

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DENNIS A. RICCI and DEPARTMENT OF THE ARMY,
NATIONAL GUARD BUREAU, Rochester, NY

*Docket No. 02-588; Submitted on the Record;
Issued August 28, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits, effective October 8, 2000.

The Office accepted appellant's claim for a lumbar strain and a herniated disc.

In a report dated August 8, 1995, appellant's treating physician, Joseph K. Eshleman, a Board-certified physiatrist, performed a physical examination and reviewed myelography and electrodiagnostic studies. He diagnosed right lumbar radiculopathy and opined that appellant was completely disabled. Dr. Eshleman stated that appellant's condition was unchanged since the March 15, 1979 employment injury and there was a cause and effect between his current clinical findings of decreased right knee jerk, weakness in the right hip flexor, right knee extensor, positive sitting root test on the right and appellant's work-related injury. In subsequent reports dated September 23, 1996, September 22 and October 6, 1997, Dr. Eshleman continued to opine that appellant was totally disabled due to the March 15, 1979 employment injury.

In a report dated January 17, 2000, Dr. Stephen R. Bailey, a Board-certified orthopedic surgeon, provided a referral opinion for the Office, considered appellant's history of injury, performed a physical examination and reviewed diagnostic tests of record including a myelogram performed in September 27, 1979 which was negative for a herniated disc, an electromyogram (EMG) and a magnetic resonance imaging (MRI) scan performed on October 14, 1996 which showed no evidence of spine trauma sequelae or ruptured disc. He diagnosed low back pain and right leg pain. Dr. Bailey stated that, based on the diagnosis of lumbar sprain resulting from the March 15, 1979 work incident and the confirmatory negative September 1979 myelogram, appellant sustained at most a soft tissue sprain of the low back as a result of the March 15, 1979 employment injury. He stated that appellant did not sustain spine trauma, ruptured disc or any other objective pathology that could explain his complaints over the years. Dr. Bailey stated that appellant was capable of returning to his normal duties as a pattern painter or any similar type of work and required no restrictions.

To resolve the conflict in the medical evidence between appellant's treating physician, Dr. Eshleman, and the second opinion physician, Dr. Bailey, regarding whether appellant was disabled due to the March 15, 1979 employment injury, the Office referred appellant to an impartial medical specialist, Dr. Robert P. Durning, a Board-certified orthopedic surgeon. In his report dated June 22, 2000, Dr. Durning considered appellant's history of injury, performed a physical examination, and reviewed results of an x-ray, MRI scan, EMGs and nerve conduction studies. He diagnosed lumbago or low back pain, obesity, hearing loss, hypertension, diabetes mellitus and presumed osteoarthritis of the left knee. Dr. Durning opined that the medical evidence failed to reveal evidence that any structural or material change occurred to appellant's low back or lumbar spine in 1979. He stated that there was no evidence of a herniated disc based on the MRI scan and x-rays. Dr. Durning stated that appellant's symptoms and complaints were not supported by objective evidence of lasting injury or disease "significant or serious enough to cause total disability." He opined that "withdrawal from a contributory manner of living and abandonment of purposeful activity for more than twenty years following a 'sprain,' 'strain,' 'soft tissue' problem of the low back is misguided, counterproductive behavior." Dr. Durning stated that appellant was permanently, totally disabled but not as a result of the March 15, 1979 employment injury. In response to an inquiry from the Office, by letter dated July 26, 2000, Dr. Durning stated that, from a "purely" orthopedic standpoint, appellant had recovered with no residuals from his March 15, 1979 employment injury.

On August 18, 2000 the Office issued a notice of proposed termination of compensation, stating that Dr. Durning's opinion represented the weight of the evidence.

Appellant submitted additional evidence. In a report dated September 6, 2000, Dr. Eshleman stated that he reviewed the Office's notice of proposed termination and reiterated that appellant had weakness on manual muscle testing of the right quadriceps, right hip flexor and right extensor hallucis longus. He stated that deep tendon reflex testing showed a diminished right knee jerk, absent right ankle jerk. He also stated that there was a positive sitting root test bilaterally, right greater than left, and that appellant related on questioning that the low back pain was constant, radiating at times down to the right knee and sometimes into the right foot.

A lumbar magnetic resonance imaging (MRI) scan dated September 9, 2000 showed no evidence of disc herniation or canal stenosis.

In a report dated September 14, 2000, Dr. Eshleman stated that his clinical examinations on several occasions had been unchanged and appropriate for a diagnosis of lumbar radiculopathy. He stated:

"While it is true that [appellant's] MRIs and electrodiagnostics have not shown evidence of herniated disc, it is in fact possible to have nerve damage from soft tissue injury such as might be sustained by a situation such as [appellant] experienced on March 15, 1979. I remain of the opinion that my clinical exams correlate with that diagnosis and because of the long term persistence he is unable to carry out gainful or competitive employment at this time."

By decision dated October 6, 2000, the Office terminated appellant's compensation benefits, effective October 8, 2000.

Appellant requested an oral hearing before an Office hearing representative which was held on June 18, 2001. Appellant described his employment history with the navy and army, the March 15, 1979 employment injury, and his medical treatment. Appellant stated that, after his injury, he gained weight rapidly due to the inactivity and stress, he was diagnosed as having diabetes millitus and he developed significant hypertension. He stated that he had no problems with his back prior to March 15, 1979. Appellant stated that since 1979 his symptoms have consistently been back pain on the right which goes "down the buttock, down the leg to [his] knee and then on this side it goes down to [his] shin almost to [his] ankle." He stated that sometimes the pain shoots through his feet like an electric shock and he now had pain on the left side.

