U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL HUGHES and DEPARTMENT OF THE NAVY, NAVAL SURFACE WARFARE CENTER, Philadelphia, PA

Docket No. 00-1890; Submitted on the Record;
Issued May 29, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM, A. PETER KANJORSKI

The issue is whether appellant's disability and need for medical treatment related to his September 17, 1997 employment injury ceased by June 28, 1999, the date the Office of Workers' Compensation Programs terminated his compensation.

On September 22, 1997 appellant, then a 38-year-old equipment specialist, filed a claim for an injury to his low back sustained on September 17, 1997 by moving a heavy box off a cart onto the floor. Appellant received continuation of pay from September 18 to November 11, 1997 and used sick leave from November 2 to 22, 1997, after which the Office began paying him compensation for temporary total disability.

After referring appellant for a second opinion evaluation, the Office issued a notice of proposed termination on April 20, 1998 on the grounds that the effects of his September 17, 1997 injury had resolved. Appellant submitted further evidence from his attending physicians and the Office determined that there was a conflict of medical opinion. After obtaining a report from an impartial medical specialist for the purpose of resolving this conflict of medical opinion, the Office issued a notice of proposed termination of compensation on May 20, 1999, on the grounds that the weight of the medical evidence supported that all residuals of appellant's September 17, 1997 employment injury had ceased. By decision dated June 28, 1999, the Office terminated appellant's compensation effective that date on the grounds that he had recovered from the lumbar sprain he sustained on September 17, 1997.

Appellant requested a hearing, which was held before an Office hearing representative on November 16, 1999. By decision dated February 2, 2000, an Office hearing representative found that the opinion of the impartial medical specialist constituted the weight of the medical evidence and was sufficient to meet the Office's burden of proof to terminate appellant's compensation.

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 disabling condition has ceased or that it is no longer related to the employment.[1]

The Board finds that the Office met its burden of proof to terminate appellant's compensation on June 28, 1999.

There was a conflict of medical opinion in this case. Appellant's attending physicians, Drs. Sofia Lam, a Board-certified anesthesiologist, Murray D. Robinson, a Board-certified neurosurgeon and Murray Brand, a family practitioner, supported continuing disability and need for continuing medical treatment related to appellant's September 17, 1997 employment injury. The Office referred appellant to Dr. Steven Valentino, an osteopath, for a second opinion evaluation. Dr. Valentino concluded in a March 18, 1998 report that appellant's lumbosacral strain sustained on September 17, 1997 had fully resolved without residuals and that he had no restrictions and no need for supervised medical care.

To resolve this conflict of medical opinion, the Office, pursuant to section 8123(a) of the Federal Employees' Compensation Act,[2] referred appellant, a statement of accepted facts and the case record to Dr. John T. Williams, a Board-certified orthopedic surgeon. In a report dated December 3, 1998, Dr. Williams set forth appellant's history, described findings on physical examination and reviewed prior medical reports and diagnostic tests. He diagnosed low back syndrome and stated:

> "First of all, the patient's history does not correlate with that what I consider to be a herniated disc. This patient is complaining about pain in his whole leg and involvement of all the toes of his feet. The toes of the feet are innervated by at least three different nerve roots. Three different nerve roots does not give result of a herniated 'single' disc. On the patient's studies and on physical examination, there are no positive objective findings to correlate to the patient's complaints, *i.e.*, that's any neurological deficits either in the myotome or dermatome distributions. With reference to his MRI [magnetic resonance imaging] of October 8, 1997, there are no focal disc herniations identified. The patient had degenerative discs involving L4-5 and L5-S1. He has a first degree spondylolisthesis and secondary pars defects, but this was not caused by the accident. With reference to spondylolisthesis, the primary symptomatology is back pain and only later as this becomes third and fourth degree does it begin to have symptoms which simulate those of a herniated disc."

