

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSE D. MONTENEGRO and DEPARTMENT OF THE NAVY,
NAVAL SHIPYARD, Philadelphia, PA

*Docket No. 99-2057; Submitted on the Record;
Issued May 3, 2001*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation benefits effective May 24, 1998.

On January 11, 1990 appellant, then a 52-year-old computer operator, injured his lower back while squatting to replace paper in a printer. Appellant stopped work on January 12, 1990 and did not return. The Office accepted the claim for a lumbosacral strain, sprain and a herniated nucleus pulposus.

Appellant began receiving treatment from Dr. Stephen F. Ficchi, a Board-certified family practitioner, shortly after his work injury. He indicated that appellant was totally disabled beginning January 11, 1990, due to his employment injury. A February 9, 1990 magnetic resonance imaging (MRI) scan revealed a large central herniation at L3-4 and smaller herniations at L2-3 and L5-S1.

The Office referred appellant to Dr. Joseph J. Toland, III, a Board-certified orthopedic surgeon, for a second opinion. In a January 13, 1992 report, Dr. Toland noted the history of injury, reported examination findings and opined that appellant's signs and symptoms were work related. While he indicated that appellant could perform some restricted duties, he recommended additional testing, to confirm the extent of disc herniation, before determining appellant's work capabilities.

In a July 20, 1993 progress note, Dr. Toland noted that appellant remained symptomatic. He reported examination findings and concluded that appellant's condition was a "little bit" worse than when he had seen him in January 1992. Dr. Toland opined that appellant had the signs and symptoms of a herniated disc and recommended a new MRI. An MRI performed on August 16, 1993 revealed a central disc herniation at L4-5 indenting into the anterior thecal sac. The scan also revealed herniations at L2-3 and L3-4 with a degenerative disc at L5-S1.

In an October 1, 1993 progress note, Dr. Toland noted that appellant remained symptomatic and could not work until his herniated discs were treated.

In an April 2, 1996 report, Dr. Toland advised that appellant's condition was essentially unchanged. He opined that appellant's condition likely would not improve and would likely deteriorate due to the "long-standing nontreatment of the herniated disc."¹ Dr. Toland stated that appellant's current conditions were due to his employment injury, but he found that he could perform sedentary work. In an accompanying work capacity evaluation, Dr. Toland listed appellant's work restrictions.

In a December 20, 1996 report, an Office medical adviser opined that, based on Dr. Toland's report, appellant could perform the duties of the selected position of computer operator. On January 31, 1997 the Office proposed reducing appellant's compensation based on his ability to perform the duties of computer operator.

Dr. Ficchi and his associates submitted status reports noting appellant's symptoms, findings and continuing disability. In a February 20, 1997 report, Dr. Ficchi diagnosed herniated discs at L2-3, L3-4, L5-S1 and myofascial pain syndrome. He opined that appellant's radicular symptoms were consistent with the herniated discs and that he could not work in a sedentary position for eight hours daily.

In an April 21, 1997 decision, the Office reduced appellant's compensation based on his ability to perform the duties of the selected position of computer operator. Appellant subsequently requested a hearing.

In an October 27, 1997 decision, an Office hearing representative found that the Office did not meet its burden of proof in reducing benefits because the selected position required activities that exceeded the physical limitations listed by Dr. Toland. The hearing representative directed the Office to refer appellant to Dr. Toland for a current examination and evaluation of work restrictions to be followed by a *de novo* wage-earning capacity decision.

After the Office determined that Dr. Toland had retired, it referred appellant to Dr. Leonard Klinghoffer, a Board-certified orthopedic surgeon, for a second opinion regarding the nature and extent of continuing residuals of appellant's work-related injury.

In a November 28, 1997 report, Dr. Ficchi noted appellant's continuing treatment for his January 11, 1990 employment injury. He diagnosed lumbar sprain strain; bilateral lower extremity radiculitis; disc herniation at L2-3, L3-4 and L5-S1; and myofascial pain syndrome. Dr. Ficchi opined that these conditions were due to the employment injury and that appellant remained totally disabled. He also submitted additional treatment notes reporting appellant's course of physical therapy and medical treatment.

In a January 15, 1998 report, Dr. Klinghoffer noted appellant's history, reviewed the medical record and reported examination findings. He opined that appellant sprained his back as a result of the January 1990 work injury and that, due to degenerative arthritis of the spine, his

¹ *Bettye F. Wade*, 37 ECAB 556 (1986); *Ella M. Garner*, 36 ECAB 238 (1984).

recovery time was longer than usual. Dr. Klinghoffer opined that the degenerative pathology may have produced some lumbar nerve root irritation in the past. However, appellant had no current radicular symptoms and the MRI did not reveal nerve root compromise. Dr. Klinghoffer could not otherwise explain the magnitude of appellant's complaints. He opined that some mild intermittent back symptoms would be reasonable on the basis of age and arthritis, but could not relate any of appellant's current conditions to his accepted work injury. Dr. Klinghoffer concluded that appellant had no physical disability due to his 1990 work injury. In an accompanying work restriction evaluation, he noted that appellant had no work-related physical limitations.

Dr. Ficchi continued submitting status reports noting that appellant remained disabled.

On February 27, 1998 the Office proposed terminating appellant's compensation.

In a May 5, 1998 decision, the Office terminated appellant's compensation effective May 24, 1998. The Office found that the weight of the medical evidence rested with Dr. Klinghoffer.

Thereafter, appellant continued submitting medical reports and treatment notes indicating that he remained symptomatic and disabled. In an April 18, 1999 letter, appellant requested reconsideration.

In a May 13, 1999 decision, the Office denied modification of its May 5, 1998 decision after reviewing the merits of the claim.

The Board finds that the Office did not meet its burden of proof in terminating appellant's compensation benefits effective May 24, 1998.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.² After it has determined that there is disability causally related to an employee's federal employment, the Office may not terminate or modify compensation without establishing that the disabling condition has ceased or that it is no longer related to the employment.³

The Office has not met its burden of proof because there is an unresolved conflict in medical opinion between Dr. Ficchi, appellant's treating physician, and Dr. Klinghoffer, an Office referral physician, on whether appellant has any continuing medical condition or disability due to the January 11, 1990 employment injury. As such, the Office should have resolved the conflict pursuant to section 8123 of the Act.⁴

² *Bettye F. Wade*, 37 ECAB 556 (1986); *Ella M. Garner*, 36 ECAB 238 (1984).

³ *John Wilkes, Jr.*, 36 ECAB 451 (1985); *Betty J. Glover*, 34 ECAB 465 (1982); *Fred Foster*, 1 ECAB 21 (1947).

⁴ 5 U.S.C. § 8123(a), in pertinent part, provides: "If 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."

Dr. Ficchi provided reports noting appellant's condition since shortly after his employment injury in January 1990. He consistently indicated that appellant remained disabled and opined that this disability was due to the employment injury. Dr. Ficchi provided examination findings throughout the course of treatment and never indicated that appellant's accepted employment-related conditions had ceased or was no longer disabling. On the other hand, Dr. Klinghoffer reviewed the medical record, examined appellant and concluded that appellant had no continuing residuals attributable to his January 11, 1990 employment injury. Consequently, there is an unresolved conflict in the medical evidence and thus the Office did not meet its burden of proof in terminating all benefits.

The May 13, 1999 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, DC
May 3, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member