

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DENNIS TIMBS and TENNESSEE VALLEY AUTHORITY,  
CONSTRUCTION SERVICES BRANCH, CUMBERLAND STEAM  
PLANT, Cumberland City, TN

*Docket No. 01-87; Submitted on the Record;  
Issued October 12, 2001*

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DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective October 18, 1999 on the grounds that appellant no longer had any residuals of his July 15, 1982 employment injury.

The Board has duly reviewed the case record in this appeal and finds that the Office improperly terminated appellant's compensation benefits effective October 18, 1999 on the grounds that appellant no longer had any residuals of his July 15, 1982 employment injury.

On July 23, 1982 appellant, then a 24-year-old painter, filed a traumatic injury claim alleging that on July 15, 1982 he experienced back pain and strained his left hand when he slipped while painting a stairwell. He stopped work on July 15, 1982. Appellant has not returned to work.

The Office accepted appellant's claim for a contusion of the lower abdominal wall and lumbar strain. Appellant received appropriate compensation for his temporary total disability.

By letter dated December 10, 1998, the Office advised appellant to submit medical evidence supportive of his continued disability.

By letter dated July 9, 1999, the Office referred appellant, along with medical records, a statement of accepted facts and a list of specific questions to Dr. William H. Ledbetter, a Board-certified orthopedic surgeon, for an examination.

In a notice of proposed termination of compensation dated September 9, 1999, the Office advised appellant that it proposed to terminate his compensation based on Dr. Ledbetter's opinion that he was neither disabled from work nor did he have any condition due to his July 15, 1982 employment injury. The Office requested that appellant submit medical evidence supportive of his continued disability within 30 days.

By decision dated October 18, 1999, the Office terminated appellant's compensation effective that date on the grounds that Dr. Ledbetter's medical reports established that appellant was no longer disabled due to his July 15, 1982 employment injury. In an undated letter, appellant requested a review of the written record.

By decision dated May 15, 2000, the hearing representative affirmed the Office's October 18, 1999 decision. In an undated letter, appellant requested reconsideration of the hearing representative's decision.

In a June 27, 2000 decision, the Office denied a merit review of appellant's claim on the grounds that the evidence submitted in support of appellant's request for reconsideration was of a repetitious nature.<sup>1</sup>

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.<sup>2</sup> The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>3</sup> If the Office, however, meets its burden of proof and properly terminates compensation, the burden for reinstating compensation benefits properly shifts to appellant.<sup>4</sup>

In terminating appellant's benefits, the Office relied on the medical opinion of Dr. Ledbetter, a Board-certified orthopedic surgeon and an Office physician. In his July 26, 1999 report, Dr. Ledbetter provided a description of the July 15, 1982 employment injury, appellant's complaints of pain in his lower back and right lower extremity, his findings on physical examination, and a review of medical records. Dr. Ledbetter diagnosed chronic pain syndrome secondary to lumbar sprain with probable neuropraxic injury to the lumbosacral plexus. In response to the Office's question whether appellant continued to have residuals of his work-related injury or whether the injury had resolved, Dr. Ledbetter stated:

“At this time [appellant] has persistent chronic pain as a result of his work-related injury. Clearly, the injury has not completely resolved in view of his pain complaints. Based on today's history and examination, he has significant disability as regards the use of his right lower extremity and low back. There are not specific objective residuals directly attributable to the work injury based on today's history and physical findings and evaluation of medical records made

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<sup>1</sup> Subsequent to the Office's June 27, 2000 decision, the Office received medical evidence. The Board, however, cannot consider evidence that was not before the Office at the time of the final decision. *See Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35 (1952); 20 C.F.R. § 501.2(c)(1). Appellant may resubmit this evidence and legal contentions to the Office accompanied by a request for reconsideration pursuant to 5 U.S.C. § 8128(a). 20 C.F.R. § 501.2(c).

<sup>2</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989).

<sup>3</sup> *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>4</sup> *See Virginia Davis-Banks*, 44 ECAB 389 (1993); *Joseph M. Campbell*, 34 ECAB 1389 (1983).

available to me. As noted above, an electromyography would be consideration for further evaluation to determine if there is objective evidence of nerve damage.”<sup>5</sup>

In response to the Office’s question that, if he had detected work injury residuals, whether they were still causing any disability, Dr. Ledbetter referenced his above response. Further, Dr. Ledbetter opined that he did not believe appellant was physically capable of performing his duties as a painter and that appellant should undergo a functional capacity evaluation.<sup>6</sup>

The Board has carefully reviewed Dr. Ledbetter’s report and finds that it is insufficient to carry the weight of the medical evidence on the relevant issue of the present case inasmuch as it does not find that appellant has recovered from his accepted employment-related injuries. Dr. Ledbetter, the impartial medical examiner that the Office relied on to terminate appellant’s benefits, is very clear that appellant is “not physically capable of performing his duties as a painter.” He is equally clear that at the time of his report he did not have sufficient information to make a determination regarding appellant’s prognosis. Dr. Ledbetter is very clear that before an accurate prognosis and treatment plan can be devised, appellant need to undergo an “extensive and total reevaluation, including a magnetic resonance imaging of the lumbar spine, electromyography of the right lower extremity and an evaluation at a pain clinic.” Because the Office failed to provide an adequate basis for its determination that appellant ceased to have residuals of his July 15, 1982 employment injury effective October 18, 1999, the Office did not meet its burden of proof to terminate appellant’s compensation.

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<sup>5</sup> Dr. Ledbetter’s August 11, 1999 electromyography report revealed that appellant had mild generalized peripheral neuropathy with overlying right common peroneal neuropathy and no evidence of a lumbosacral radiculopathy on either side between the L2 and S2 levels.

<sup>6</sup> Dr. Ledbetter’s August 6, 1999 functional capacity report indicated that appellant was unable to participate in this test, and thus, it was not possible to determine whether appellant was able to work in any capacity.

The June 27 and May 15, 2000, and October 18, 1999 decisions of the Office of Workers' Compensation Programs are hereby reversed.

Dated, Washington, DC  
October 12, 2001

David S. Gerson  
Member

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member