U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DENNIS T. KILPATRICK and DEPARTMENT OF THE NAVY, HILA NAVAL SHIPYARD, Philadelphia, PA

Docket No. 02-877; Submitted on the Record;
Issued December 12, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation.

On March 6, 1991 appellant, then 41-year-old sandblaster, injured his back when he reached to retrieve a tool he dropped.

Appellant's medical history included a nonwork-related back injury in 1991, a splenectomy in 1989 and a history of heroin and prescription drug abuse.

In an April 23, 1991 decision, the Office accepted appellant's claim for lumbosacral sprain and he received compensation for total temporary disability.

In an April 29, 1991 report, Dr. Denis A. Boyle diagnosed appellant with resolving thoracic and lumbar sprains and recommended physical therapy.

In a May 15, 1991 report, Dr. Corey K. Ruth, interpreted a magnetic resonance imaging (MRI) scan and diagnosed appellant with thoracic and lumbar sprains and a herniated disc at L4-5 and L5-S1.

In a November 13, 1991 report, Dr. Daniel J. Gross a Board-certified orthopedic surgeon and second opinion referral found that the MRI revealed no significant herniation and indicated that appellant had chronic back strain but could perform light duty.

In an April 6, 1992 letter, the employing establishment offered appellant a part-time, light-duty job that Dr. Boyle, in a May 12, 1992 report, indicated that appellant could try.

In a June 4, 1992 report, Dr. Boyle diagnosed appellant with hepatitis.

In a June 5, 1992 letter, the employing establishment indicated that appellant failed to show up for his part-time light-duty assignment that was later withdrawn when appellant was diagnosed with active and contagious hepatitis B.

In a June 17, 1992 letter, the Office requested more information from appellant and his physician on his diagnosis of hepatitis B, including if there was any relationship between it and appellant's accepted injury.

Neither appellant nor his physician responded to these inquiries.

In a September 24, 1992 report, Dr. Boyle indicated that appellant could not work due to his hepatitis but he did not address the issue of causal relationship.

In an April 29, 1993 report, Dr. Ruth indicated that appellant was suffering from liver failure.

On May 7, 1993 appellant had a liver transplant.

Dr. Boyle submitted monthly medical reports from 1994 through 1999 indicating that appellant had ongoing pain in his back related to his March 6, 1991 employment injury and was receiving physical therapy.

The Office and the employing establishment continued to request information from Dr. Boyle regarding a causal relationship between appellant's hepatitis and liver transplant. He was nonresponsive.

In a February 4, 2000 letter, appellant was referred to Dr. Stephen Valentino, an orthopedic surgeon, for a second opinion referral.

In a February 23, 2000 report, Dr. Valentino found, based on an examination and MRI scans, that appellant suffered no residuals from the March 6, 1991 accepted injury. He further indicated that appellant had nonwork-related conditions of a liver transplant, osteoporosis and a compression fracture above the lumbar spine that would require him to do light, sedentary work.

The Office, finding a conflict between Drs. Boyle and Valentino, referred appellant for an independent medical examination.

In a September 18, 2000 report, Dr. Menachem M. Meller, a Board-certified orthopedic surgeon, indicated that he had reviewed appellant's medical history and found his March 6, 1991 accepted injury had fully and completely resolved. He further found, based on a recent MRI, that there was no herniation present. Appellant did have signs of degenerative disc disease consistent with his age and he suffered from depression and anxiety. Dr. Meller opined that appellant had work limitations, but that they were not due to his accepted condition of lumbosacral sprain.

In a January 31, 2001 letter, the Office proposed terminating appellant's compensation and provided him 30 days to submit additional evidence.

In a March 2, 2001 letter, appellant's representative argued that all appellant's injuries are consequential to the accepted claim. Had he not been injured on March 6, 1991 he would not have taken narcotic pain medication that led to a relapse of his substance abuse that caused his liver transplant. He further argued that the statement of accepted facts was flawed because it failed to mention Dr. Gross' finding that appellant's pain was "chronic," which he interpreted to mean "permanent."

In support of his position, appellant submitted an April 29, 1992 handwritten report from a clinician (signature illegible) indicating that he was addicted to heroin since he was 18 years old and Vicodin since he was 40. It quoted appellant as saying he had stopped taking drugs until his industrial accident when he was prescribed narcotics and he started using again.

Appellant also submitted a February 21, 2001 report from Dr. Ruth indicating that he had a liver transplant secondary to drug abuse and a February 16, 2001 letter from Thomas Wind, a DO, who diagnosed appellant as suffering from major depression and generalized anxiety. Dr. Wind opined that appellant could not work.

In a February 20, 2001 letter, Dr. Boyle argued that the Office must consider appellant's post-traumatic stress and chronic pain syndromes, depression and pharmacological addictions to be work related because none of these conditions were active prior to the accepted incident.

