

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT A. CHAREST and FEDERAL EMERGENCY MANAGEMENT
AGENCY, Maynard, MA

*Docket No. 99-2004; Submitted on the Record;
Issued May 4, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs has met its burden to justify its termination of compensation benefits for the cervical and lumbar strain appellant sustained on February 13, 1990; and (2) whether appellant has met his burden to establish that his degenerative spinal condition is a residual of his February 13, 1990 employment injury.

In a prior appeal,¹ the Board related the procedural history of this case, which is hereby incorporated by reference. Because the record on appeal was incomplete, the Board set aside the Office's December 3 and September 10, 1996 decisions and remanded the case for a merit decision.

On February 13, 1990 appellant, then a 50-year-old operations officer, sustained a cervical and lumbar strain while moving a safe.² The safe was on a dolly and his supervisor was leading it down an incline. A wheel got caught and the safe tipped forward. Appellant, who was trailing the dolly, grabbed the safe to prevent it from falling. The Office paid compensation for temporary total disability on the periodic compensation rolls.

In a report dated January 3, 1991, Dr. Donald A. Driscoll, Jr., appellant's attending orthopedic surgeon, stated that appellant's major problems involved the cervical spine, left shoulder and lumbar spine. He stated that appellant was still quite incapacitated from his back problem. Dr. Driscoll related his findings on examination and diagnosed degenerative disc disease in the lumbar spine, degenerative disc disease in the cervical spine with cervical

¹ Docket No. 97-1021 (issued January 13, 1999) (order remanding case).

² Appellant had a previous employment injury on March 22, 1988 when he helped move a desk and a file cabinet from one room to another. The Office accepted that claim for lumbar strain and left shoulder strain with adhesive capsulitis.

radiculitis and problems from the left shoulder resulting from a previous injury. He reported that the lumbar and cervical spine problems were probably at a medical endpoint.

On June 13, 1993 the Office requested a current medical opinion from Dr. Driscoll on the status of any residuals of the February 13, 1990 employment injury. When it received no response, the Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. John F. Duff, a Board-certified orthopedic surgeon.

In a report dated April 1, 1994, Dr. Duff related appellant's history, complaints and findings on examination. He diagnosed residual deformity and loss of motion of the left shoulder with disability, cervical arthritis with restriction and lumbar spine osteoarthritis with restrictions. Responding to questions posed by the Office, Dr. Duff reported that there were no objective residuals from the cervical and lumbar strain appellant sustained on February 13, 1990. He believed that the acute strain had healed. Dr. Duff explained that, while appellant was permanently totally disabled, the disability was due to a long-term progressive disease and not that particular injury. He stated:

“I do not think there is any significant disability from the February 13, 1990 [injury]. I believe that this man's disabilities were basically preexisting a long-term degenerative and traumatic loss of function of the left shoulder, with progressive degenerative arthritic changes of the cervical spine and lumbar spine.”

Completing a work capacity evaluation, Dr. Duff reported that appellant was totally disabled due to advanced degenerative cervical and lumbar changes but that none of appellant's limitations were due to the employment injury.

In a supplemental report dated May 13, 1994, Dr. Duff stated:

“In my opinion, the limitation of the neck, back and upper extremities motion is not directly related to the February 13, 1990 episode at work. Rather, in my opinion, this is related to a preexisting long-term degenerative and traumatic loss of function of the left shoulder, with progressive degenerative arthritic changes of the cervical spine and lumbar spine. As I stated in my previous report, I believe that acute strain that he had in February 1990 has healed.

“Secondly, in my opinion, the 1988 and 1990 episode represented aggravations of these preexisting conditions and this aggravation, which as I indicated above, has healed. I would anticipate that the effects of this aggravation would have resolved in about six months.”

In a decision dated July 27, 1994, the Office, after proper notice, terminated appellant's compensation benefits for the February 13, 1990 employment injury on the grounds that the weight of the medical evidence, as represented by the opinion of Dr. Duff, indicated that appellant had no residual disability.

Appellant requested an oral hearing before an Office hearing representative. He submitted a May 18, 1993 work restriction evaluation form from Dr. Driscoll, who indicated on

the form that appellant was totally disabled, but he did not address whether appellant continued to suffer residuals of the February 13, 1990 employment injury.

Appellant also submitted an August 3, 1994 report from Dr. Ralph R. Wolf, who reported that appellant had cervical pain with radiation to the left shoulder “following an injury lifting a safe, in 1990.” He diagnosed cervical degenerative disc disease and stated as follows: “Dr. Driscoll’s report was reviewed and the patient’s degenerative disc disease was likely exacerbated by his 1988 and 1990 work injuries.”

Dr. Wolf obtained a magnetic resonance imaging (MRI) study on August 24, 1994. The study was reported to show widespread degenerative disc disease of the cervical spine as well as posterior degenerative spurring at C5-6, creating a mild spinal stenosis.