Appellant's rehabilitation specialist, Mary Williams, testified that she believed appellant's complaints were authentic and that his condition had not improved. She believed appellant had a medical condition that was getting worse. Appellant's representative contended that Drs. Bailey and Durning's reports were defective because they ignored objective evidence of appellant's complaints such as the absence of reflexes. He also objected to Dr. Durning's characterization of appellant's condition as "counterproductive."

Appellant submitted additional medical evidence. In a report dated February 6, 2001, Dr. Eshleman stated that appellant's current disability, as stated in his September 14, 2000 report, was related to the March 15, 1979 employment injury. He noted that he consistently found objective evidence consisting of appellant's having a sitting root test on the right, abnormalities of deep tendon evaluation on the right lower extremity, and focal motor weakness in the same distribution when compared to the left lower extremity. Dr. Eshleman stated that these problems continued to generate pain and physical disability. He stated that because of appellant's continuing, unrelenting pain and the continued focal motor weakness, his physical activity had been substantially reduced and his inactivity was a significant factor in the development of appellant's obesity. Dr. Eshleman stated that the obesity became a modifying factor in the low back itself as well as a significant factor in the management of hypertension and diabetes. He also stated that appellant developed intradiscal degenerative disease as reflected on the MRI scan. Dr. Eshleman concluded that appellant was permanently, totally disabled.

In a report dated February 19, 2001, Dr. Eshleman performed a physical examination and noted an almost completely normal MRI scan except for some very mild signal changes within the disc. He stated that appellant had a 21-year history of lower back pain due to an industrial injury, and he could not explain why appellant had left-sided leg pain since there was absolutely no indication of a pinched nerve in his lower back or any radiculopathy patterns. He prescribed chronic pain management.

In a report dated May 31, 2001, Dr. Eshleman stated that clinical evidence of radiculopathy consisting of specific muscle weakness, reflex change and positive sitting root test coincided with his opinion within reasonable medical certainty that appellant's condition was a direct consequence of his March 1979 employment injury.

By decision dated September 7, 2001, finalized on September 11, 2001, the Office hearing representative affirmed the Office's October 6, 2000 decision.

The Board finds that the Office properly terminated appellant's compensation benefits, effective October 8, 2000.

Once the Office has accepted 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 disability has ceased or that it is no longer related to the employment.¹ The Office's burden of proof includes the necessity of furnishing rationalized medical evidence based on a proper factual and medical background.²

In this case, to resolve the conflict in the medical evidence between Dr. Eshleman's and Dr. Bailey's opinions regarding whether appellant was totally disabled due to his March 15, 1979 employment injury, the Office referred appellant to Dr. Durning, an impartial medical specialist. In his June 22, 2000 report, Dr. Durning considered appellant's history of injury, performed a physical examination and reviewed the diagnostic tests of record. He diagnosed, in part, lumbago or low back pain, obesity and hypertension. Dr. Durning found no evidence of a herniated disc and found that appellant's symptoms and complaints were not supported by objective evidence which could cause total disability. He opined that appellant was permanently, totally disabled but not as a result of the March 15, 1979 employment injury. In his July 26, 2000 letter, he stated that appellant had recovered from the March 15, 1979 employment injury with no residuals.

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 Dr. Durning's opinion is complete and well-rationalized, and because Dr. Durning is an impartial medical specialist, his opinion that appellant completely recovered from his March 15, 1979 employment injury constitutes the weight of the evidence. The Office therefore properly terminated appellant's compensation benefits in its October 6, 2000 decision.

The evidence appellant submitted subsequent to the Office's decision including Dr. Eshleman's reports dated February 6, February 19 and May 31, 2001 in which Dr. Eshleman restated his opinion that appellant was permanently totally disabled due to the March 15, 1979 employment injury are insufficient to counter Dr. Durning's opinion. In his February 6, 2001 report, Dr. Eshleman stated that there was objective evidence of appellant's condition consisting of a sitting root test on the right, abnormalities of deep tendon evaluation on the right lower extremity and focal motor weakness in the distribution when compared to the left lower

¹ *Wallace B. Page*, 46 ECAB 227, 229-30 (1994); *Jason C. Armstrong*, 40 ECAB 907, 916 (1989).

² *Larry Warner*, 43 ECAB 1027, 1032 (1992); *see Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

³ *Kathryn Haggerty*, 45 ECAB 383, 389 (1994); *Jane B. Roanhaus*, 42 ECAB 288 (1990).

extremity. He also stated that appellant's obesity resulted from his inactivity and appellant had developed intradiscal degenerative disease as shown on the MRI scan. Dr. Eshleman's findings of objective evidence were contained in his other reports in the record. He did not provide a sufficiently rationalized opinion explaining how appellant's degenerative disc disease developed from the March 15, 1979 employment injury. His opinion is therefore of diminished probative value.⁴ In his reports dated February 19 and May 31, 2001, Dr. Eshleman restated his findings of objective symptoms and his opinion that appellant's condition was directly related to the March 15, 1979 employment injury. The Board has held that, where the attending physician was on one side of the conflict in the medical opinion which was resolved by the impartial specialist, additional reports of the attending physician are insufficient to overcome the weight of the impartial medical specialist or to create a new conflict in the medical opinion unless the additional reports contain new, relevant information.⁵ In this case, Dr. Eshleman's reports dated from February 6 through May 31, 2001 do not contain new, relevant information or a well-rationalized medical opinion based on new information. The Office therefore properly relied on the opinion of the impartial medical specialist, Dr. Durning, in finding that appellant recovered from the March 15, 1979 employment injury, and his opinion justifies the Office's termination of benefits.

The September 7, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
August 28, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

⁴ *Annie L. Billingsley*, 50 ECAB 210, 213 n. 20 (1998).

⁵ *See Dorothy Sidwell*, 41 ECAB 857, 874 (1990).