In answer to the Office's questions, Dr. Williams stated that appellant "incurred an acute lumbosacral sprain/strain, by history, which has resolved leaving him with his preexisting spondylolisthesis," that it was possible that appellant's employment injury aggravated his underlying pathology but that this aggravation would be of a temporary and transient nature,

[1] *Patricia A. Keller,* 45 ECAB 278 (1993).

[2] 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."

taking "as much as anywhere from four to six months for complete resolution." He noted that appellant's objective findings did not correlate with his subjective complaints and recommended a bone scan, electromyogram (EMG) and comparison of appellant's x-rays from the 1980's when he sustained prior injuries.

Appellant submitted results of a bone scan done on January 13, 1999 and of an EMG and nerve conduction velocity studies done on January 12, 1999 by Dr. Stephen E. Sacks, an osteopath, who concluded that these studies, appellant's clinical picture and the MRI were "consistent with L5-S1 nerve root involvement of the left lower extremity." The Office submitted these studies to Dr. Williams, who in a report dated July 29, 1999, stated:

> "After reviewing these documents, I do n[o]t see anything here to alter my opinion, as previously stated in the body of my report. The basis of my opinion is, when arriving at a medical diagnosis, the most important contributing factor is the history. The history contributes 75 percent and the physical examination 15 percent. So, on the basis of a thorough history and physical examination, 90 percent of the time, one should be able to arrive at a primary and/or differential diagnosis. The remaining 10 percent is these so called diagnostic tests, which should be used to confirm the information gathered from a thorough history and physical examination."
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> "When I saw this patient, there were no sensory or motor deficits referable to his examination. The ankle jerks were 1+/1+ (symmetrical). So in the absence of any motor, sensory or neurological deficits, the patient may have some electrodiagnostic findings of a L5-S1 radiculopathy, but there are no positive objective findings to correlate to this. The patient's history nor his symptoms are not compatible with that of an L5-S1 nerve root radiculopathy.
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> "In Dr. Sacks' report of January 20, 1999, he states that his motor evaluation revealed deep tendon reflex activity to be present at 2+ in the knee jerk and ankle jerk areas and equal. Dorsi and plantar flexion are able to be performed at 5/5 though there was a slight decrease in the extensor maneuver of the left big toe. (The big toe is not innervated by the S1 nerve root.)
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> "Nevertheless, the bone scan showed no activity in the area of the bilateral spondylolisthesis which, as I stated, preexisted the accident, it has been there for years and it was quiescent. There is no evidence of any increased uptake around the area, referable to the incident of September 17, 1997.
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> "So, it's my opinion that he incurred an acute lumbosacral sprain/strain by history, which has resolved leaving him with his preexisting pathology. I, clinically, see no need to operate on this patient."

In situations where there are 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 on a proper factual background, must be given special weight.[3]

The reports of Dr. Williams were based upon an accurate history. They address an earlier low back injury sustained in a fall at work and the decompressive neuroplasties of appellant's S1 nerve done by Dr. Lam on November 12 and 26, 1997. Dr. Williams also reviewed the diagnostic testing done prior to his examination of appellant and the bone scan and EMG done afterwards and concluded that the later testing did not alter his opinion.[4] That opinion, which was supported by medical rationale and by his findings on examination, was that appellant sustained an acute lumbosacral strain or sprain on September 17, 1997 and that this condition had resolved, leaving appellant with his underlying pathology, with any aggravation of such pathology ending in no more than six months.

Dr. Williams' reports are entitled to special weight and are sufficient to meet the Office's burden of proof to terminate appellant's compensation. The reports from Drs. Lam and Brand submitted by appellant after the November 16, 1999 hearing, as those of physicians on one side of the conflict resolved by Dr. Williams, are not sufficient to overcome the weight of Dr. Williams' reports or to create a new conflict of medical opinion.[5]

The February 2, 2000 and June 28, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
May 29, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

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

[4] After requesting that appellant submit the x-rays of appellant's lower back taken in the 1980's, as recommended by Dr. Williams the Office attempted to obtain these x-rays through the employing establishment, which was unable to produce them.

[5] *See Dorothy Sidwell,* 41 ECAB 857 (1990).