Appellant submitted a December 14, 1994 report from a physical therapist.³

A hearing was held on February 7, 1995. In a decision dated May 2, 1995, the hearing representative affirmed the termination of compensation for the February 13, 1990 employment injury. The hearing representative noted that Dr. Driscoll had failed to address the element of causal relationship with respect to appellant’s degenerative disc conditions. He found that the weight of the medical evidence rested with the opinion of Dr. Duff on the issue of continuing disability with respect to the February 13, 1990 employment injury.

Appellant requested reconsideration. The Office received additional medical evidence.

On July 26, 1995 Dr. Driscoll reported that appellant recently had an exacerbation of his low back pain while taking a shower, which caused excruciating pain that dropped him to his knee. He reported that appellant’s examination had not changed for the worse or for the better.

In a treatment note dated July 27, 1995, Dr. Jurgen F. Piper, an orthopedist, related that appellant had injured his left arm and neck and lower back in 1988 and “had another lifting injury” in 1990. After reporting his findings, he stated that appellant had a degenerative L4-5 disc with instability. He added: “The extent of his back disease is presumably precipitated by the aforementioned lifting injuries.”

In an August 3, 1995 treatment note, Dr. Piper reported that appellant had a history of “lifting injuries” in 1988 and 1990: “The worse incident being the latter one in 1990 when a 700-pound object was being lifted and he got twisted and wrenched and hurt his back.” Dr. Piper briefly related medical course and diagnosed degenerative lumbar disc disease with chronic persistent symptoms following a lifting injury “which has no doubt caused aggravation of his basic disc degeneration.”

³ The reports of physical therapists have no probative value on medical questions because a physical therapist is not a physician as defined by 5 U.S.C. § 8101(2) and, therefore, is not competent to render a medical opinion. *Barbara J. Williams*, 40 ECAB 649, 657 (1988).

The Office also received an August 22, 1995 report from Dr. Duff. Although he evaluated appellant's left shoulder, he made reference to appellant's degenerative back condition. Dr. Duff stated:

“So far as I could determine at this time, [appellant] tells me and it was not clear on my last evaluation, that his shoulder was perfectly normal prior to that episode in March 1988. I reviewed the medical records of [appellant] and found that his original injury was on the March 22, 1988. He was seen shortly thereafter on the 30th of March by Major E. Blair. At that time, he gave the history of a back injury and had no other element of difficulty either with his neck, shoulders or other problems. [Appellant] was then treated subsequently on April 29, 1988 and he was followed by [seeing] Dr. Blair again in May 13, 1988, six weeks after his injury and he began complaining of his left shoulder and upper arm hurting him. So far as I could determine, the shoulder problem, although it came on delayed, could well be related to the incident and although there was no primary injury the disuse activity due to his back could have created a left shoulder capsulitis. In regards to his neck and low back, in my opinion, these are advancing degenerative osteoarthritic changes, not related to an isolated injury.”

In a decision dated September 27, 1995, the Office denied modification of its prior decision.

In a supplemental report dated January 26, 1996, Dr. Duff stated that he thought his May 13, 1994 report was confusing and he apologized stating:

“In the first paragraph I state very clearly that the shoulder preexisted and was not directly related to the February 13, 1990 episode and that it related to a preexisting long-term degenerative and *traumatic* loss of function in the left shoulder. [Emphasis in original.]

“The second paragraph states that in 1988 and 1990 episode represent aggravations of these preexisting conditions. That is an inappropriate statement. [Appellant] was perfectly well without any left shoulder or left upper extremity complaints other than a Dupuytren's contracture in the hand and that is not in any way related. So for that reason, my statement that the 1988 and 1990 episode represent aggravations of these preexisting conditions is incorrect. It should actually state that the left shoulder condition presently is directly related to the injury of March 22, 1988. Some aggravation of that injury may have occurred in 1990, but I felt that he had resolved and the residual that presented to me in my evaluation was directly related to the original injury.

“In the second section I state that [appellant's] shoulder was in same condition as it was a year ago and it is my continued opinion that his problems are related specifically to the injury of 1988 and was only temporarily aggravated in the incident of February 13, 1990. His limitation, with respect to his left shoulder is due, in my opinion, to the underlying condition of [the] previous injury sustained on March 22, 1988.

“Having reviewed the record carefully, I could not identify any previous incident prior to that date that would account for this condition. Therefore, I apologize for any confusion which may have occurred by my previous reports.”

In a decision dated May 6, 1999, the Office, on remand from the Board, denied modification of its September 27, 1995 decision.

The Board finds that the Office met its burden of proof to justify its termination of compensation benefits for the cervical and lumbar strain appellant sustained on February 13, 1990.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁴ 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.⁵

The Office accepted that appellant sustained a cervical and lumbar strain on February 13, 1990 when he attempted to keep a safe from falling forward onto his supervisor. The Office paid compensation benefits on the basis of these soft-tissue injuries, but before long appellant's disability for work was no longer being attributed to these conditions. Instead, on January 3, 1991, Dr. Driscoll, appellant's attending orthopedic surgeon, diagnosed degenerative disc disease in the lumbar spine, degenerative disc disease in the cervical spine with cervical radiculitis and problems from the left shoulder resulting from the 1988 injury. He stated that appellant was still quite incapacitated from his back problem, but he did not diagnose a cervical or lumbar strain and did not attribute appellant's disability for work to such.