In a March 29, 2001 decision, the Office terminated appellant's compensation.

In an October 8, 2001 letter, appellant requested a review of the written record by the Branch of Hearings and Review. He also argued that the Office failed to properly use the Physician's Directory System (PDS) in selecting Dr. Meller for the independent medical examination. Appellant argued that the Office is to use a rotational system to select independent medical examiners from among the qualified physicians in the appellant's vicinity. He made the points that there were at least 172 orthopedic surgeons in Philadelphia County and that Dr. Meller was selected to examine appellant on September 18, 2000 and again, for another unrelated claimant, on November 27, 2000. Appellant argued that the Office could not, using a rotational system, have selected Dr. Meller twice in 69 days. He offered no further evidence that the selection process used to select Dr. Meller was tainted.

In a February 20, 2002 decision, the Office finalized its termination of appellant's compensation.

The Board finds the Office properly terminated appellant's compensation.

Under the Federal Employees' Compensation Act,[1] once the Office has accepted a claim it has the burden of justifying termination or modification of compensation benefits.[2] The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[3] The Office's burden of proof includes the necessity of

[1] 5 U.S.C. §§ 8101-8193.

[2] *Charles E. Minniss,* 40 ECAB 708, 716 (1989); *Vivien L. Minor,* 37 ECAB 541, 546 (1986).

[3] *Id.*

furnishing rationalized medical opinion evidence based on a proper factual and medical background.[4]

The Office properly determined that there was a conflict in the medical opinion between Dr. Boyle, appellant's attending physician and Dr. Valentino, an orthopedic surgeon, acting as an Office referral physician, regarding whether appellant continued to have residuals of the March 6, 1991 employment injury. In order to resolve the conflict, the Office properly referred appellant, pursuant to section 8123(a) of the Act, to Dr. Meller for an impartial medical examination and an opinion on the matter.[5]

In situations where there exist 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 upon a proper factual background, must be given special weight.[6]

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Meller, the impartial medical specialist selected to resolve the conflict in the medical opinion. The report of Dr. Meller establishes that appellant had no disability due to his March 6, 1991 employment injury.

The Board has carefully reviewed the opinion of Dr. Meller and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Meller's opinion is based on a proper factual and medical history in that he had the benefit of an accurate and up-to-date statement of accepted facts, provided a thorough factual and medical history and accurately summarized the relevant medical evidence. Moreover, Dr. Meller provided a proper analysis of the factual and medical history and the findings on examination, including the results of diagnostic testing and reached conclusions regarding appellant's condition, which comported with this analysis.[7] He provided medical rationale for his opinion by explaining that based on his examination and review of appellant's medical history and objective studies that appellant's March 6, 1991 lumbosacral strain had completely and fully resolved. Dr. Meller found that appellant's ongoing medical conditions, while preventing appellant from returning to his date-of-injury job, were not related to the accepted employment injury.

On appeal appellant argues that his medical conditions, including post-traumatic stress and chronic pain syndromes, depression and pharmacological addictions were a consequence of his March 6, 1991 injury and, therefore, should be compensable. However, he failed to submit rationalized medical evidence to support his argument.

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[4] *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

[5] Section 8123(a) of the Act provides 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." 5 U.S.C. § 8123(a).

[6] *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

[7] *See Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

The handwritten note from the clinician indicated that appellant had been abusing heroin for several years and Vicodin for at least one year prior to his March 6, 1991 injury. The only indication of a causal relationship between the drug abuse and the accepted injury was a statement quoting appellant that he had been "clean for five years" prior to the industrial incident. That statement contradicts appellant's earlier statement that he started abusing Vicodin when he was 40, one year before the March 6, 1991 injury.

Dr. Ruth's February 20, 2001 letter indicated that appellant's liver transplant was secondary to his drug abuse, but she does not explain the causal relationship between the accepted injury, the drug abuse and the liver transplant.

Dr. Wind indicated that appellant could not work due to depression but he did not explain how or why the depression is causally related to the accepted employment injury.

Dr. Boyle's February 20, 2001 report states that appellant's post-traumatic stress and chronic pain syndromes, depression and pharmacological addictions were all a consequence of the March 6, 1991 employment injury but he never explains how or why they are related. This was after the Office had requested information from him for several years on the relationship between appellant's subsequent medical conditions and the March 6, 1991 incident.

Finally, appellant has had these conditions for several years and never suggested a causal relationship before the Office proposed termination.

Appellant's allegation that the selection of Dr. Meller for the independent medical examination was tainted is unsupported. The fact alone that Dr. Meller was selected a second time 69 days after he examined appellant does not establish that the PDS was ignored in selecting Dr. Meller to examine appellant.

The Board finds that the decisions by the Office of Workers' Compensation Programs dated February 20, 2002 and March 29, 2001 are hereby affirmed.

Dated, Washington, DC
December 12, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member