strain had resolved long ago, but that appellant had continued subjective complaints consistent with a psychological condition. Appellant's treating physician, Dr. Bonner, concurred with Dr. Solomon's conclusions that appellant no longer had a physical basis for his subjective complaints but that appellant did have an employment-related chronic pain syndrome. There is no medical evidence of record that appellant had residuals of the head contusion and cervical strain.

Regarding the issue of chronic pain syndrome, Dr. DeSilverio's report is insufficient to establish that appellant no longer has residuals of his initial injury. For example, in his report, he noted that he "conducted a psychiatric examination on April 18, 1996," but the report itself refers to a series of questions that the doctor raised with appellant; among them how he spent his time, whether he went out, his sources of income, whether he had mental problems, and how his condition affected his family life. Dr. DeSilverio made no reference to any accepted diagnostic tool such as a MMPI test. Further, he stated in reference to Dr. Paul's diagnosis of chronic pain syndrome, that "even if the diagnosis were accurate, there were no indications in Dr. Paul's reports or notes that such factors were caused by the injury." He also stated that Dr. Paul did not understand the nature and severity of appellant's handicaps and disabilities.

The Board notes that the Office had accepted chronic pain syndrome and thus Dr. DeSilverio's opinion regarding whether appellant had the condition and whether appellant's treating psychologist was aware of his symptoms undermines the objectivity of his report and lessens its credibility. For example, Dr. DeSilverio stated that "[I]f he were psychologically disturbed as he contends…," implying that appellant had no psychiatric or emotional conditions

related to the claim at any time. He then stated that appellant's "position speaks for a significant psychiatric disturbance." These statements are inherently contradictory, result in an unrationalized opinion and thus are of diminished probative value.[10]

The Office did meet its burden of proof to terminate medical benefits for the conditions of head contusions and cervical strain but Dr. DeSilverio's opinion is not a sufficient basis for terminating appellant's compensation because it does not establish that appellant had recovered from his chronic pain syndrome.

The February 10, 1999 decision of the Office of Workers' Compensation Programs is affirmed in part and reversed in part.

Dated, Washington, DC
March 5, 2001

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member

[10] *See Joseph M. Popp*, 48 ECAB 624 (1997) (a medical opinion must be based on a complete factual history). Further, Dr. DeSilverio also incorrectly noted that Dr. Paul would have had to have adopted the diagnosis of chronic pain syndrome because he, Dr. Paul, was not a physician. The Board has long held that a clinical psychologist may diagnose an emotional condition. *Went Ling Chang*, 48 ECAB 272 (1997).