Dr. Duff, the orthopedic referral physician, addressed the issue directly. On April 1, 1994 he diagnosed residual deformity and loss of motion of the left shoulder with disability, cervical arthritis with restriction and lumbar spine osteoarthritis with restrictions. He reported that there were no objective residuals from the cervical and lumbar strain sustained on February 13, 1990. He found that the acute strains had healed. On May 13, 1994 he again reported that the acute strain that appellant had in February 1990 had healed.

Dr. Duff drew his conclusion from a review of the medical record and a statement of accepted facts and from his findings on examination. Although he submitted additional reports after reviewing records relating to appellant's 1988 employment injury, he consistently reported that appellant no longer suffered from the cervical and lumbar strain he sustained on February 13, 1990. As there is no medical opinion to the contrary, that is, no medical opinion attributing appellant's continuing disability for work to the accepted cervical or lumbar strain, the Board finds that the weight of the medical evidence rests with Dr. Duff. The Office has met its burden to terminate compensation benefits for the accepted conditions.

⁴ *Harold S. McGough*, 36 ECAB 332 (1984).

⁵ *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

The Board also finds that appellant has not met his burden to establish that his degenerative spinal condition is a residual of his February 13, 1990 employment injury.

A claimant seeking benefits under the Federal Employees' Compensation Act⁶ has the burden of proof to establish the essential elements of his claim by the weight of the evidence,⁷ including that he sustained an injury in the performance of duty and that any specific condition or disability from work, for which he claims compensation is causally related to that employment injury.⁸

The Office accepts that appellant sustained an injury in the performance of duty on February 13, 1990. Appellant asserts that his disabling degenerative spine condition is a residual of that employment injury, so he bears the burden to establish the element of causal relationship.

The evidence generally required to establish causal relationship is rationalized medical opinion evidence. The claimant must submit a rationalized medical opinion that supports a causal connection between his current condition and the employment injury. The medical opinion must be based on a complete factual and medical background with an accurate history of the claimant's employment injury and must explain from a medical perspective how the current condition is related to the injury.⁹

The record contains no such medical opinion. Dr. Wolf reported on August 3, 1994 that appellant's degenerative disc disease was likely exacerbated by his 1988 and 1990 work injuries, but he offered no medical reasoning to support this conjecture.¹⁰ Further, Dr. Wolf reported that appellant injured himself "lifting a safe" in 1990. This is not an accurate description of the incident that occurred on February 13, 1990 and, therefore, the probative value of his conclusion is diminished further.¹¹

Dr. Piper also reported a lifting injury. In his July 27, 1995 treatment note, he stated that the extent of appellant's back disease was "presumably" precipitated by the lifting injuries of 1988 and 1990.¹² In his August 3, 1995 treatment note, Dr. Piper offered a more certain opinion.

⁶ 5 U.S.C. §§ 8101-8193.

⁷ *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

⁸ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁹ *John A. Ceresoli, Sr.*, 40 ECAB 305 (1988).

¹⁰ The Board has held that medical conclusions unsupported by rationale are of little probative value. *Ceferino L. Gonzales*, 32 ECAB 1591 (1981); *George Randolph Taylor*, 6 ECAB 968 (1954).

¹¹ Medical conclusions based on inaccurate or incomplete histories are of little probative value. *See James A. Wyrick*, 31 ECAB 1805 (1980) (physician's report was entitled to little probative value because the history was both inaccurate and incomplete). *See generally Melvina Jackson*, 38 ECAB 443, 450 (1987) (addressing factors that bear on the probative value of medical opinions).

¹² An award of compensation may not be based on surmise, conjecture or speculation. *Shirloyn J. Holmes*, 39 ECAB 938 (1988); *Pamela A. Harmon*, 37 ECAB 263 (1986); *Vernon O. Fein*, 34 ECAB 78 (1982); *see also Manuel Garcia*, 37 ECAB 767 (1986).

He stated that appellant's lifting injury "no doubt" caused an aggravation of his basic disc degeneration. This opinion is of little probative value because Dr. Piper offered no medical explanation of how such an incident can aggravate a degenerative disc condition. Further, he reported that in 1990 a 700-pound object was being lifted and appellant got twisted and wrenched his back. For his conclusion to be convincing, Dr. Piper must demonstrate that he based it on an accurate history of injury, such as appears in the statement of accepted facts.

Because the medical evidence submitted to support appellant's claim is of little probative or evidentiary value and is insufficient to establish that his degenerative spinal condition is causally related to the incident that occurred on February 13, 1990, appellant has not met his burden of proof.

The May 6, 1999 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
May 4, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member